

The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act*

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In 2014, the National Conference of Commissioners on Uniform State Laws approved a set of amendments to the Uniform Fraudulent Transfer Act. Among other changes, the amendments renamed the act the Uniform Voidable Transactions Act. In this paper, the reporter for the committee that drafted the amendments describes the amendment project and discusses the changes that were made to the act.

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* This paper speaks as of November 27, 2014. References in this paper to the Bankruptcy Code are to title 11, United States Code. References to the Uniform Commercial Code sometimes use its acronym, UCC.

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I. INTRODUCTION

The fundamental things apply, as time goes by. Few legal doctrines are more fundamental than that traditionally referred to as “fraudulent conveyance”—the doctrine which, by any name, defines the limits of a debtor’s right to deal with its property vis-à-vis its creditors. The doctrine was elaborately developed in Roman law, and English common law borrowed from that source.¹ Similar antiquity could be claimed for many legal doctrines, but fraudulent conveyance may be unique in its statutory continuity. Its primordial rule, set forth in its modern American codifications in the Uniform Fraudulent Transfer Act (“UFTA”) and the Bankruptcy Code, renders voidable any transfer of property by a debtor made with “intent to hinder, delay, or defraud” creditors.² Those are the very same words, inconsequentially reordered, that were used to express the rule in 1571 in the English Statute of 13 Elizabeth, which is traditionally referred to as the fountainhead of American law on the subject.³

Statutory continuity implies continuity of precedent. The primordial rule set forth in the Statute of 13 Elizabeth was famously restated in 1601 in *Twyne’s Case*.⁴ That case remains living law in America, a staple of law school casebooks and regularly cited in current cases.⁵ Judges are steeped in this history. Modern cases involving this doctrine, however pedestrian, commonly begin with a bow to the Statute of 13 Elizabeth.

Notwithstanding the unusual continuity of this doctrine, it has not been immune to the modern itch to codify. In this country, each generation during the

1. See Max Radin, *Fraudulent Conveyances at Roman Law*, 18 VA. L. REV. 109 (1931); 1 GARRARD GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* §§ 58–61, at 79–86 (rev. ed. 1940).

2. The quoted language appears in both UFTA § 4(a)(1) (1984) (not altered by the 2014 amendments) and Bankruptcy Code § 548(a)(1)(A) (2014).

3. An Acte agaynst fraudulent Deedes Gyftes Alienations, &c., 1571, 13 Eliz., c. 5, para. 1 (Eng.) (“Intent to delaye hynder or defraude Creditors”), reprinted in 4 STATUTES OF THE REALM 537 (1819).

4. (1601) 76 Eng. Rep. 809 (Star Chamber).

5. *Twyne’s Case* was cited by twenty-six cases in Westlaw’s omnibus database of state and federal cases during the decade 2004–2013.

last century has produced at least one major codification. The first of general importance was the Uniform Fraudulent Conveyance Act (“UFCA”), promulgated by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 1918.⁶ In its time the UFCA was widely enacted, and as of this writing it remains the law in two states.⁷ Twenty years later, the fraudulent conveyance rule integral to federal bankruptcy law was conformed to the UFCA as section 67d of the then-Bankruptcy Act.⁸ Forty years after that the Bankruptcy Code was adopted, and with it the federal bankruptcy law’s integral fraudulent conveyance rule was updated to its current form, subject to modest subsequent amendments. That rule resides in section 548, with remedies addressed in section 550.⁹ Inspired by this, NCCUSL promptly undertook to modernize state law as well. As a result, the UFTA was promulgated in 1984 as the new uniform state law of fraudulent conveyance. Although the UFTA superseded the UFCA, the UFTA is more akin to an update of the UFCA than to a new creation, as the UFTA retained the structure of the older statute as well as key language (notably that of the primordial rule quoted above).¹⁰ The UFTA has been quite successful as a uniform act, having been enacted by forty-five jurisdictions as of 2014.¹¹

The historical rhythm continues. Another generation has elapsed since 1984, and NCCUSL has again made significant changes to the uniform act on the subject. Those changes consist of amendments to the UFTA approved by NCCUSL in 2014. Among other things, those amendments rename the UFTA the Uniform Voidable Transactions Act (“UVTA”).

The name of the act was changed for good reasons, discussed later in this paper.¹² But the renaming should not be taken to imply that the UVTA is a new and different act, or that the amendments make major changes to the substance of the UFTA. Nothing could be further from the truth. The UVTA is not a new act; it is the UFTA, renamed and lightly amended. The substantive changes made by the amendments, though significant enough to warrant attention, are,

6. In 2007 NCCUSL adopted Uniform Law Commission (“ULC”) as an alternative name, but its older name also remains official. This paper generally uses the older name and its acronym.

7. In 1984, when the UFTA superseded the UFCA, the UFCA was in force in twenty-four states and the U.S. Virgin Islands. As of 2014 the UFCA remains in force in Maryland and New York.

8. Act of June 22, 1938, ch. 575, § 67d, 52 Stat. 840, 877–78 (1938) (commonly known as the Chandler Act; repealed 1978); see also Nat’l Bankr. Conference, Analysis of H.R. 12889, 74th Cong., 2d Sess. 214 (1936) (“We have condensed the provisions of the Uniform Fraudulent Conveyance Act, retaining its substance and, as far as possible, its language.”). When the Bankruptcy Act was first enacted in 1898, its integral fraudulent conveyance provision was section 67e. That provision simply codified the primordial rule, by invalidating a transfer “within four months prior to the filing of the petition, with the intent and purpose on [the debtor’s] part to hinder, delay, or defraud his creditors.” Act of July 1, 1898, ch. 541, § 67e, 30 Stat. 544, 564 (1898) (repealed 1938).

9. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 548, 550, 92 Stat. 2549, 2600–01, 2601–02 (1978) (codified in title 11, United States Code, the Bankruptcy Code).

10. In the UFCA the primordial rule is codified at UFCA § 7 (1918).

11. As of 2014 the UFTA is in force in forty-three states, the District of Columbia, and the U.S. Virgin Islands. The seven states that have not enacted the UFTA are the two that retain the UFCA (Maryland and New York) and five with idiosyncratic laws (Alaska, Kentucky, Louisiana, South Carolina, and Virginia).

12. See *infra* Part III.B.

as just stated, light. They are much less extensive than the changes made by any of the post-1918 codification projects enumerated above.

The purpose of this paper is to summarize the main features of the 2014 amendments and to memorialize some of the reasons why the amendments came to be as they are. As is usual with uniform laws, the act as amended in 2014 was issued with interpretative aids. Those consist of amended comments to each section of the act, plus a new Prefatory Note that summarizes the changes wrought by the 2014 amendments, supplementing the Prefatory Note originally issued with the act in 1984. This paper might be thought of as an unofficial supplement to those official interpretative aids by one participant in the drafting process. As this paper is written, many states are studying the 2014 amendments with a view to enactment, so this paper is also mindful of the needs of study committees and legislative drafters in the states.

In this paper, “UFTA” refers to the act as originally promulgated in 1984, “UVTA” refers to the act as amended in 2014, and “act” refers to both.¹³ A transfer of property for which the act provides a remedy is generally referred to in this paper as a “voidable transfer,” rather than as a “fraudulent conveyance” or “fraudulent transfer.” The UFTA jettisoned the traditional word “conveyance” in favor of “transfer,” but it referred to such a transfer sometimes as “voidable” and sometimes as “fraudulent.”¹⁴ The amendments rectify that inconsistency by consistently using “voidable.”¹⁵

The core provisions of the act provide for avoidance of obligations incurred by a debtor, as well as avoidance of transfers of property by a debtor.¹⁶ For conciseness, the discussion herein usually refers only to avoidance of property transfers, and leaves the act’s application to obligations as understood.

II. THE AMENDMENT PROJECT AND ITS SCOPE

A. THE PROCESS

The 2014 amendments originated in a desire to codify a choice of law rule for voidable transfers. In an article published in 2011, the author of this paper analyzed the often-unhappy history of NCCUSL’s engagement with choice of law in the uniform acts that it has issued, noting the absence of a choice of law rule in the UFTA.¹⁷ Soon afterward the author submitted to NCCUSL a long memorandum, later

13. The official texts of the UVTA and the UFTA are available for download from NCCUSL at <http://www.uniformlaws.org>.

14. Compare UFTA §§ 2(d), 8(a), 8(d), 8(e), 8(f) (1984) (“voidable”), with *id.* §§ 4(a), 5(a), 5(b), 9 (“fraudulent”).

15. See UVTA § 14 cmt. 4 (2014); see also *infra* Part III.B.

16. The core provisions of the UFTA are (i) the primordial rule relating to transfers made and obligations incurred with intent to hinder, delay, or defraud creditors, codified at section 4(a)(1), and (ii) the so-called “constructive fraud” rules, codified at sections 4(a)(2) and 5(a). The core provisions apply to both transfers of property and incurrence of obligations. The other operative provision of the UFTA is the insider preference rule, codified at section 5(b). Section 5(b) applies only to transfers of property, and does not apply to incurrence of obligations.

17. Kenneth C. Kettering, *Harmonizing Choice of Law in Article 9 with Emerging International Norms*, 46 GONZ. L. REV. 235, 242–50 (2011).

published as an article, that proposed adding a choice of law rule to the UFTA and made tentative suggestions about the content of such a rule.¹⁸ Others were of like mind. As a result, in the summer of 2011 NCCUSL formed a Study Committee, the original charge of which was confined to evaluating the desirability and feasibility of codifying a choice of law rule.¹⁹

The Study Committee submitted a report recommending that a drafting committee be formed to prepare an amendment to the UFTA adding a choice of law rule. The report also went somewhat beyond the committee's original charge by further recommending that the UFTA be amended to prescribe uniform rules on the standards of proof and burdens of proof applicable to actions under the act. By way of penance, the report recommended that the drafting committee's mandate be limited to those two subjects, so that the drafting committee would be required to receive prior authorization before pursuing any other amendments.²⁰

Rather than chiding the Study Committee for going beyond its charge, NCCUSL's leadership broadened the committee's charge, directing the committee to evaluate the desirability and feasibility of updating the UFTA in any and all respects. The committee thereupon solicited suggestions from potentially interested organizations, academics who had published on the subject of voidable transfer in recent years, and individuals known to be involved in current litigation or in efforts to enact nonuniform amendments to state enactments of the UFTA. That solicitation produced several suggestions for revision. After considering the outside suggestions and suggestions put forth by the committee's own members and observers, the committee formulated its final recommendations in a supplemental report.²¹ In addition to the two subjects addressed in its first report, the supplemental report recommended that the drafting committee be empowered to craft amendments on two other narrowly defined subjects, and to revise and refresh the official comments generally.

NCCUSL's leadership took the Study Committee at its word. In the summer of 2012 NCCUSL formed a Drafting Committee to prepare amendments to the UFTA. The Drafting Committee was not authorized to effect a general revision of the act, or anything like a general revision. Rather, its mandate was limited

18. 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).

19. The Study Committee was chaired by Edwin E. Smith, and its members were Vincent P. Cardi, William C. Hillman, Lyle W. Hillyard, Gerald L. Jackson, Steven N. Leitess, Neal Ossen, and Gail Russell. As in other NCCUSL projects, any interested person could join as observer, and many did.

20. Memorandum from Edwin E. Smith, Chair, Comm. on Choice of Law for Fraudulent Transfer, to Richard T. Cassidy, Chair, Comm. on Scope and Program, Unif. Law Comm'n, Report of the Committee on Choice of Law for Fraudulent Transfer (Jan. 9, 2012). This memorandum is available at the non-comprehensive archival website maintained by NCCUSL for documents of the Study Committee and the later Drafting Committee, at [http://www.uniformlaws.org/Committee.aspx?title=Voidable Transactions Act Amendments \(2014\)—Formerly Fraudulent Transfer Act](http://www.uniformlaws.org/Committee.aspx?title=Voidable%20Transactions%20Act%20Amendments%20(2014)—Formerly%20Fraudulent%20Transfer%20Act) [hereinafter NCCUSL Archive].

21. Memorandum from Edwin E. Smith, Chair, Study Comm. on Choice of Law for Fraudulent Transfer, to Richard T. Cassidy, Chair, Comm. on Scope and Program, Unif. Law Comm'n, Study Committee on Choice of Law for Fraudulent Transfer (the "Study Committee")—Supplemental Report (June 6, 2012) [hereinafter Supplemental Report]. The Supplemental Report is available at the NCCUSL Archive, *supra* note 20.

to drafting amendments relating to a short list of narrowly defined subjects, which list closely tracked the recommendations of the Study Committee. In addition, the Drafting Committee was authorized to draft, for approval by NCCUSL's Executive Committee, revisions to all of the official comments to the UFTA.²² In the course of its work the Drafting Committee asked for, and received, authority to add one or two additional narrowly defined subjects to the list of authorized amendments. But the project was designed to result in a narrowly targeted set of amendments, and it had that result.

The Drafting Committee held four meetings in person and two by conference call, at which drafts were discussed with advisors and observers.²³ A draft was read to the full membership of NCCUSL at its meeting in 2013, and the final draft was similarly read and approved in 2014, on both occasions with free floor discussion.

B. SELECTED CHANGES NOT MADE BY THE 2014 AMENDMENTS

The Study Committee might have recommended that the Drafting Committee be authorized to draft amendments on additional subjects, or the Drafting Committee itself might have sought such authorization. Following is a selection, by no means comprehensive, of suggestions for amendment that one or both committees declined to pursue after specific consideration.

1. Charitable Contributions

Both the Study Committee and the Drafting Committee considered and rejected proposals to amend the UFTA to immunize charitable contributions from avoidance under the act. The committees thus declined to parallel the Bankruptcy Code, which was amended in 1998 to create such an immunity.

The core of the 1998 amendments was an addition to the Bankruptcy Code's integral voidable transfer provision, section 548, that immunizes from attack under section 548 a debtor's "charitable contribution" to a "qualified religious

22. The Drafting Committee's original mandate, set forth in a resolution adopted by NCCUSL's Committee on Scope and Program at a meeting held on July 14–15, 2012, was as follows:

to prepare amendments to the Uniform Fraudulent Transfer Act that address (a) choice of law for fraudulent transfers, (b) presumptions and burdens of proof for fraudulent transfers, (c) who receives "reasonably equivalent value" under UFTA Section 8(a), (d) asset freezing orders, and (e) the consistency of UFTA with ULC unincorporated business organization acts. The drafting committee is also authorized to draft, for approval by the Executive Committee, revisions to the comments to other provisions of the Uniform Fraudulent Transfer Act.

The reference to "asset freezing orders" was a request to assure the UFTA's consistency with laws authorizing that form of relief, including a pertinent uniform act that NCCUSL had just issued (the Uniform Asset-Freezing Orders Act, since renamed the Uniform Asset-Preservation Orders Act). The Drafting Committee concluded that no specific reference to asset-freezing orders need be included in the act in order to assure the act's consistency with the Uniform Asset-Preservation Orders Act or similar laws.

23. The members of the Drafting Committee, and the advisors to the committee appointed by the American Bar Association, are identified in the forepart of the official text of the UFTA. See *supra* note 13.

or charitable entity or organization” if the contribution was either (i) less than 15 percent of the “gross annual income of the debtor for the year in which . . . the contribution is made,” or (ii) “consistent with the practices of the debtor in making charitable contributions.”²⁴ This defense applies only to attack based on a so-called “constructive fraud” theory; it does not apply to attack based on the primordial rule that applies to a transfer of property made with intent to hinder, delay, or defraud creditors.²⁵ Because the reachback period for any avoidance action under section 548 is, under the current Bankruptcy Code, two years preceding the filing of the bankruptcy petition (subject to exceptions not relevant in this setting), charitable contributions made before that two-year period are not subject to avoidance under section 548 in any event.

The 1998 amendments rounded out the immunity afforded to a charitable donee in its donor’s bankruptcy proceeding with a change to section 544. Section 544 generally empowers the debtor’s bankruptcy trustee to employ state avoidance law to attack prepetition transfers by the debtor.²⁶ That is often useful to the trustee because the statute of limitations under state law is commonly longer than the two-year reachback of section 548. (The 2014 amendments to the UFTA did not alter the limitation period provided by the UFTA, which remains four years in general.)²⁷ The 1998 amendments extended the immunity provided by section 548 to apply also to an attack based on state avoidance law pursuant to section 544.²⁸

The 1998 amendments to the Bankruptcy Code are sometimes referred to as relating to “tithing” because religious groups were their primary instigators and intended beneficiaries, though secular charities were added to the protected class to avoid issues of constitutionality that otherwise might have arisen.²⁹ The 1998 amendments were enacted hastily, and their drafting includes serious glitches and ambiguities. For example, the “15% of annual gross income” ceiling is written to apply on a contribution-by-contribution basis. Hence on a given day an insolvent debtor might contribute 10 percent of his annual gross income to each of ten different charities, and each of those ten contributions is immune from attack under those provisions as written.³⁰ Another problem is that it is

24. Bankruptcy Code § 548(a)(2) (2014) (added 1998). The terms “charitable contribution” and “qualified religious or charitable entity or organization” are defined at *id.* § 548(d)(3), (4).

25. “Constructive fraud” refers to provisions of voidable transfer law that declare avoidable a transfer of property made by a debtor who is insolvent, or in a similar state of financial distress, and who does not receive reasonably equivalent value in exchange for the transfer. The constructive fraud provision of the Bankruptcy Code is section 548(a)(1)(B); the very similar provisions of the UFTA are (and remain after the 2014 amendments) sections 4(a)(2) and 5(a). The shorthand “constructive fraud,” though well established, is unfortunate, because these provisions have nothing to do with fraud. See *infra* Part III.B.

26. Bankruptcy Code § 544(b)(1) (2014).

27. UVTA § 9 (2014).

28. Bankruptcy Code § 544(b)(2) (2014) (added 1998).

29. See Kenneth N. Klee, *Tithing and Bankruptcy*, 75 AM. BANKR. L.J. 157, 157–61 (2001). During the period leading up to enactment of the 1998 amendments Mr. Klee was chair of the National Bankruptcy Conference’s Committee on Legislation.

30. 5 COLLIER ON BANKRUPTCY ¶ 548.09[6][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) briefly cites legislative history in support of the reasonable-sounding but nontextual

not clear whether the immunization from attack under state avoidance law in a bankruptcy proceeding applies only to a contribution made during the two-year reachback period for which section 548 applies, or whether the immunity also applies to earlier contributions for which a state-law avoidance action is brought pursuant to section 544. Such an action could be brought if the relevant state statute of limitations is longer than two years.³¹

There are plausible motivations for amending the UFTA to add an immunity for charitable contributions comparable to that added to the Bankruptcy Code in 1998. The immunities provided by the Bankruptcy Code apply only if the donor-debtor becomes subject to a bankruptcy proceeding and a prepetition contribution he made is attacked in that proceeding. If the donor-debtor makes a contribution, does not later go bankrupt, and a creditor brings an action to avoid the contribution on the basis of the UFTA or other applicable state avoidance law, the Bankruptcy Code immunities do not apply. Furthermore, even if the donor-debtor becomes subject to a bankruptcy proceeding, the ambiguity noted in the preceding paragraph means that a charitable donee may be at risk of an avoidance action based on state law as to a contribution made before the two-year reachback period of section 548.

While the UFTA amendment project was in progress, three states amended their enactments of the UFTA in differing ways to create immunities for charitable contributions. The first of these enactments was by Minnesota in 2012.³² It is burdened with many of the same drafting glitches and ambiguities that exist in the Bankruptcy Code. The Minnesota provision completely immunizes from attack charitable contributions made earlier than two years before the commencement of an avoidance action, even attack based on the primordial rule pertaining to transfers made with intent to hinder, delay, or defraud creditors. This effectively makes the statute of limitations for avoidance of a charitable contribution two years. That two-year period starts when the contribution is made, even if the contribution or its wrongfulness could not then have been discovered by the

proposition that a court should apply the “15% of annual gross income” ceiling to the aggregate of all contributions made by the debtor during the year. (This begs the question of whether the relevant “year” is the calendar year that includes the date of the contribution, or the year ending on the date of the contribution, or some other year.) However, a student commentator, after recounting the legislative history at length, concluded that “a court . . . would be hard-pressed to evince clear legislative intent from the congressional debate.” Lawrence A. Reicher, Comment, *Drafting Glitches in the Religious Liberty and Charitable Donation Protection Act of 1998: Amend § 548(a)(2) of the Bankruptcy Code*, 24 EMORY BANKR. DEV. J. 159, 177 (2008). Aggregation was applied in *Universal Church v. Geltzer*, 463 F.3d 218 (2d Cir. 2006), but contrary dictum is in *Murray v. Louisiana State University Foundation (In re Zohdi)*, 234 B.R. 371, 380 n.20 (Bankr. M.D. La. 1999). (The actual holding in *Zohdi* is also provocative: namely, that a contribution that exceeds the 15 percent ceiling and that is not “consistent with past practices of the debtor” is avoidable in its entirety, not merely the portion above 15 percent. That holding was later followed in *Wadsworth v. Word of Life Christian Center (In re McGough)*, 737 F.3d 1268 (10th Cir. 2013).)

31. See Steven Walt, *Generosity in Bankruptcy: The New Place of Charitable Contributions in Fraudulent Conveyance Law*, 32 LOY. L.A. L. REV. 1029, 1035–36 (1999). The two problems highlighted in the text are by no means the only problems with the language of the 1998 amendments. For instance, “gross annual income” is not defined.

32. Act of Apr. 3, 2012, 2012 Minn. Laws ch. 151 (codified at MINN. STAT. ANN. § 513.41(12) (West 2014)) (amending the definition of “transfer” in the Minnesota UFTA).

plaintiff. (By contrast, the UVTA's statute of limitations applies a "discovery rule" to actions based on the primordial rule.)³³ Charitable contributions made during that two-year period are immunized to an extent similar to the immunity provided by the 1998 amendments to the Bankruptcy Code. The foregoing immunities apply to a transfer of property to a charitable organization only if the transfer is a "contribution," which term is not defined. But the immunity is stated to be inapplicable to a "return on investment," so the immunity would not seem to extend to a distribution received by a charitable organization from an investment in a Ponzi scheme.

Immunities for charitable organizations were later enacted by Florida³⁴ and Georgia.³⁵ The three nonuniform state provisions are drafted quite differently from each other, making them difficult to compare briefly. For instance, Georgia, like Minnesota, applies a two-year limitation period to any attack on a property transfer to a charitable organization, even attack based on the primordial rule, with no discovery rule. As to transfers made within that two-year period, Georgia, unlike Minnesota, immunizes any such transfer, regardless of its amount, unless the charitable organization "had knowledge of the fraudulent nature of the transfer." Furthermore, unlike Minnesota, Georgia applies the foregoing immunities to any transfer of property to a charitable organization, not just charitable contributions. Hence Georgia's provision will immunize, among other transfers, a distribution of false profits to a charitable organization on account of its investment in a Ponzi scheme. The immunity granted by Florida is limited to charitable contributions and is confined to constructive fraud attack, but only to some theories of constructive fraud attack (possibly a drafting error).³⁶ All three state provisions follow the Bankruptcy Code in defining the entities entitled to immunity by opaque cross-references to complex provisions of the Internal Revenue Code, but they define the protected class in differing ways.

During the course of the project that culminated in the 2014 amendments to the UFTA, the Study Committee and the Drafting Committee each considered proposals to create an immunity for charitable contributions. The Drafting Committee indeed heard a presentation from a major charitable organization on the subject. Both committees concluded that such an immunity is not justified as a

33. UVTA § 9(a) (2014) (not substantively changed by the 2014 amendments) (providing that an action under the primordial rule is barred if not brought within the later of four years after the transfer was made or one year after the transfer "was or could reasonably have been discovered by the claimant").

34. Act of June 14, 2013, 2013 Fla. Laws ch. 189 (codified at FLA. STAT. ANN. §§ 726.102(3), (12), 726.109(7) (West Supp. 2014)) (adding to Florida's enactment of UFTA § 8 a defense for "charitable contributions," and related definitions).

35. Act of May 7, 2013, 2013 Ga. Laws 328 (codified at GA. CODE ANN. § 18-2-81 (Supp. 2013)) (adding a new section to Georgia's enactment of the UFTA). This provision enigmatically declares certain transfers to a charitable organization to be "complete." Taken in context, that appears to be intended to mean that such a transfer is not to be avoided under Georgia's enactment of the UFTA.

36. The immunity provided by FLA. STAT. ANN. § 726.109(7)(a) (West Supp. 2014) applies only to attack under Florida's enactment of the constructive fraud rules of UFTA § 4(a)(2), and hence does not apply to attack under Florida's enactment of the primordial rule of UFTA § 4(a)(1) or the constructive fraud rule of UFTA § 5(a).

policy matter. The fundamental command of voidable transfer law is “be just before you are generous”—a debtor may not make gifts at the expense of his creditors. The property of a debtor in financial distress belongs to his creditors, and a donee, including a church or secular charity, should no more be entitled to retain a gift of such property than it would be to retain a gift of stolen property. Nothing has happened to warrant changing that longstanding law. The National Bankruptcy Conference opposed the 1998 amendments to the Bankruptcy Code for similar reasons, regarding those amendments as special interest legislation.³⁷ Though the National Bankruptcy Conference lost to a tidal wave of lobbying, the states are not compelled to follow Congress’s policy choice.³⁸

2. Conformity to Other Features of Bankruptcy Code § 548

Preparation of the UFTA was spurred by the enactment in 1978 of the Bankruptcy Code, with its shiny new section 548 addressing voidable transfers.³⁹ Nonetheless, the drafters of the UFTA had no interest in mirroring section 548, and they did not. They saw their task instead as being to modernize the UFCA.⁴⁰ Broad conformity between the UFTA and section 548 followed effortlessly anyway, because both drafting projects were essentially modernizations of the UFCA. The UFTA was the UFCA’s direct successor, and section 548 was the successor of section 67d of the former Bankruptcy Act, which adopted the substance of the UFCA and borrowed much of its language.⁴¹ Moreover, in the course of their modernization of the UFCA the drafters of the UFTA found that some of their work had already been done for them by the drafters of section 548, and so the former adopted or adapted some of the language written by the latter. Still, from the day the UFTA was issued there were many differences of detail between it and section 548, both in language and in substance. Amendments to the Bankruptcy Code since then have added more differences.

The responsibility for the differences between the UFTA and section 548 is shared by the drafters of both statutes. Both groups effectively started from

37. “Congress should not slice up our fraudulent transfer laws with special-interest exceptions, no matter how deserving the special interest groups may be. Don’t let insolvent persons give away the creditors’ money, say we at the NBC.” *Religious Liberty and Charitable Donation Protection Act of 1997 and Religious Fairness in Bankruptcy Act of 1997: Hearing on H.R. 2604 and H.R. 2611 Before the Subcomm. on Commercial & Admin. Law of the House Comm. on the Judiciary*, 105th Cong. 52 (1998) (statement of Stephen H. Case on behalf of the National Bankruptcy Conference); see also Klee, *supra* note 29.

38. One observer of the Drafting Committee also commented, “Render unto Caesar.” *Matthew* 22:21.

39. The Bankruptcy Code deals with the remedies available under section 548 in a separate provision, section 550, which also applies to avoidance pursuant to provisions of the Bankruptcy Code other than section 548. The two sections operate together as a single rule, so the following discussion of section 548 should be understood to encompass section 550 as well.

40. As a member of the 1984 drafting committee wrote, “the UFTA group saw its mission as modernizing the UFCA, not preparing a new statute that mirrored the Bankruptcy Code, which was still pretty new and untested in many respects when we began our work on the UFTA in 1983.” Email from H. Bruce Bernstein to Kenneth C. Kettering (May 1, 2013).

41. See *supra* note 8.

the UFCA, but the drafters of section 548 chose to deviate from the UFCA in some ways that are inexplicable.⁴² Some of the differences between the UFTA and section 548 arose because the UFTA adhered to the UFCA while the Bankruptcy Code went on a frolic of its own.⁴³

For state voidable transfer law and section 548 to be in exact conformity would be desirable, at least in the abstract. But conformity is a two-way street. In general, it would make more sense for section 548 to be conformed to the UFTA, rather than vice versa. That is because the state law of voidable transfer is fundamental, while section 548 is an optional extra. Comparison with the doctrine of voidable preference is instructive. Preference doctrine must fundamentally be a matter of bankruptcy law, because outside of bankruptcy there is no mechanism for sharing a recovered preferential transfer among all of the creditors who were injured by the transfer.⁴⁴ By contrast, voidable transfer has always been part of the web of non-bankruptcy debtor-creditor law. It serves the same basic functions in bankruptcy as it does outside of bankruptcy. Arguably there is no need for any federal rule of voidable transfer in bankruptcy, and the bankruptcy trustee should have only the avoidance power prescribed by the UVTA or other applicable state law.⁴⁵ As a matter of principle, why should state lawmakers take their marching orders from a provision of the Bankruptcy Code whose very legitimacy is questionable?

Furthermore, it would have been out of the question to amend the UFTA to conform to section 548 with respect to some of their most important differences. Probably the single most important difference between the two is their statutes of limitations (often referred to in this context as “reachback period”). The 2014 amendments did not alter the period prescribed by the UFTA, which is generally four years.⁴⁶ The period under section 548 is currently a meager two years, as a rule.⁴⁷ To shorten the UFTA period to that of section 548 would be unthinkable. To take another example, if a transfer is voidable under section 548 the basic remedy is avoidance of the entire transfer.⁴⁸ That is more sweeping than the remedy provided by the UFTA, under which the plaintiff creditor is entitled to avoidance only to the extent necessary to satisfy his own claim against the debtor.⁴⁹ There would have been no appetite for conforming the UFTA to section 548 in this respect, had anyone been eccentric enough to suggest doing so.

42. “Inexplicable” is Professor Jackson’s word. Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 779 n.172 (1984).

43. An example is section 8(a) of the UFTA. See *infra* note 171 and accompanying text.

44. The UFTA creates a limited nonbankruptcy law of preference in section 5(b), which allows certain preferential transfers to insiders to be avoided. However, if an action is brought under section 5(b) outside of bankruptcy, the remedy is not to undo the preference, but merely to shift its benefit to the plaintiff creditor. Whether that doctrine makes sense is debatable, as shown by the fact that several UFTA states declined to enact section 5(b). See *infra* notes 66 & 70.

45. See THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 146–50 (1986).

46. UFTA § 9 (1984) (not changed substantively by the 2014 amendments).

47. Bankruptcy Code § 548(a)(1) (2014). For an exception, see *id.* § 548(e).

48. *Id.* § 550(a).

49. UFTA § 7(a)(1) (1984) (not changed by the 2014 amendments) (providing for avoidance “to the extent necessary to satisfy the creditor’s claim”). The 2014 amendments add a new comment 7 to that section that elaborates this point.

Principle is one thing, expediency another. If someone had made a case to the Study Committee or the Drafting Committee that a particular inconsistency between the UFTA and section 548 had caused a practical problem, or might cause a practical problem in the future, the committee certainly would have considered resolving the problem by a conforming amendment to the UFTA. Yet only two issues of that nature were ever seriously raised by members of the committees or by outsiders. One was the immunity for charitable contributions recognized by section 548, discussed earlier in this paper. The other relates to section 8(a) of the act, which has no analogue in section 548. As discussed later in this paper, section 8(a) was initially questioned on account of conflicting judicial views as to its meaning, not because of its inconsistency with section 548, but the Drafting Committee seriously considered deleting it.⁵⁰ The committees considered both of these issues at length, but decided not to conform the UFTA to section 548 as to either.

The Study Committee reviewed other inconsistencies between the UFTA and section 548 and found none that it thought warranted action in the absence of a proponent for action.⁵¹ As to some of the inconsistencies, that conclusion was based on the difference between what Congress can do and what a state legislature can do, or will do. For example, section 548(e) of the Bankruptcy Code, added in 2005, extends the reachback period to ten years in the case of certain transfers by a debtor to a “self-settled trust or similar device.” That provision was largely a response to legislation in a number of states validating asset protection trusts, overriding the historical abhorrence of that device by voidable transfer law and trust law.⁵² Section 548(e) goes a long way toward thwarting such state legislation. But there would be little point in emulating that provision in the UFTA. A state that has enacted legislation validating asset protection trusts would not be likely to enact an amendment to the UFTA that emulates section 548(e).

3. Attorney’s Fees and Punitive Damages

The UFTA does not provide explicitly for the award of attorney’s fees or punitive damages in an action under the act. However, its basic remedial provision, after enumerating various remedies, states that a creditor may obtain “any other relief the circumstances may require.”⁵³ This invites courts to consider themselves empowered to award attorney’s fees, punitive damages, or both. Courts in some states have accepted this invitation; courts in other states have declined it.⁵⁴

50. See *infra* Part III.E.

51. See Supplemental Report, *supra* note 21, at 13–15.

52. See *infra* notes 109–10 and accompanying text.

53. UFTA § 7(a)(3)(iii) (1984) (not changed in 2014). Similar language appeared in the former UFCA, though only in its remedial provision applicable to creditors whose claims have not matured. UFCA § 10(d) (1918).

54. Compare, e.g., *Klein v. Weidner*, 729 F.3d 280, 286–96 (3d Cir. 2013) (holding that punitive damages are available under the Pennsylvania UFTA, based primarily on the “any other relief” provision), with *N. Tankers (Cyprus) Ltd. v. Backstrom*, 968 F. Supp. 66 (D. Conn. 1997) (holding that punitive damages are not available under the Connecticut UFTA); *Morris v. Askeland Enters.*, 17 P.3d 830, 832–33 (Colo. Ct. App. 2000) (holding that neither attorney’s fees nor punitive damages

A creditor seeking attorney's fees or punitive damages also has a second string to his bow. The UFTA contains a provision, familiar from its use in the Uniform Commercial Code, which states that principles of law outside the act supplement its provisions, unless displaced by the provisions of the act.⁵⁵ As a result, if law outside the act can be said to authorize award of attorney's fees or punitive damages in an action under the act, then a court should apply that other law (for it seems clear that nothing in the act would "displace" that other law). Attorney's fees and punitive damages have been granted on that basis in a number of states. Such awards often have been based simply on the court's conclusion that the common law of the state authorizes such an award; sometimes the conclusion is bolstered by a non-UFTA statute (such as a statute of general application authorizing such relief against bad actors that is interpreted to apply to a voidable transfer).⁵⁶

The preceding discussion distinguishes between reliance on the "any other relief" provision of the UFTA and reliance on law outside the UFTA more sharply than do the cases. Indeed the distinction is necessarily blurry. There is little or no meaningful difference between concluding that the "any other relief" provision of UFTA authorizes exemplary relief, and concluding that non-UFTA principles of common law authorize such relief. What matters is the result: courts in some UFTA states will award attorney's fees and punitive damages in an action under the act, and courts in other states will not.

At least two large states, New York and Texas, have nonuniform provisions in their avoidance statutes that address attorney's fees. New York, which continues to rely on the aged UFCA rather than the UFTA, since 1938 has had a nonuniform provision that mandates award of attorney's fees to a creditor who prevails in an action based on the primordial rule relating to transfers made with intent to hinder, delay, or defraud creditors.⁵⁷ The judgment for those fees runs against the debtor and the transferee. In 2003 Texas amended its enactment of the UFTA to add a short and simple provision giving the court discretion to award costs and attorney's fees in any proceeding under that act.⁵⁸ Unlike the New York provision, the Texas provision is discretionary rather than mandatory; it is not limited to actions based on the primordial rule; and it would seem to

are available under the Colorado UFTA); *C & A Invs. v. Kelly*, 792 N.W.2d 644 (Wis. Ct. App. 2010) (holding that punitive damages are not available under the Wisconsin UFTA).

55. UFTA § 10 (1984) (redesignated § 12 in 2014 but not otherwise changed). This provision is similar to U.C.C. § 1-103(b) (2014), but that is not its origin. A similar provision appeared in UFCA § 11 (1918).

56. See, e.g., *Henderson v. Henderson*, No. CV-00-53, 2001 WL 1719192, at *2 (Me. Super. Ct. 2001) (awarding punitive damages under the Maine UFTA, based on common law principles); *Volk Constr. Co. v. Wilmescherr Drusch Roofing Co.*, 58 S.W.3d 897 (Mo. Ct. App. 2001) (holding that attorney's fees and punitive damages are available under the Missouri UFTA, based on common law principles); *Aristocrat Lakewood Nursing Home v. Mayne*, 729 N.E.2d 768, 782-84 (Ohio Ct. App. 1999) (holding that attorney's fees and punitive damages are available under the Ohio UFTA, based on other statutory law and on common law principles); *Macris & Assocs., Inc. v. Neways, Inc.*, 60 P.3d 1176, 1179-81 (Utah Ct. App. 2002) (holding that attorney's fees and punitive damages are available under the Utah UFTA, based on common law principles).

57. N.Y. DEBT. & CRED. LAW § 276-a (McKinney 2012).

58. TEX. BUS. & COM. CODE ANN. § 24.013 (Vernon 2009).

permit award in favor of a prevailing transferee, as well a prevailing creditor. The Texas provision does not state whether a fee award may be entered against the transferee, the debtor, or both.

At least one state, Maine, has altered its enactment of the UFTA to authorize expressly the grant of punitive damages.⁵⁹ That amendment adds to the uniform text's list of remedies that "may" be obtained, "subject to applicable principles of equity," damages in an amount not to exceed twice the value of the property transferred.

The Study Committee considered whether the 2014 amendments should include a uniform provision on award of attorney's fees, and in response to a later suggestion the Drafting Committee reconsidered that issue as to both attorney's fees and punitive damages. Both committees decided not to pursue such a change. Neither committee gave extended consideration to the substance of the issue, i.e., whether and in what circumstances award of attorney's fees or punitive damages is appropriate. Rather, the decision not to pursue the matter was based on the perception that it would be pointless to do so because there would be little chance that a provision on the matter would be enacted uniformly whatever it said. Attorney's fees and punitive damages are highly visible subjects on which people have strong and diverse opinions. Members of NCCUSL have expressed divided opinions on those subjects in connection with other proposed uniform acts. NCCUSL is not an academic institution or a debating society; its mission is to draft language that state legislatures will actually enact.⁶⁰

Hence the Drafting Committee left it to the individual states to address the availability of attorney's fees and punitive damages more specifically than does the official text, if they choose to do so. In drafting uniform acts involving issues on which states are apt to take differing approaches, it is sometimes useful to present alternative language for states to choose between. In this instance, alternative language would have done no more than remind states that they might (or might not) wish to change their current law. States need no such reminder on this high-profile subject.

4. Insider Preferences and the Definition of "Insider"

Much the longest of the definitions with which the UFTA opens are those of "insider" and "affiliate."⁶¹ Functionally they are a single definition, as the act uses "affiliate" only in the definition of "insider." It is convenient to refer only to "insider," understanding that the discussion applies also to "affiliate."

59. ME. REV. STAT. ANN. tit. 14, § 3578(1)(C)(3) (West 2003).

60. See Nat'l Conference of Comm'rs on Unif. State Laws, Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts ¶ 1(e) (July 13, 2010) ("As a general rule, [NCCUSL] should consider past experience in determining future projects and should avoid consideration of subjects that are . . . controversial because of disparities in social, economic, or political policies or philosophies among the states . . .").

61. UFTA § 1(1) (1984) ("affiliate"; not substantively changed by the 2014 amendments); *id.* § 1(7) ("insider"; redesignated § 1(8) in 2014 but not substantively changed).

The definition of “insider” refers many times to business organizations, but it recognizes only two kinds, namely “partnership” and “corporation,” neither of which terms is defined in the act. Since 1984, when the UFTA was promulgated, other forms of business organization have become widely used. Most notably, the limited liability company (“LLC”) barely existed in 1984, but has since become enormously popular. Several states have altered the definition of “insider” in their enactments of the UFTA to make reference to LLCs, or to unincorporated business organizations generally.⁶² The thought of making such a change is natural. However, the Drafting Committee concluded that it is neither necessary nor desirable to alter the definition of “insider” in that respect.

The term “insider” is used meaningfully in only one provision of the act: section 5(b), the insider preference rule.⁶³ “Insider” also appears in the “badges of fraud” listed in section 4(b).⁶⁴ The latter provision is, by its terms, merely precatory and suggestive; the meaning of the act would not change if section 4(b) were omitted.⁶⁵ A precise definition of “insider” is not necessary or even desirable in section 4(b). Hence the states that enacted the UFTA but chose not to enact its insider preference rule quite sensibly did not enact any definition of “insider,” notwithstanding that word’s appearance in section 4(b).⁶⁶

Section 5(b) applies to certain preferential transfers. A “preferential” transfer is a transfer of property by debtor to creditor that pays or secures the debt owed. A preferential transfer, as such, is unlikely to be avoidable under the core rules of the UFTA, which are set forth in sections 4 and 5(a).⁶⁷ The rule of section 5(b) renders a preferential transfer avoidable if it is made to an “insider” of the debtor and the debtor was insolvent at the time of the transfer. An action to avoid the transfer must be brought within one year after the transfer is made.⁶⁸ Section 5(b) is modeled on the preference recapture provision of the Bankruptcy Code, section 547, as it applies to insiders, and section 5(b) rarely if ever adds anything of substance to the rights created by section 547 in the debtor’s bankruptcy

62. The enactments of the UFTA by at least five jurisdictions (Nebraska, North Dakota, Utah, Vermont, and Wisconsin) alter the definition of “insider” to refer to LLCs. The enactments of at least two jurisdictions (District of Columbia and Wyoming) refer more broadly to “unincorporated business organizations.”

63. “Insider” also appears in section 8(f), which sets forth defenses that apply only to section 5(b) and is functionally part of section 5(b). References herein to section 5(b) should be understood to include section 8(f).

64. UFTA § 4(b)(1), (11) (1984) (not changed by the 2014 amendments).

65. The 1984 drafters might have been wiser to omit section 4(b), while retaining the extensive comments on that provision as comments to the primordial rule of section 4(a)(1). Section 4(b) is in tension with the maxim that every word in a statute must be given meaning, and its presence in the statute may induce some courts to give inappropriate effect to the badges of fraud it lists.

66. At least Arizona, California, Indiana, and Pennsylvania enacted the UFTA but did not enact the insider preference rule of section 5(b).

67. A preferential transfer cannot be avoided under the so-called “constructive fraud” rules of sections 4(a)(2) and 5(a) because a debtor is considered to receive “value” when the debtor makes a transfer to pay or secure a debt. UFTA § 3(a) (1984) (not changed by the 2014 amendments). No express language precludes a preferential transfer from being challenged under the primordial rule of section 4(a)(1), but it is unlikely that payment of or security for a legitimate debt would be captured by that rule as interpreted in modern times.

68. UFTA § 9(c) (1984) (not substantively changed by the 2014 amendments).

proceeding.⁶⁹ Hence the practical effect of section 5(b) is only to create a similar cause of action for use outside of bankruptcy, in the rare event that a creditor wishes to pursue such an action.⁷⁰

In keeping with the modeling of section 5(b) on the Bankruptcy Code, the UFTA's definitions of "insider" and "affiliate" are nearly identical to the definitions of those terms in the Bankruptcy Code.⁷¹

In both the UFTA and the Bankruptcy Code, the statutory definition of "insider" is not exclusive. That follows from the fact that in both statutes the definition of "insider" says that the word "includes" the persons described in the definition; it does not say that the word "means" those persons. The Bankruptcy Code drives this point home with a provision stating that "includes" is not limiting.⁷² The UFTA does likewise in its official comments.⁷³ These parallel definitions of "insider" are thus exemplary. In both statutes, the definition sets forth a list of persons who are per se insiders of debtors of various types, and the statute invites a court to award insider status to any other person who has a relationship to the particular debtor involved in the case before the court that is comparable to the examples given. Cases applying the parallel definitions have taken this invitation to heart, and have been quite willing to award insider status to persons not on the statutory list.⁷⁴ In particular, courts have had no difficulty in concluding that an LLC, as debtor, can have "insiders," notwithstanding that LLCs are not among the types of organization referred to in the statutory list.⁷⁵

Accordingly, the definition of "insider" need not be altered to cover relationships involving an LLC or other nontraditional form of business organization. Courts have applied the definition sensibly in reported cases, and have shown no need for additional guidance.

69. Indeed, the elements of a claim under section 5(b) are more demanding than those of section 547 because the former, unlike the latter, requires proof that "the insider had reasonable cause to believe that the debtor was insolvent." Section 546(e) creates defenses applicable to certain capital markets transactions that apply to a claim under section 547, and the UFTA provides no analogous defenses to a claim under section 5(b). However, a bankruptcy trustee cannot circumvent the defenses afforded by section 546(e) by claiming under section 5(b) pursuant to section 544(b), because section 546(e) by its terms applies to such a claim.

70. A significant difference between avoidance of an insider preference under the Bankruptcy Code as compared with section 5(b) is that avoidance under the Bankruptcy Code inures to the debtor's bankruptcy estate, and so to the benefit of all of the debtor's unsecured creditors, while avoidance under section 5(b) inures to the benefit only of the plaintiff creditor. Avoidance under section 5(b) thus does not undo the preference, but rather shifts its benefit to a different creditor. That, no doubt, is one of the reasons why several states declined to enact section 5(b). See *supra* note 66.

71. Bankruptcy Code § 101(2) (2014) ("affiliate"); *id.* § 101(31) ("insider").

72. *Id.* § 102(3).

73. UFTA § 1 cmt. 7 (1984). The 2014 amendments redesignate this as comment 8 and revise it to state this point more emphatically.

74. Cases applying the definition as it appears in the Bankruptcy Code are gathered in 1 COLLIER, *supra* note 30, ¶ 101.31.

75. See, e.g., *In re Longview Aluminum, L.L.C.*, 657 F.3d 507 (7th Cir. 2011) (debtor was an LLC; individual who was on the debtor's Board of Managers and owned a 12 percent economic interest in the debtor was held to be an insider of the debtor).

Of course that does not necessarily mean that additional guidance might not be helpful. But the Drafting Committee concluded that any such intervention is more likely to do harm than good. The purpose of the definition of “insider” is to provide a list of examples of persons that should be considered per se “insiders” of a debtor of a given type. If the examples are to be useful, they must be defined in a fairly clear-cut way. It is probably impossible to write provisions declaring certain persons to be per se “insiders” of an LLC that are at once sound and clear-cut. LLCs by their nature are a hybrid of a partnership and a corporation, and the organizers of a particular LLC have great freedom to define its rules of internal governance and economic interests. Some LLCs may resemble a corporation, others may resemble a traditional partnership, still others may be *sui generis*. Sound determination of insider status must depend upon the structure of the particular LLC. If a particular LLC’s structure resembles that of a corporation, the existing per se rules for corporations suffice, and it would be a mistake to deviate from them. If a particular LLC’s structure resembles that of a partnership, the existing per se rules for partnerships suffice, and it would be a mistake to deviate from them. If a particular LLC’s structure is *sui generis*, a court must take its best shot, and per se rules drafted without reference to that LLC’s structure cannot offer guidance that is both clear-cut and sensible.

The very diverse approaches taken by the states that have adopted nonuniform provisions illustrate this point. To take just one example, some of those provisions state that a member of an LLC is per se an insider of the LLC.⁷⁶ That is unwise. An LLC might be managed by a manager rather than by its members, and a member of such an LLC who is not the manager and whose economic interest is small will not be in a position to cause the LLC to use its last dollars to pay off a debt it owes to him in preference to other creditors. Vermont attempted to address this by classifying LLCs as “member-managed” or “manager-managed,” and providing that a member is per se an insider of a “member-managed” LLC but not of a “manager-managed” LLC.⁷⁷ However, Vermont did not define the terms “member-managed” and “manager-managed,” and case law shows that those concepts can blur as to a given LLC.⁷⁸

First, do no harm. Revising the definition of “insider” to designate certain persons as per se insiders of LLCs or other kinds of nontraditional business organizations is not necessary, and in the judgment of the Drafting Committee would be more likely to do harm than good. The 2014 amendments revised the comment to that definition to summarize the points made above, with particular

76. See, e.g., NEB. REV. STAT. § 36-702(7) (2002); UTAH CODE ANN. § 25-6-2(7) (1998).

77. VT. STAT. ANN. tit. 9, § 2285(6) (2006). Another illustration of the difficulty of writing rules for this setting that are sound and clear-cut is that under Vermont’s definition, a member of a “manager-managed” LLC is per se an insider of the LLC only if the member is in control of, or is an “affiliate” of, the LLC. A member of a “manager-managed” LLC who is not in control qualifies as an “affiliate” only if his interest constitutes “20% of the voting securities” of the LLC. Is an interest in a “manager-managed” LLC a “voting security” sometimes, always, or never?

78. For example, the organic documents of the LLC debtor in *Longview* provided that power to manage that LLC was “vested in the Board of Managers and the Members.” 657 F.3d at 510. Is that LLC managed by its members or by its Board of Managers?

reference to LLCs. The revised comment merely updates and makes more emphatic the original comment, which stated the same essential principles.⁷⁹

III. THE MAIN FEATURES OF THE 2014 AMENDMENTS

Substantially all of the remainder of this paper is dedicated to discussing the main features of the 2014 amendments. “Main features” means that the discussion passes over some changes that are substantive but too minor to warrant attention in this paper.⁸⁰

The Drafting Committee’s mandate narrowly limited its authority to revise the act, but the committee had a free hand to revise and refresh the official comments as it thought best. Changes to the statute naturally were accompanied by new and revised comments. The discussion of the statutory changes in this Part III generally covers the matter included in the related comments, and indeed the discussion draws on those comments. As to comments on provisions of the act that were not substantively revised, nobody associated with the amendment project ever suggested that they should be rewritten from scratch. Still, the amendment package does include some revisions to the comments that are not linked to changes in the statutory text. This paper makes no attempt to survey such revisions, though a few are mentioned (notably in Part III.B). Such revisions are not substantive, as states do not enact the comments and courts are not bound by them. Moreover, they speak for themselves (or at least they should).

A. CHOICE OF LAW

As noted earlier, the original motivation for the 2014 amendments was to codify a choice of law rule for voidable transfers. The amendments do that by adding to the act a new section 10.

1. Current Law and the Motivation for Change

The current legal environment on choice of law for voidable transfers was addressed at length in the memorandum-cum-article that was written to start the amendment project, so it need be discussed only briefly here.⁸¹ As originally written in 1984 the UFTA said nothing about choice of law, nor did the UFCA before it. The subject therefore has been left to common law, and that common law is chaotic. There are two *Restatements* of choice of law, but courts

79. UVTA § 1 cmt. 8 (2014) (amending UFTA § 1 cmt. 7 (1984)).

80. For example, one provision of the UFTA refers to a possible “writing.” UFTA § 6(5)(ii) (1984). The amendments change the wording to cover electronic media, and add to the act the battery of standard definitions used for that purpose in uniform acts. The amendments also add to the act, as a new section 14, a provision standard in uniform acts that employ those standard definitions, the effect of which is to opt out of the federal statute applicable to electronic records and signatures. This footnote is more than sufficient attention to those picayune changes.

81. See Kettering, *supra* note 18, at 336–45.

in some states do not purport to follow either. Nor are the wildly divergent *Restatements* of much practical help.

The *First Restatement*, characteristically, sets forth a territorial rule, to the effect that the avoidability of a transfer is governed by the law of the jurisdiction in which the transferred property is situated.⁸² Choice of law with respect to a transfer of intangible property is left obscure. Such a territorial rule obviously results in application of more than one voidable transfer law to a transaction that involves transfer of property situated in more than one jurisdiction. The authors of the *First Restatement* threw up their hands and confessed their inability to decide whether this territorial rule should be abandoned in the case of such a multijurisdictional transfer, in favor of looking to the law of the jurisdiction from which the assets are managed.⁸³

The *Second Restatement*, equally characteristically, has nothing in common with the *First Restatement* on choice of law for voidable transfer. It addresses the subject only as to land, as to which it states that “ordinarily” the law of the situs of the land should be applied, but “on occasion” (not elaborated) courts “may” identify the governing law by applying the choice of law methodology applicable to torts.⁸⁴ However, courts purporting to apply the *Second Restatement* approach to voidable transfer claims invariably ignore what it actually says and simply apply its tort methodology, period. That tort methodology designates as governing the law of the jurisdiction having “the most significant relationship to the occurrence and the parties,” which a court is to ascertain by meditating upon eleven factors, set forth in two lists, all impressionistic, none controlling.⁸⁵ A plurality, perhaps a majority, of reported cases decided in the last decade or two embrace that approach. It affords scant predictability.

Voidable transfers are not singled out for special ill treatment in the world of choice of law. The diversity of approaches followed by different states is not unique to avoidance law. It is the common legacy of the mid-twentieth-century revolution in choice of law thought, which had incomplete success and left many bodies unburied behind it. Nor is the unpredictability of result under the *Second Restatement* unique to voidable transfer. The indeterminacy of the “interest analysis” championed by post-revolutionary thought on choice of law is notorious, and the *Second Restatement* applies it to many other areas of law.

The motivation for creating a statutory rule is that voidable transfer law has become a subject that lawyers cannot ignore in structuring transactions for their clients. In the current era commonplace transactions have features that may implicate the doctrine.⁸⁶ Inability to predict which jurisdiction’s voidable transfer law will apply to a transaction adds to the cost of doing the transaction. It also adds to the cost of litigation, should a matter ever come to litigation.

82. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS §§ 218, 257 (1934).

83. *Id.* § 256 caveat; *id.* § 257 cmt. c.

84. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 & cmts. f & i (1971); *id.* ch. 9, topic 2, introductory note.

85. *Id.* §§ 6, 145.

86. Acquisition financing and “upstream” guaranties are familiar examples.

Accordingly, a main object of the 2014 amendments was to create a uniform, sensible, and reasonably predictable choice of law rule, as far as state law can achieve that object.

The reason why the original UFTA did not include a choice of law rule was, no doubt, mere inertia. As previously noted, the UFTA was thought of by its drafters as a modernization of the UFCA, so the drafters took the UFCA as their starting point. The UFCA was issued in 1918, long before anyone thought to add provisions on choice of law to uniform acts. The first uniform act to contain a choice of law provision was the Uniform Commercial Code, first promulgated in 1951. The persons interested in the UCC likewise included transactional lawyers as well as litigators, and so they had the same combined motivation to resolve common-law uncertainty by statute that motivated the 2014 amendments to the UFTA.⁸⁷

It should be kept in mind that state legislation can do nothing to change the uncertainty about choice of law that will remain when a claim based on state avoidance law is brought in the debtor's bankruptcy proceeding. That is because the Supreme Court, surprisingly, has never said what choice of law rule a bankruptcy court should apply to a matter governed by nonbankruptcy law. Lower federal courts have followed divergent approaches: some apply the choice of law rules of the state in which the bankruptcy court sits; others apply a uniform choice of law rule created as a matter of federal common law; still others split the difference, applying the choice of law rule of the state in which the bankruptcy court sits absent a federal interest requiring a federal choice of law rule.⁸⁸

2. The New Choice of Law Rule

New section 10 sets forth a choice of law rule that is simple, reasonably predictable, and familiar. It prescribes that a voidable transfer claim is governed by the law of the jurisdiction in which the debtor is located when the challenged transfer or obligation was made or incurred.⁸⁹ The "location" of an individual is defined to be his principal residence, and the "location" of an organization (i.e., a debtor other than an individual) is defined to be its place of business or, if it has more than one place of business, its chief executive office.

If this rule sounds familiar, it should. It is the same as the baseline choice of law rule that determines the priority of a security interest in intangible property under Article 9 of the Uniform Commercial Code.⁹⁰ Use of the same rule in both

87. The authors of the UCC also had other motivations for including choice of law provisions. Those included their desire to impose choice of law rules that would result in the application of the UCC to the broadest extent constitutionally permissible, at a time when the UCC was not expected to be widely enacted. See Kettering, *supra* note 17, at 242–50.

88. See Kettering, *supra* note 18, at 323–24.

89. The existing rule that determines when a transfer is made or an obligation is incurred for purposes of the act is not altered substantively by the 2014 amendments. UFTA § 6 (1984).

90. U.C.C. §§ 9-301(1), 9-307(b) (2014). The stated rule is actually Article 9's baseline rule on choice of law for priority of a security interest in any personal property, tangible or intangible. However, as applied to tangible property, the baseline rule in many instances is trumped by a later provision which prescribes that priority of a possessory security interest (necessarily in tangible property)

settings is apt, because voidable transfer law is a species of priority rule: it determines priority in property transferred by a debtor as between the transferee of the property and the debtor's creditors.

Article 9 embellishes this baseline rule in various ways. For example, Article 9 defines a domestic corporation or other "registered organization" to be "located" in its jurisdiction of organization.⁹¹ Article 9 also provides that a debtor that would otherwise be "located" in a jurisdiction that lacks an Article 9-style filing system is instead "located" in the District of Columbia.⁹² Article 9 includes those embellishments because, under Article 9, the location of the debtor is the jurisdiction whose law generally governs perfection of a security interest, as well as its priority. As a result, the location of the debtor under Article 9 generally defines the jurisdiction in which a secured creditor must file a financing statement in order to perfect its security interest. Article 9 therefore embellishes its definition of "location" in order to make the Article 9 rules on filing work more smoothly than they would otherwise. The UVTA has no analogue to the Article 9 concept of perfection, so the UVTA omits those embellishments.

A major virtue of the rule of section 10 is that it will never be the case that more than one jurisdiction's voidable transfer law will apply to a transaction by a given debtor. That would not be true of a rule that based the governing law on the situs of the transferred property, in a transaction involving transfer of multiple items situated in different jurisdictions. A leveraged acquisition and its financing, common subjects of avoidance litigation, often will involve such a multijurisdictional transfer. Furthermore, intangible property has no situs, so a rule based on situs would have to designate a fictitious situs for such property.

Section 10 should be reasonably predictable. The Article 9 pattern that section 10 borrows was designed with predictability in mind, and it has been used in Article 9 for decades.⁹³

Persons with experience in multinational bankruptcy proceedings may be tempted to think of "location" through the lens of the bankruptcy concept of "center of main interests" ("COMI"). The COMI concept appears in chapter 15 of the Bankruptcy Code, applicable to multinational bankruptcies, which was based on a model law that has influenced the laws of other nations. Chapter 15 refers to a foreign bankruptcy proceeding in the country of the debtor's COMI as the "foreign main proceeding," and it permits or requires United States courts to defer in various ways to the foreign main proceeding in matters involving the

is governed by the law of the jurisdiction in which the property is located. *Id.* § 9-301(2). Many security interests in tangible property are not possessory, and as to such a security interest the baseline rule does apply. Other provisions, less broad, further qualify the baseline rule in Article 9 as to both tangible and intangible property.

91. *Id.* § 9-307(e).

92. *Id.* § 9-307(c).

93. The choice of law rules of Article 9 have been overhauled several times, but its current baseline rule on choice of law governing priority of a security interest in intangible property, adopted in the 1998 revision, is substantially identical to the baseline rule set forth in the previous major revision, issued in 1972. See U.C.C. § 9-103(3)(b), (d) (1972).

debtor.⁹⁴ Chapter 15 aspires to a “universalist” treatment of multinational bankruptcy, the idea being that if all relevant jurisdictions have laws similar to chapter 15, then one court—the court of the debtor’s COMI—can effectively administer the debtor’s bankruptcy worldwide, with courts in other countries merely cooperating as necessary to further the main proceeding.

A debtor’s “location” under section 10 is in no way linked to the debtor’s COMI. For one thing, in the case of a debtor that is an organization, its jurisdiction of organization is presumptively its COMI.⁹⁵ The definition of “location” in section 10 contains no such presumption. More fundamentally, the functions of the two definitions are quite different. The consequences of COMI determination under chapter 15 make it almost inevitable that the determination will be based in substantial measure on judgments about the likely quality of a candidate country’s bankruptcy law and bankruptcy administration.⁹⁶ Such considerations do not apply to, or are at least very much weaker in respect of, determination of the debtor’s “location” for purposes of section 10.⁹⁷

3. The New Rule and the Extraterritorial Reach of the Act

Common law rules on choice of law rarely, if ever, distinguish between international and interstate choice. If a court is faced with a choice between applying the substantive law of New York or Georgia on some legal issue, and the choice is determined by a common law rule, it almost certainly will be irrelevant to application of the rule whether the Georgia is the one north of Florida or the one north of Turkey.⁹⁸ New section 10 is in keeping with that orientation. In determining which jurisdiction’s avoidance law applies to a transaction under section 10, it is irrelevant whether a candidate jurisdiction is a state or a foreign nation.⁹⁹

94. Bankruptcy Code § 1502(4) (2014) (defining “foreign main proceeding”).

95. *Id.* § 1516(c).

96. See Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 *BROOK. J. INT’L L.* 1019, 1019–22, 1030–34 (2007).

97. See Kettering, *supra* note 18, at 351–55. Jay Westbrook, a leading scholar of multinational bankruptcy and one of the drafters of the model law on which chapter 15 is based, has written that, in a multinational bankruptcy, the avoidance law applied usually should be that of the jurisdiction under whose law the proceeds of the avoidance will be distributed, which ideally would be the jurisdiction of the main proceeding. However, he does not take that view with respect to an avoidance law (such as the UVTA) that is available under nonbankruptcy law, whether or not employed in bankruptcy. See Jay Lawrence Westbrook, *Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases*, 42 *TEX. INT’L L.J.* 899, 900–05, 914–15 (2007).

98. See Kettering, *supra* note 17, at 279.

99. Comment 1 notes that section 10 “applies equally to a candidate jurisdiction that is a sister state and to a candidate jurisdiction that is a foreign nation.” The baseline rule of UCC Article 9 on choice of law governing priority of a security interest likewise applies identically to domestic and foreign jurisdictions. However, as noted in the text, Article 9 adds some embellishments to that baseline rule, and some of those embellishments do treat foreign jurisdictions differently than domestic. Notably, a “registered organization” is deemed to be “located” in the jurisdiction in which it is organized, rather than in the jurisdiction of its sole place of business or its chief executive office. The definition of “registered organization” includes only domestic organizations. U.C.C. §§ 9-102(a)(71), 9-307(e) (2014). This and other quirks in the Article 9 definition of “location,” such as a provision that deems a person to be “located” in the District of Columbia if its otherwise-location lacks an Article 9-style filing system,

Thus, in a state that has enacted section 10, courts are directed to apply the avoidance law of the jurisdiction in which the debtor is located, regardless of whether that jurisdiction is the forum state, a sister state, or a foreign nation. As a result, the court may be required to apply the forum state's own avoidance law to a transfer of property that is situated in another state or foreign country. Equally, the court may be required to apply the avoidance law of some other state or a foreign country to a transfer of property that is situated in the forum state.

Enactment of section 10 should remove any basis for an argument that the UVTA should not be interpreted to apply extraterritorially (in any sense of that word). A longstanding principle of interpretation applied to federal statutes is that Congress is presumed to intend that its legislation apply only within the territorial jurisdiction of the United States.¹⁰⁰ In the recently decided *Madoff*¹⁰¹ case, a federal district court applied that principle to the provisions of the Bankruptcy Code applicable to voidable transfers. *Madoff* held that, notwithstanding their express terms, the avoidance provisions of the Bankruptcy Code should not be interpreted to permit the debtor's estate to recover property transferred outside the United States by foreign Transferee A, a direct transferee of the debtor, to foreign Transferee B. The provisions of the Bankruptcy Code that allow recovery from a transferee of the debtor's initial transferee are essentially the same as those of the UVTA.¹⁰²

Even if *Madoff* is considered to be a sound interpretation of federal law, the UVTA should not be similarly interpreted.¹⁰³ This notwithstanding the fact that the courts of many states have applied to their own statutes the same principle of interpretation that the Supreme Court applies to federal statutes—that is, it is presumed that a state statute was intended by the state legislature to apply only within the state's territorial jurisdiction.¹⁰⁴ For a state statute, such as the

can cause Article 9 to have an extraterritorial reach that is probably inappropriate. See Kettering, *supra* note 17, at 250–59. As also noted in the text, Article 9 introduced those quirks for the purpose of facilitating the operation of the Article 9 filing system, so those quirks are not carried into the definition of “location” in section 10 of the UVTA.

100. See, e.g., *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255–61 (2010). Crucial to applying this principle to a federal statute is deciding whether a given transaction or occurrence took place inside or outside the territorial jurisdiction of the United State. The present discussion need not address that subject.

101. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, 513 B.R. 222 (S.D.N.Y. 2014). The case arose from a proceeding to liquidate a securities dealer under the Securities Investor Protection Act, which empowers a SIPA trustee to use the Bankruptcy Code's avoidance provisions to recover customer property.

102. Compare Bankruptcy Code § 550(a)(2), (b) (2014), with UVTA § 8(b)(1)(ii) (2014). See *infra* Part III.G.

103. Other cases considering the extraterritorial reach of the avoidance provisions of the Bankruptcy Code have reached conclusions that differ from those of *Madoff*. See Kettering, *supra* note 18, at 338 & n.82.

104. See Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301, 330 & n.155 (2014). See generally Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of Morrison v. National Australia Bank*, 92 B.U. L. REV. 535 (2012).

UVTA, this principle operates as a presumption against interpreting the statute to apply in a sister state or a foreign nation.

This principle of interpretation is a presumption about legislative intent, and the presumption was created because many statutes are silent as to their territorial reach. The presumption can be rebutted by showing that the legislature intended the statute to be applied outside the territory over which the legislature has sovereignty. *Madoff* concluded that the terms of the Bankruptcy Code do not evidence intent to make the avoidance provision in question applicable to a transfer made outside the United States by a foreign Transferee A to a foreign Transferee B. The situation is different as to the UVTA. Section 10 is, among other things, an express directive as to circumstances in which the courts of the enacting state should apply the state's enactment of the UVTA to transactions that occurred outside the state, whether in a sister state or a foreign nation. The legislative intent is explicit.

The foregoing does not preclude the possibility that application of a state's enactment of the UVTA to a transaction that occurred outside the state might be thwarted by some other doctrine. For example, as an alternative basis for its holding, *Madoff* relied on the principle of international comity, which it invoked on the ground that Transferee A was itself subject to an insolvency proceeding in its home country.¹⁰⁵ Comity is a supplemental principle of law the application of which should be preserved by section 12 as applied to a claim under the UVTA. Furthermore, notwithstanding that the UVTA does not have a limited territorial reach, its application in the debtor's bankruptcy proceeding may be limited by federal bankruptcy law, if interpreted as per *Madoff*, to transactions deemed to occur within the territorial jurisdiction of the United States.¹⁰⁶

4. Jurisdictions Whose Avoidance Law Is Substantially Debased

The avoidance laws of some jurisdictions are substantially debased by comparison with the UVTA. That is notably so in "asset havens" that have eviscerated, or completely expunged, their avoidance laws, commonly as part of a package of local laws that facilitate the local formation of so-called "asset protection trusts" by persons seeking to shield their assets from their creditors.¹⁰⁷ If the ordinary

105. *Madoff*, 513 B.R. at 231–32.

106. Even if *Madoff* is considered to be a correct application of section 550 of the Bankruptcy Code in an action based on section 548, that need not necessarily mean that section 550 should be similarly applied in an action based on state avoidance law pursuant to section 544(b). Cf. UVTA § 8 cmt. 8 (2014) (noting that the provisions of section 8 of the act should apply if the act is invoked in a bankruptcy proceeding pursuant to section 544(b), unless clearly overridden by the Bankruptcy Code or other federal law); Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 970 n.57 (1981) (noting that section 550 is less protective of innocent transferees than is state avoidance law, and questioning whether section 550 should be applied to displace state-law treatment of transferees).

107. For example, Belize, the former British Honduras, apparently has no voidable transfer law at all that applies to transfers into a local asset protection trust. The law of the Cook Islands nominally includes voidable transfer, but that law makes successful attack on a transfer into a local asset

choice of law rule of section 10 points to a jurisdiction whose avoidance law is substantially debased, should section 10 contain an escape hatch that would permit or require selection of a different jurisdiction's avoidance law?

Closely related is the question of whether the choice of law rule of section 10 should contain an escape hatch to address possible asset tourism by the debtor. "Asset tourism" in this context refers to an attempt by a debtor to manipulate the choice of law rule by establishing its location artificially in a jurisdiction whose substantive law is debased. For example, a debtor conceivably might try to establish a notional "chief executive office" in an asset haven through use of straw-man officers or directors, or might try to establish a notional "principal residence" for a short term in an asset haven for the purpose of making an asset transfer while there.

The Drafting Committee probably spent more time on these issues than on any other topic during the amendment process. The committee considered a number of possible escape hatches, some triggered if the ordinary choice of law rule pointed to a jurisdiction whose law is substantially debased, others aimed at asset tourism. The committee considered whether any such escape hatch should be limited to jurisdictions outside the United States. It also considered ways of making more concrete the idea of "substantially debased law."

Section 10 reflects the committee's conclusion, which was to include no escape hatch in the statutory text. It addresses asset tourism through a comment stating that a debtor's "principal residence," "place of business," or "chief executive office" should be determined on the basis of genuine and sustained activity, not on the basis of artificial manipulations. Notwithstanding that section 10 uses the same language as the choice of law provision in UCC Article 9, courts should not feel obligated to give those words the same meanings in both statutes. There has been little experience of debtors seeking artificially to establish or re-establish their location for the purpose of gaming the Article 9 choice of law rules. No doubt that is because a debtor ordinarily could not hope to gain much by doing so. The most that a debtor might ordinarily expect to gain from success would be to cause his secured creditor's security interest to become unperfected. But a reasonably attentive secured creditor can prevent that injury by perfecting in the jurisdiction of the debtor's new location. By contrast, successful gaming of voidable transfer law by asset tourism could have lasting effects on the debtor's creditors, by allowing the debtor to shield assets from his creditors in a way that creditors could not undo. The terms that define the debtor's location should be interpreted with this difference in mind.¹⁰⁸

protection trust practically impossible. Cook Islands law includes such features as requiring the plaintiff creditor to prove beyond a reasonable doubt that the transfer was made with intent to defraud the particular plaintiff creditor; even with such proof, the creditor cannot recover unless the settlor was insolvent at the time the creditor's claim arose; and the claim for avoidance must be brought within one year from the date of the transfer. See Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1048–51 (2000). On the term "asset protection trust," see *infra* note 110.

108. See UVT A § 10 cmt. 3 (2014).

Whether section 10, supplemented by this comment, will sufficiently protect creditors against attempts by debtors to game the rule remains to be seen. The decision not to include any statutory escape hatch was based on several considerations. One was that the avoidance law of an asset haven sometimes really does seem appropriate. If the debtor who makes a questionable transfer is an individual who genuinely lives in an asset haven, perhaps it is right that a creditor should have access to no better avoidance law than the debased law of the asset haven. If the creditor is a voluntary creditor, the creditor should have known this risk before extending credit to the debtor; if the creditor is involuntary, the asset haven's law puts its own citizens, as plaintiffs or potential plaintiffs, at the same risk.

Another consideration was the difficulty of defining with sufficient clarity the point at which a jurisdiction's voidable transfer law is sufficiently debased to warrant application of an escape hatch. The difficulty is compounded by the possibility that the law of a given jurisdiction might deal with voidable transfers in ways, such as effective criminal sanctions, that are hard to compare to the remedial scheme of the UVTA.

A third consideration was political. However one defines law that is sufficiently debased to warrant application of an escape hatch, it is possible that a state of the United States might have or acquire law that would qualify. Since 1997 some fourteen states have enacted legislation validating asset protection trusts.¹⁰⁹ Such legislation necessarily overrides in those states the historical rule that a transfer of property to such a trust for the settlor's own benefit is voidable per se.¹¹⁰ There is no reason why further degradation of local avoidance law might not follow. Yet the membership of NCCUSL would not be apt to receive kindly a proposed uniform act that might now or later result in the classification

109. See Adam S. Hofri-Winogradow, *The Stripping of the Trust: From Evolutionary Scripts to Distributive Results*, 75 OHIO ST. L.J. 529, 542–43 (2014).

110. "Asset protection trust" is a current name for a creditor-thwarting device historically known as a "self-settled spendthrift trust." A "spendthrift trust" is a trust the beneficial interest of which cannot be seized by the beneficiary's creditors. A trust is "self-settled" if the person funding the trust is himself its beneficiary. The spendthrift trust, not recognized in English law, originated in Pennsylvania in the mid-1800s. See ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS §§ 25–33, at 21–33 (2d ed. 1947). Soon after it was invented, an optimistic Pennsylvania debtor transferred assets into a spendthrift trust for his own benefit. The Pennsylvania Supreme Court held the transfer to be a per se violation of the primordial rule of voidable transfer law, as embodied in the Statute of 13 Elizabeth. *MacKason's Appeal*, 42 Pa. 330, 338–39 (1862). Later cases confirmed that holding. See, e.g., *Ghormley v. Smith*, 139 Pa. 584, 591 (1891) (such an arrangement is "against the public policy, as well as the statute of Elizabeth"); *Patrick v. Smith*, 2 Pa. Super. 113, 119 (Super. Ct. 1896) ("The prohibition of conveyances with intent to delay, hinder or defraud creditors, would be of little use if the debtor may put his estate beyond the reach of creditors and still get a living from it."). As the spendthrift trust spread to other states, courts in other states took the same attitude of per se invalidity. See, e.g., *Jamison v. Miss. Valley Trust Co.*, 207 S.W. 788, 789 (Mo. 1918); *J.S. Menken Co. v. Brinkley*, 31 S.W. 92, 94–95 (Tenn. 1895); *Petty v. Moores Brook Sanitarium*, 67 S.E. 355, 356–57 (Va. 1910). The per se abhorrence of such trusts was also incorporated into trust law. See RESTATEMENT (THIRD) OF TRUSTS § 58(2) (2003); RESTATEMENT (SECOND) OF TRUSTS § 156(1) (1959); RESTATEMENT OF TRUSTS § 156(1) (1935). See generally *Kettering*, *supra* note 18, at 327–30. The 2014 amendments add to the comments a brief reminder of this history. UVTA § 4 cmt. 2 (2014).

of some states of the United States as asset havens, on a par with such jurisdictions as Belize and the Cook Islands.

5. Avoidance for Reasons Other than Depletion of Assets

The choice of law rule in section 10 is based on the location of the debtor, not the situs of the transferred property. Some of the reasons for that choice were stated earlier, and one more reason should now be noted. The most familiar kind of voidable transfer is one that diminishes the assets of the debtor available to pay unsecured creditors. A transfer in which the debtor does not receive reasonably equivalent value in exchange for property the debtor transfers has that effect. The harm that is inflicted by such a transaction is injury to the debtor's credit quality. That harm has nothing to do with the situs of the property; the injury is the same no matter where the transferred property is. The harm is, rather, associated with the person of the debtor. So it is natural to consider that the lawfulness of the harm should be evaluated under the law of the jurisdiction where the debtor is, rather than where the property is.¹¹¹

However, voidable transfer law is not concerned only with transfers that diminish the assets of the debtor available to pay unsecured creditors. The primordial rule of voidable transfer law, which captures any transfer made with intent to hinder, delay, or defraud creditors, has been applied in many famous cases to transfers that "hinder" creditors in ways other than by diminishing the debtor's assets.¹¹² The primordial rule is available to challenge any transfer of the debtor's property that a court views as being outside acceptable norms of debtor behavior.¹¹³ If the injury sought to be redressed by avoidance is something other than diminution of the debtor's assets, it might be that linkage of the transaction to the situs of the transferred property has something to be said for it, at least in some settings.

Probably the most familiar kind of voidable transfer that need not diminish the debtor's assets is a transfer that has an undue potential to deceive. That is exemplified by situations of "ostensible ownership," in which one person (X) has an interest in tangible property that is in the possession of another (Y). Ever since *Twyne's Case*, courts have been enthusiastically willing to avoid X's property interest in order to protect Z, an actual or potential creditor of Y, who may be misled by Y's possession into believing that Y owns the item free

111. For further analysis of possible choice of law rules for voidable transfer, see Kettering, *supra* note 18, at 345–58.

112. See, e.g., *Shapiro v. Wilgus*, 287 U.S. 348 (1932) (summarized *infra* at text accompanying notes 129–31); *Benedict v. Ratner*, 268 U.S. 353 (1925) (holding that a receivables financing in which the debtor had the right to retain collections of the assigned receivables violated the primordial rule); *Dean v. Davis*, 242 U.S. 438 (1917) (holding that a grant of a security interest to secure a loan violated the primordial rule when the debtor borrowed the loan for the purpose of making a preferential payment in contemplation of bankruptcy).

113. For a discussion of the primordial rule, with particular reference to its application to transactions that do not diminish the assets of the debtor available to unsecured creditors, see Kenneth C. Kettering, *Securitization and Its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553, 1585–1622 (2008).

of any interest of X. This doctrine was enormously important in the history of secured transactions law, because the doctrine generally invalidated any attempt to create a nonpossessory security interest in personal property until states enacted statutes validating such interests (and those statutes almost invariably required the secured creditor to give public notice of its interest in order to dispel any risk of deception). The comprehensive secured transactions statutes in force today have generally displaced the doctrine as applied to secured transactions. Yet the doctrine continues to pop up in other settings like an elusive mole.¹¹⁴ One situation in which ostensible ownership may create a risk of avoidance arises in the case of a “vendor in possession”: Y sells a good to X but Y remains in possession of it. In such a case, X’s ownership interest might be at risk of avoidance under the primordial rule for the benefit of Z, a creditor of Y.¹¹⁵

In a vendor-in-possession situation, should the applicable avoidance law be that of the jurisdiction in which Y is located, or that of the jurisdiction in which the good is situated? In such a situation it is difficult to see why anyone’s expectations should be focused on anything other than the good. That suggests that the law of the situs of the good should be applied. Article 2 of the UCC contains a provision that creates a limited safe harbor for X in such a situation, the terms of which generally protect X’s interest from avoidance if Y is a merchant and retains the item for a time that is commercially reasonable.¹¹⁶ That provision reflects an expectation by its drafters that the governing law will be that of the jurisdiction in which the good is situated.

The Drafting Committee was aware of the foregoing from the outset, and early drafts proposed various ways to deal with it.¹¹⁷ One early proposal was simply to add to the rule of section 10 an exception for the vendor-in-possession, as to which governing law would be that of the situs of the property.

Another early draft aimed to deal comprehensively with any situation in which the injury caused to creditors by a transfer is something other than diminution of the debtor’s assets available to unsecured creditors. Under that

114. See, e.g., U.C.C. § 2-403(2), (3) (2014) (providing that an owner of a good who entrusts it to a merchant will lose his ownership interest to a buyer in the ordinary course from the merchant).

115. If Z is a purchaser from Y rather than a creditor, the primordial rule does not apply, as it permits avoidance only by a creditor. However, the act does not purport to be the exclusive law of avoidance, and a common law of avoidance can be applied to “near miss” situations. See *infra* notes 218–19 and accompanying text. Cf. John C. McCoid II, *Constructively Fraudulent Conveyances: Transfers for Inadequate Consideration*, 62 TEX. L. REV. 639, 643 n.16 (1983) (suggesting that the drafters of the former UFCA may not have intended it to cover ostensible ownership); *id.* at 642 n.11 (noting confusion about the source for this suggestion). For background on the application of avoidance law to situations of ostensible ownership, see Charles W. Mooney, Jr., *The Mystery and Myth of “Ostensible Ownership” and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases*, 39 ALA. L. REV. 683, 726–38 (1988).

116. U.C.C. § 2-402(2) (2014) reads as follows:

A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

117. See Kettering, *supra* note 18, at 356–57 (discussing this subject).

draft, the avoidance law of the debtor's location would apply to (i) a transfer challenged under the so-called "constructive fraud" rules, and (ii) a transfer challenged under the primordial rule in which the facts alleged would support a claim under the constructive fraud rules. In a vendor-in-possession situation, the avoidance law of the situs of the property would govern. In all other situations (i.e., all situations, other than the vendor-in-possession situation, in which the claim is made under the primordial rule and could not also be pleaded under the constructive fraud rules), the applicable avoidance law would be that of the jurisdiction judged to have the most appropriate relation to the transaction and the parties.

This elaborate phrasing was used to sort out transactions in which the harm to creditors may be something other than diminution of the debtor's assets. A transfer for which the debtor does not receive reasonably equivalent value necessarily diminishes the debtor's assets. The debtor's failure to receive reasonably equivalent value is a necessary element of a constructive fraud claim, but it may or may not be an element of a claim under the primordial rule.

Fairly early in the drafting process the Drafting Committee abandoned this line of thought, and decided not to pursue a rule under which choice of law would depend upon the nature of the voidable transfer. The reasons for that decision were not embodied in any writing. The author's impression is that it resulted from a judgment that the game would not be worth the candle. A comprehensive rule along those lines would have been complex, leaving much room for argument and litigation. The vendor-in-possession situation, which in the committee's discussions was always the concrete example of a transaction as to which governing law might plausibly be chosen on a basis other than location of the debtor, was viewed as somewhat archaic, rare in application, and not worthy of much respect in the current era.¹¹⁸

Only time and experience will reveal the effect of this decision. What effect will this decision about choice of law have on the substantive law of avoidance in vendor-in-possession situations, for example? Perhaps it may hasten the decline of what is already perceived to be an archaic strand of avoidance law.¹¹⁹ Perhaps, too, this decision may tend to make it somewhat more difficult to

118. The enormous popularity of equipment leasing today illustrates why skepticism is warranted about continued legal concern with ostensible ownership, at least in some settings. The lessor's ownership interest is generally enforceable against creditors of and buyers from the lessee, notwithstanding the lessee's possession of the equipment and the absence of any public notice of the lessor's ownership interest. U.C.C. §§ 2A-305(1), 2A-307(1) (2014). When UCC Article 2A was under consideration, some academics proposed to require the lessor in a true lease to file a financing statement in order to give public notice of his ownership interest. See Mooney, *supra* note 115 (criticizing such proposals). That proposal received no significant support from outside the academic community, and it has not since been pursued in the academic literature.

119. As previously noted, the safe harbor for vendor-in-possession situations set forth in U.C.C. § 2-402(2) (2014) reflects an expectation that the avoidance law governing such a situation is that of the situs of the good. That is inconsistent with the choice of law rule of UVTA § 10 (2014). Rather than amending section 2-402(2), the Drafting Committee reconciled the inconsistency by adding to the UVTA a comment that incorporates the substance of the safe harbor into the UVTA, thereby rendering section 2-402(2) moot. UVTA § 4 cmt. 9(a) (2014).

invoke the primordial rule to challenge a transfer for other reasons that do not involve diminution in the debtor's assets available for unsecured creditors.

B. THE NEW NAME AND RELATED MATTERS

The most conspicuous change wrought by the amendments is the renaming of the act, dropping "Uniform Fraudulent Transfer Act" in favor of "Uniform Voidable Transactions Act." The main purpose of the renaming is to replace the long-used but misleading word "fraudulent" with terminology that will not mislead. The renaming has no substantive effect whatever. Yet it reflects an important truth about the act that merits discussion.

The name change was not contemplated at the outset of the amendment project, and was not suggested until the drafting process was well under way. It was sparked by the observation that the UFTA is not consistent in the terminology it uses to denote a transfer or obligation for which the act provides a remedy. It uses "fraudulent" and "voidable" about equally. Discussion about the best way to cure that inconsistency led to the realization that not only is "fraudulent" the wrong word, but the wrongness extends to its use in the title of the UFTA. As amended, the act uses "voidable" consistently.¹²⁰ That change, like the name change, is a mere shift in terminology that has no substantive effect. These changes drew mixed reviews when a draft of the amendments was first presented to the full membership of NCCUSL in 2013, but at the next meeting, after a year's reflection, the only comments from the floor on the subject were positive.¹²¹

There is precedent for the act's abandonment of misleading terminology, however venerable it may be. The 1984 act dropped the time-honored phrase "fraudulent conveyance," used in the title of the former UFCA, in favor of "fraudulent transfer." The reason was to eliminate what was perceived to be a misleading connotation that the act is particularly associated with real estate.¹²² Unfortunately, "transfer" is also inaccurate, because the act applies to the incurrence of obligations as well as to transfers of property. These considerations, however, are secondary.

The heart of the matter is that fraud, in the modern sense of that word, is not, and never has been, a necessary element of a claim for relief under the act. The misleading suggestion to the contrary in the act's original title has led to misunderstandings, some of which are detailed later in this paper.¹²³ The problem is exacerbated because the act's misleading terminology has spawned a widely used shorthand that is even more misleading, if that is possible. Thus, the oxymoronic tag "constructive fraud" has become inseparably attached to a set of related theories

120. See *supra* notes 14–15 and accompanying text.

121. Indeed, at about the same time the Drafting Committee decided that better terminology is warranted, Judge Kaplan independently deplored the misleading word "fraud" in "constructive fraud" and wrote, "If someone were to petition the state legislatures and Congress suggesting another label, this writer would wish them success." *Cyganowski v. Lapidus (In re Batavia Nursing Home, LLC)*, Bankr. No. 11-13223K, 2013 WL 4593175, at *1 (Bankr. W.D.N.Y. Aug. 28, 2013).

122. See UFTA prefatory note para. 5 (1984).

123. See *infra* notes 140–48 and accompanying text.

of recovery under the act that have nothing to do with fraud.¹²⁴ The act's codification of the primordial rule that applies to a transfer made with intent to hinder, delay, or defraud creditors is widely referred to by the tag "actual fraud."¹²⁵ That tag is simply false, because a claim under the primordial rule does not require proof of fraudulent intent. The statutory words are "hinder, delay, or defraud." As innumerable cases have observed, those words say that a transfer that "hinders" or "delays" creditors violates the rule, even if it does not "defraud" them.¹²⁶

The confusion in terminology can be blamed on the fact that American lawyers, as a group, have never been fluent Latin scholars. The English common law of fraudulent conveyance, which long predated the Statute of 13 Elizabeth, drew on the well-developed Roman law on the subject. From that source the Latin expression *in fraudem creditorum* came to be familiar to the English legal community in Elizabethan times. Translated by the "if-it-were-English" method, that became the familiar phrase "in fraud of creditors." But the root word *fraus* did not really mean "fraud." Rather, it meant "prejudice" or "disadvantage."¹²⁷ The key phrase "hinder, delay, or defraud any creditor" in the Statute of 13 Elizabeth, which remains the statement of the primordial rule in the UFTA and other modern statutes,¹²⁸ was written by Elizabethan lawyers who were far better Latinists than today's, and the statutory phrase signals the correct understanding through its use of "hinder" and "delay" in addition to "defraud." But this point is too subtle to sink into the shorthand language used by lawyers in a hurry. A more correct shorthand for this doctrine than "fraudulent conveyance" or "fraudulent transfer" would be the more correct translation, "conduct to the prejudice of creditors."

This point is by no means antiquarian. It is central to understanding the doctrine codified by the act. American courts have long understood that this doctrine is aimed at policing conduct to the prejudice of creditors—in other words, debtor behavior that contravenes acceptable norms of creditors' rights. The doctrine thus is in no way limited to debtor behavior that is describable as "fraudulent" in anything like the modern sense of that word. Rather, the doctrine can resemble a regulatory tool.

124. The so-called "constructive fraud" provisions are at UFTA §§ 4(a)(2), 5(a) (1984) (not substantively altered by the 2014 amendments).

125. The primordial rule is codified at UFTA § 4(a)(1) (1984) (not substantively altered by the 2014 amendments). This rule is "primordial" because its language dates back to the Statute of 13 Elizabeth. See *supra* notes 2–3 and accompanying text.

126. See, e.g., *Shapiro v. Wilgus*, 287 U.S. 348, 354 (1932); *Means v. Dowd*, 128 U.S. 273, 288 (1888); *Consove v. Cohen (In re Roco Corp.)*, 701 F.2d 978, 984 (1st Cir. 1983); *Empire Lighting Fixture Co. v. Practical Lighting Fixture Co.*, 20 F.2d 295, 297 (2d Cir. 1927) (L. Hand, J.); *Lippe v. Bairnco Corp.*, 249 F. Supp. 2d 357, 374 (S.D.N.Y. 2003), *aff'd*, 99 F. App'x 274 (2d Cir. 2004); *Plotkin v. Pomona Valley Imports, Inc. (In re Cohen)*, 199 B.R. 709, 715–16 (B.A.P. 9th Cir. 1996); see also *Kettering*, *supra* note 113, at 1591–92 & n.118.

127. See *Radin*, *supra* note 1, at 110–11; see also 1 GLENN, *supra* note 1, § 60, at 82–83. Cf. 6 THE OXFORD ENGLISH DICTIONARY 152 (2d ed. 1989) (defining "fraud" in part as follows: "in *Law*. *in fraud of, to the fraud of*: so as to defraud; also, to the detriment or hindrance of").

128. The quoted language is from the statement of the primordial rule in section 4(a)(1) of the UFTA. The language of the Statute of 13 Elizabeth is "delaye hynder or defraude Creditors." See *supra* note 3.

This point was made concisely by Justice Cardozo, speaking for a unanimous Supreme Court, in *Shapiro v. Wilgus*.¹²⁹ That case involved an individual engaged in business who was solvent but had a cash flow problem. To solve it, he formed a wholly owned corporation to which he contributed all of his assets and which he caused to assume all of his debts, and which he then caused to be placed into a receivership proceeding for which he, as an individual, was not eligible under then-current law. The court held that this asset transfer, made for the purpose of opting into a body of insolvency law not available to an individual debtor, had been made with intent to hinder, delay, or defraud creditors within the meaning of the primordial rule.¹³⁰ Justice Cardozo then observed:

We have no thought in so holding to impute to counsel for the debtor or even to his client a willingness to participate in conduct known to be fraudulent. The candor with which the plan has been unfolded goes far to satisfy us, without more, that they acted in the genuine belief that what they planned was fair and lawful. Genuine the belief was, but mistaken it was also. Conduct and purpose have a quality imprinted on them by the law.¹³¹

Today, the dissociation of the act from “fraud” in the modern sense seems to be reasonably well understood as to the so-called “constructive fraud” branch of the doctrine, whose nickname is merely bizarre. But it is not always well understood as to the primordial rule, which suffers from a nickname, “actual fraud,” that is grossly misleading.

The comments to section 4 of the act, as written in 1984, include much valuable commentary on the primordial rule. Most of that commentary is devoted to gathering cases that have considered one or another of the badges of fraud listed in section 4(b). The amendments add further commentary, centered on a new comment 8, which gathers cases that illustrate the meaning of the primordial rule from a broader perspective. In particular, the cases gathered in new comment 8 illustrate the use of the primordial rule as a regulatory tool, completely divorced from anything like “fraud” in the modern sense.¹³²

New comment 8 also includes cases on the related subject of “intent,” as that word is used in the primordial rule. The word “intent” is used throughout statutory, common, and constitutional law, and no word can have been interpreted in more diverse ways. In criminal law and the law of intentional torts, for example, “intent” is commonly interpreted to focus on the actor’s subjective mental state, so that an actor is considered to “intend” result X only if he acted with the purpose of achieving result X. In other settings, the word is interpreted to diminish or all but eliminate the significance of the actor’s mental state, as by considering the actor to “intend” X if the actor knows that X is almost certain to result, or is likely to result, or may result, without regard to the actor’s

129. 287 U.S. 348 (1932).

130. *Id.* at 354 (applying the primordial rule as codified in the Pennsylvania enactment of the UFCA and the Statute of 13 Elizabeth).

131. *Id.* at 357.

132. For further discussion of the primordial rule, see Kettering, *supra* note 113, at 1585–1620.

purpose.¹³³ Still other interpretations eliminate consideration of mental state entirely. For example, a principal drafter of UCC Article 9 stated flatly, to general agreement, that a key provision of the statute referring to parties' "intent" should not be understood to have any reference to mental state.¹³⁴

The nickname of the primordial rule, "actual fraud," invites the misconception that the rule's intent requirement should be interpreted in a way similar to the intent requirement for a claim of common-law fraud. The latter focuses upon the alleged fraudster's mental state, and is generally thought to be satisfied only if the fraudster has something close to the conscious purpose of inducing his victim to rely upon his fraudulent misrepresentation.¹³⁵

Such emphasis upon the debtor's mental state would have been a sensible interpretation of the primordial rule as originally written in the Statute of 13 Elizabeth, but it makes little sense as an interpretation of that language in modern codifications of voidable transfer law. The Statute of 13 Elizabeth was a penal statute. More important, it targeted the debtor who made the improper transfer as much as the transferee who received it. Both the debtor and the transferee were subject to imprisonment.¹³⁶ The debtor's *mens rea* naturally should be a prerequisite to imposition of penal sanctions on the debtor.

Modern statutes are fundamentally different. They are civil, not criminal. More important, the debtor is not their target. The remedy is against the transferee; the debtor is a mere bystander. It would make little sense to impose liability on the transferee based upon the mental state of a different person, the debtor.

As a result, for centuries courts applying the modern statutes or similar laws have interpreted the reference to "intent" to minimize or eliminate the significance of the debtor's mental state. Courts have used different tools for that purpose. The so-called "badges of fraud" are one such tool. Another is forceful employment of the standard evidentiary presumption that a person is presumed to

133. For a discussion of different interpretations of "intent" in various settings of criminal law and intentional tort, see David Crump, *What Does Intent Mean?*, 38 HOFSTRA L. REV. 1059 (2010). For a discussion of different interpretations of "intent" in employment discrimination statutes and judicial construction of the Equal Protection Clause, see Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1450–55 (2012).

134. In the original version of the UCC, the "true lease" issue—i.e., whether a purported lease of goods should be recharacterized as an installment sale of the goods, with the lessee-buyer's obligation to pay the price secured by the goods—was said to depend upon whether the lease was "intended as security." U.C.C. § 1-201(37) (1962). Grant Gilmore, a principal drafter of Article 9, said of this language: "It is clear enough that 'intended' in the provision just quoted has nothing to do with the subjective intention of the parties, or either of them." 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 11.2, at 338 (1965). Other commentators vigorously agreed, and in general the courts agreed too.

135. See RESTATEMENT (SECOND) OF TORTS §§ 525, 531 (1977).

136. Section 3 of the Statute of 13 Elizabeth provided that "all and every the parties" to a transfer made with intent to hinder, delay, or defraud creditors, "being privy and knowing of the same," shall forfeit one year's value of the land (if land was transferred) and "the whole value of the goods and chattels," one half to the Queen and the other half to any party or parties aggrieved by the transfer. The guilty persons "shall suffer imprisonment for one-half year without bail or mainprize." Section 2 declared the transfer void. Professor Glenn makes the point that the statute was not enacted for the benefit of creditors at all. It was a revenue measure, the forfeitures for the benefit of the Crown being the reason for enactment. 1 GLENN, *supra* note 1, §§ 61a–61c, at 86–94.

intend the natural consequences of his acts. New comment 8 to the amended act adds references to such cases.¹³⁷

The changes made by the amendments on the foregoing matters are purely symbolic. The changes to the act's title and terminology have no substantive effect. The new comments are merely comments, and they do no more than add to the cases already gathered for the convenience of readers of section 4. Still, the changes should prevent understanding of the act from being distorted by the act's former terminology, which could be rightly understood only by a fluent Latinist who has a detailed knowledge of the history of this branch of the law.

C. BURDEN OF PROOF AND STANDARD OF PROOF

As written in 1984, the UFTA said nothing about allocation of the burden of proof or the required standard of proof for claims and defenses under the act. Its devotion to evidentiary matters was limited to a single presumption, set forth in section 2(b), which provides that a debtor that is generally not paying its debts as they become due is presumed to be insolvent.

From the earliest stages of the amendment project, allocation of the burden of proof and the required standard of proof were identified as subjects as to which it would be desirable to promote uniformity among the states.¹³⁸ Accordingly, the amendments add to the act rules on those subjects. New sections 4(c) and 5(c) allocate to the plaintiff creditor the burden of proving the elements of a claim for relief under the act, and specify that the required standard of proof is preponderance of the evidence. New sections 8(g) and 8(h) allocate in a natural way the burden of proving matters relating to defenses and liabilities, the required standard of proof likewise being preponderance of the evidence. The amendments do not substantively change the presumption of insolvency in section 2(b), though they do elevate to the statutory text two glosses that were stated in the original comments.¹³⁹

Probably the most significant of these additions is the required standard of proof, namely preponderance of the evidence. That, of course, is the standard ordinarily required in civil actions. Nonetheless, courts in many states currently prescribe the extraordinary "clear and convincing evidence" standard for claims based on the primordial rule relating to transfers made with intent to hinder, delay, or defraud creditors.¹⁴⁰ Courts in a few states prescribe that

137. Frank Kennedy, the reporter for the committee that drafted the UFTA in 1984, observed, "[F]or over 400 years the courts recognized that if fraudulent transfers are to be coped with successfully . . . , a transferor's acts must be judged by their effects rather than by the words of the parties that accompany them." Frank R. Kennedy, *Involuntary Fraudulent Transfers*, 9 *CARDOZO L. REV.* 531, 576 (1987). For further discussion of "intent" in avoidance law, see *id.* at 537–39, 575–77 and Kettering, *supra* note 113, at 1613–20.

138. See Kettering, *supra* note 18, at 325–27.

139. See *infra* note 160.

140. For a collection of cases on the standard of proof applicable to claims based on the primordial rule, see Richard M. Cieri et al., *Breaking Up Is Hard to Do: Avoiding the Solvency-Related Pitfalls in Spinoff Transactions*, 54 *BUS. LAW.* 533, 594 n.237 (1999). For additional cases applying the ordinary standard of proof to such claims, see, e.g., *Meija v. Ruiz*, 985 So. 2d 1109, 1113 (Fla. Dist. Ct. App.

extraordinary standard even for claims based on the so-called “constructive fraud” rules.¹⁴¹

The Drafting Committee had little trouble concluding that the ordinary standard is the right standard. Use of the extraordinary standard appears to be largely a product of the terminological confusion discussed in Part III.B of this paper. The extraordinary standard has long been required for claims of common-law fraud. But claims under the act are not inherently claims about fraudulent behavior, notwithstanding the act’s misleading terminology. A claim under the primordial rule—the badly nicknamed “actual fraud” prong of the act—is a claim about behavior to the prejudice of creditors that need not bear any resemblance to fraud in the modern sense of that word.

More fundamentally, the extraordinary standard of proof originated in cases that were thought to involve a special danger that claims might be fabricated. In the earliest such cases, a court of equity was asked to grant relief on claims that were unenforceable at law for failure to comply with Statute of Frauds, the Statute of Wills, or the parol evidence rule. In time, extraordinary proof also came to be required in actions seeking to set aside or alter the terms of written instruments.¹⁴² Those reasons for extraordinary proof do not apply to claims for relief under the act.

Akin to this statutory rule on the standard of proof is an observation in the official comments about standards of pleading. Many jurisdictions’ procedural rules follow the Federal Rules of Civil Procedure in requiring “fraud” to be pleaded with particularity.¹⁴³ The amended comments observe that such rules should not be interpreted to apply to claims under the act, absent some gloss to the rule that would compel a different interpretation.¹⁴⁴

This pleading rule is another subject as to which the act’s misleading terminology has led to confusion.¹⁴⁵ The elements of a claim under the act are very different from the elements of a claim of common-law fraud. Furthermore, the reasons for imposing extraordinary pleading requirements on claims of fraud do not

2008) (Florida UFTA); *Morris v. Nance*, 888 P.2d 571, 576 (Or. Ct. App. 1994) (Oregon UFTA); *Prairie Lakes Health Care Sys., Inc. v. Wookey*, 583 N.W.2d 405, 411 (S.D. 1998) (South Dakota UFTA).

141. See *Tessitore v. Tessitore*, 623 A.2d 496, 498 (Conn. App. Ct. 1993) (applying pre-UFTA Connecticut law), *overruled on other grounds*, *Kaczynski v. Kaczynski*, 981 A.2d 1068 (Conn. 2009); *Parker v. Parker*, 681 N.W.2d 735, 742 (Neb. 2004) (Nebraska UFTA; court stated that the “clear and convincing” standard applies to claims under the act, without distinguishing claims under the primordial rule and claims under the constructive fraud rules; the claim in the case was under the primordial rule); see also *Sedwick v. Gwinn*, 873 P.2d 528, 531 (Wash. Ct. App. 1994) (Washington UFTA; constructive fraud must be shown by “substantial evidence”).

142. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 388–89 & n.27 (1983), and sources cited therein. That case held that defrauded buyers of securities seeking recovery under section 10(b) of the Securities Exchange Act of 1934 need prove their claim only by a preponderance of the evidence.

143. FED. R. CIV. P. 9(b).

144. UVTA § 4 cmt. 10 para. 3 (2014).

145. Of course the confusion is by no means universal. For a careful analysis, see *Carter-Jones Lumber Co. v. Denune*, 725 N.E.2d 330, 331–33 (Ohio Ct. App. 1999). See also, e.g., *Janvey v. Alguire*, 846 F. Supp. 2d 662, 675–77 (N.D. Tex. 2011).

apply to a claim under the act.¹⁴⁶ Unlike common-law fraud, a claim under the act is not unusually susceptible to abusive use in a strike suit. Nor is it apt to be of use to a plaintiff who is on a fishing expedition, seeking to discover unknown wrongs. Likewise, a claim under the act is unlikely to cause significant harm to the defendant's reputation. The defendant in a claim under the act is the transferee, and the elements of the claim do not require the defendant to have committed even an arguable wrong.¹⁴⁷ The appendix to the Federal Rules of Civil Procedure includes an illustrative form of complaint for relief under the primordial rule, and that form evinces no extraordinary degree of specificity.¹⁴⁸

A final aspect of these new provisions relates to their effect on presumptions. Courts have been liberal in creating and applying presumptions in cases under the act and its predecessors. Such presumptions have played an important role in the history of those statutes. Certain kinds of behavior that are now controlled by specific statutes were originally policed under the primordial rule, supplemented by an evidentiary presumption, until it became expedient to create a statute that essentially made the presumption absolute. The so-called "constructive fraud" rules of the act had their origin in a forceful presumption that a debtor in parlous financial condition who conveys assets for less than fair consideration intends to hinder, delay, or defraud his creditors.¹⁴⁹ Bulk sales laws and the absolute priority rule applicable to reorganizations under chapter 11 of the Bankruptcy Code have analogous origins.¹⁵⁰

The amendments allocate the ultimate burden of persuasion under the act, but it was not the intention of the drafters thereby to thwart judicial creativity as to presumptions (if it were even possible to do so). A comment dedicated to presumptions makes this point explicitly.¹⁵¹

146. See generally 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296 (3d ed. 2004) (compiling reasons suggested for the particularized pleading requirement for fraud claims).

147. As to the debtor: In an ordinary action under the act, in which a creditor is seeking to avoid a transfer of property by the debtor to the transferee or a money judgment against the transferee in lieu of avoidance, there is generally no reason for the debtor even to be a party to the action. Note that "avoidance" of the transfer does not revest the debtor with the transferred property; the transfer remains complete and valid as between the debtor and the transferee. See UVTA § 7(a)(1) & cmt. 7 (2014). Many cases have held that the debtor is not a necessary party, but there are also contrary cases. Much may depend on the particular facts. See W.J. Dunne, Annotation, *Necessary Parties Defendant to Action to Set Aside Conveyance in Fraud of Creditors*, 24 A.L.R.2d 395 (1952).

148. FED. R. CIV. P. app. Form 21; see also FED. R. CIV. P. 84 (stating that the illustrative forms in the Appendix are sufficient under the Federal Rules of Civil Procedure).

149. The constructive fraud rules first appeared in the UFCA, and their drafters stated that they merely codified "the present law in the great majority of states." NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, PROCEEDINGS OF THE TWENTY-EIGHTH ANNUAL MEETING 351 (1918); see also GARRARD GLENN, THE RIGHTS AND REMEDIES OF CREDITORS RESPECTING THEIR DEBTOR'S PROPERTY §§ 122-124, at 95-97 (1915).

150. As to bulk sales laws, see Thomas Clifford Billig, *Bulk Sales Laws: A Study in Economic Adjustment*, 77 U. PA. L. REV. 72, 75-80 (1928). As to the absolute priority rule, codified in Bankruptcy Code § 1129(b)(2)(B)(ii) (2014), see Bruce A. Markell, *Owners, Auctions and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN. L. REV. 69, 74-84 (1991).

151. UVTA § 4 cmt. 11 (2014).

Of course the price of letting a hundred flowers bloom in regard to presumptions is that presumptions may differ between jurisdictions, as they do today. Such presumptions should be treated as matters of substantive law, rather than as procedural matters that are governed by the law of the forum.¹⁵² The existence of differing presumptions in different jurisdictions may be a significant reason for invoking choice of law rules to determine which jurisdiction's substantive law governs a particular avoidance claim.¹⁵³ The addition of the new choice of law rule to the act will mitigate the problems that may arise from diverse presumptions. The choice of law rule will not make the diversity go away, but it should make it easier to predict reliably which jurisdiction's law, inclusive of evidentiary presumptions, will apply to a given transaction.

The comment reminds courts that the act should be applied so as to effectuate its purpose of making the law uniform among the states enacting it.¹⁵⁴ In other words, a court should give due weight to the policy of uniformity when asked to employ a presumption that was previously recognized in its jurisdiction, or to create a new presumption. The comment also reminds courts to examine for obsolescence the presumptions they are asked to employ. The long continuity of this area of law may lead to the creation of presumptions that will continue to be on the books after they have ceased to make sense, until they are housecleaned.¹⁵⁵

D. DEFINITION OF "INSOLVENCY"

The UFTA defines "insolvency" in section 2. Like the Bankruptcy Code, the act defines insolvency in the balance sheet sense.¹⁵⁶ In both statutes, the basic definition states that a debtor is insolvent if its assets are less than its debts, both at fair valuations.¹⁵⁷ The 2014 amendments make a stylistic change to the UFTA's statement of that basic definition in order to convey more lucidly that debts, as well as assets, require valuation. Ordinarily the fair value of a debt owed by the debtor is, from the debtor's standpoint (which is the appropriate standpoint for the purpose of the definition), the debt's face amount.¹⁵⁸ Still, for some debts,

152. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 133–134 (1971).

153. See, e.g., *Murphy v. Meritor Sav. Bank (In re O'Day Corp.)*, 126 B.R. 370, 390 (Bankr. D. Mass. 1991) (action to avoid security interests securing the financing of a failed leveraged acquisition, in which an important issue was whether the applicable avoidance law was that of Massachusetts or Pennsylvania, due to different allocation by those states of the burden of establishing the debtor's solvency or insolvency).

154. UFTA § 4 cmt. 11 (2014); see also *id.* § 13.

155. See, e.g., *Fidelity Bond & Mortg. Co. v. Brand*, 371 B.R. 708, 716–22 (E.D. Pa. 2007) (rejecting an obsolete presumption previously applied under Pennsylvania avoidance law; the court's conclusion was bolstered by local comments to Pennsylvania's enactment of the UFTA).

156. Bankruptcy Code § 101(32) (2014) (defining "insolvent").

157. UFTA § 2(a) (1984) (not substantively changed by the 2014 amendments); Bankruptcy Code § 101(32)(A) (2014).

158. It matters whether a debt is valued from the standpoint of the debtor or the creditor. If Debtor owes Creditor \$100, Debtor has a debt of \$100 for purposes of section 2 (assuming that, if the debt is not yet due, no issue of its present value arises on account of it having an unusually high or low interest rate). From the standpoint of Creditor, however, the fair value of the debt

fair value may differ from face amount. An example is a contingent debt owed by the debtor as to which the relevant contingency has not occurred. Another example is a non-interest-bearing debt that is not yet due, which should be reduced to its present value. It is clear from the official comments that the definition as originally written was to be so interpreted.¹⁵⁹ A stylistic change to central and longstanding language of this kind had to satisfy a fairly high threshold of desirability before the Drafting Committee was moved to make it, but this change, as well as some other stylistic changes to this definition, met that threshold.¹⁶⁰

The amendments make one important substantive change to this definition. The UFTA, like the Bankruptcy Code, defines insolvency differently for partnerships than for other entities.¹⁶¹ In both statutes, the special definition for partnerships starts from the basic calculation of partnership assets less partnership debts, and then adds to the partnership's assets the net worth of each general partner (calculated without reference to the general partner's interest in the partnership). The idea behind this, evidently, was that adding the general partners' net worths is justified because general partners are liable for the partnership's debts by operation of partnership law. While that idea may have been soundly based in 1984, it is not today. The proliferation of nontraditional forms of business organization since 1984 includes partnerships that have general partners who are not liable for some or all partnership debts.¹⁶²

may be less than \$100, because its value to Creditor depends upon the likelihood that Debtor will pay it. To take that nonperformance risk into account for purposes of section 2 would be contrary to the purpose of the section, which is to assess Debtor's ability to meet its obligations. Current financial accounting standards provide that in the event a fair valuation of a debtor's liability is permitted or required for financial accounting purposes, valuation should take into account the risk of the debtor's nonperformance. See FIN. ACCOUNTING STANDARDS BD., ACCOUNTING STANDARDS CODIFICATION ¶¶ 820-10-35-17 to -18 (2014) (formerly STATEMENT OF FIN. ACCOUNTING STANDARDS NO. 157; FAIR VALUE MEASUREMENT ¶ 15 (2006)). The 2014 amendments add a comment stating that, whatever may be required for purposes of financial accounting, it is not appropriate to take into account the risk of the debtor's nonperformance when valuing the debtor's debts for purposes of section 2. UVTA § 2 cmt. 1 para. 2 (2014).

159. See UFTA § 2 cmt. 1 para. 1 (1984) (not substantively changed by the 2014 amendments).

160. Section 2(b) of the UFTA creates a presumption, which has no parallel in the Bankruptcy Code, that a debtor that is generally not paying its debts as they become due is insolvent. The 2014 amendments elevate to the statutory text two glosses that were stated in comment 2 to section 2. The first is that failure to pay a debt as a result of bona fide dispute does not count when evaluating whether the debtor is generally not paying its debts. The second relates to the effect of the presumption, which is to shift the burden of persuasion on solvency. Hence the presumption is not merely a "bursting bubble" that evaporates if evidence of solvency is presented. The elevation of these two points from the comment to the statutory text is more reasonably viewed as a stylistic change than as a substantive change.

161. UFTA § 2(c) (1984) (deleted 2014); Bankruptcy Code § 101(32)(B) (2014).

162. In a "limited liability partnership" or a "limited liability limited partnership," a general partner, as such, is not liable for some or all partnership debts. The laws of most states follow the Revised Uniform Partnership Act in providing that a general partner of such a partnership is not liable for any partnership debts. See REVISED UNIF. P'SHIP ACT § 306(c) (1997) (limited liability partnerships); REVISED UNIF. LTD. P'SHIP ACT § 404(c) (2001) (limited liability limited partnerships). The laws of some states immunize a general partner of such a partnership only from liability for partnership debts arising from negligence or other misconduct by partners, employees, or agents of the partnership (other than the general partner himself).

The Drafting Committee initially thought to retain the special definition of insolvency for partnerships and revise it to fix this problem. It then occurred to the committee to wonder why there should be a special definition of insolvency for partnerships at all. Its existence can be attributed to inertia, for the former UFCA had such a special definition.¹⁶³ But the committee could think of no good reason to retain it today. If a debtor other than a partnership has a guarantor who has guaranteed some or all of the debtor's debts, the basic definition of insolvency gives the debtor no credit for the net worth of the guarantor. Why, then, should a partnership be given credit for the net worth of a general partner who is liable for partnership debts? There may well be differences in the procedure by which a partnership creditor may pursue a general partner for a partnership debt, as compared to a corporate creditor's pursuit of a guarantor of the corporation's debt.¹⁶⁴ But both the general partner and the guarantor are ultimately liable for the debt. It is anomalous to credit the partnership with the net worth of its general partner but not credit the corporation with the net worth of its guarantor.

Accordingly, the amendments delete the special definition of insolvency applicable to partnerships, thereby making partnerships subject to the same definition that applies to all other debtors.

Even before the 2014 amendments, at least one state made the same change to its enactment of the UFTA.¹⁶⁵ This change renders the act's definition of insolvency for a partnership inconsistent with the definition in the Bankruptcy Code, unless and until the Bankruptcy Code's definition is similarly revised.

E. GOOD-FAITH TRANSFEREES AND THE SECTION 8(A) DEFENSE

The 2014 amendments make a small but significant change to section 8(a) of the act. Briefly stated, the change is that a good-faith transferee cannot qualify for the defense provided by section 8(a) unless the "reasonably equivalent value" referred to in that provision goes to the debtor, rather than to just anyone. Whether that change is the wisest policy is debatable, and the members of the Drafting Committee would probably be the first to say so.

Section 8(a) must be understood in its context, as one of two provisions of the act that protect the initial transferee of a voidable transfer if he takes in good

163. UFCA § 2(2) (1918). One may wonder why the 1918 drafters adopted this special definition. Perhaps it was a natural consequence of their being imbued with the old common-law notion that a partnership is not a legal entity at all, but rather is merely a name given to the aggregate of its partners.

164. Under UNIFORM PARTNERSHIP ACT § 15(b) (1914), a partner is only "jointly" liable for most partnership obligations. As a result, an obligee ordinarily must join all partners in the same suit. REVISED UNIFORM PARTNERSHIP ACT § 306(a) (1997) obviates the joinder requirement by generally making each partner "jointly and severally" liable for all partnership obligations. However, *id.* § 307(d) provides that a judgment against a partner based on a claim against the partnership ordinarily cannot be satisfied against the partner's assets until a judgment on the claim has been rendered against the partnership and a writ of execution thereon has been returned unsatisfied. Commercial guarantees do not ordinarily provide the guarantor with any comparable procedural rights.

165. TEX. BUS. & COM. CODE ANN. § 24.003 (Vernon Supp. 2014) (as amended in 2013).

faith.¹⁶⁶ The basic protection is provided by section 8(d), which applies to all theories of attack under the act.¹⁶⁷ The protection afforded by section 8(d) is limited; it is not a complete defense. It protects a good-faith transferee only “to the extent of the value given the debtor for the transfer,” and it does that by vesting the transferee with a lien for that amount on the property whose transfer is avoided (or, if the remedy against the transferee is a money judgment rather than avoidance of the transfer, the judgment is reduced by the same amount). The former UFCA provided essentially the same protection.¹⁶⁸ The Bankruptcy Code’s integral rule on voidable transfers likewise includes a provision that closely parallels section 8(d).¹⁶⁹

Section 8(a) is a separate protection available to some good-faith transferees. Unlike section 8(d), if section 8(a) applies it is a complete defense. Also unlike section 8(d), section 8(a) is not a shield against all theories of attack. Rather, it protects the transferee only from attack based on the primordial rule relating to transfers made with intent to hinder, delay, or defraud creditors. Section 8(a) affords the transferee of such a transfer a complete defense if he took in good faith and for a reasonably equivalent value.

It is plausible to suppose that the reason why the section 8(a) defense was limited to an attack based on the primordial rule was the thought that a transferee does not require such a defense against attack based on the so-called “constructive fraud” rules. That is because a transferee who gives reasonably equivalent value in exchange for the transfer cannot breach the constructive fraud rules in the first place. However, we will see momentarily that this thought is not quite correct. A transferee who gives reasonably equivalent value may still breach the constructive fraud rules, if that value does not go to the debtor.

166. A third provision, rather different, affords protection to a person other than the initial transferee who takes the property, directly or remotely, from the initial transferee. That provision, section 8(b), was revised in 2014 but the revisions were in the nature of technical corrections. See *infra* Part III.G.

167. As written, the protection afforded by section 8(d) is available not only to the transferee of a “true” voidable transfer—i.e., one that is voidable under the primordial rule of section 4(a)(1) or the so-called “constructive fraud” rules of sections 4(a)(2) and 5(a)—but also to the transferee of an insider preference that is voidable under section 5(b). Arguably section 8(d) should have been written to exclude its application to section 5(b). Section 5(b) would be meaningless if the transferee is allowed to invoke section 8(d), because a debtor who makes a transfer to pay or secure an antecedent debt is always considered to receive value for the transfer. (See section 3(a).) The absence of such an exclusion should not make a difference, however. A transfer is not avoidable under section 5(b) unless the transferee had reasonable cause to believe that the debtor was insolvent, and such a transferee should be considered to lack the good faith that is necessary to invoke section 8(d).

168. UFCA § 9(2) (1918). Curiously, the UFCA provides transferees with this protection (as well as the protection of section 9(1) referred to in note 170 *infra*) only in an action brought by a creditor of the debtor whose claim has matured. No similar protections are stated in section 10, which applies to an action brought by a creditor of the debtor whose claim has not matured, although avoidance of the transfer is a remedy available under section 10. The absence of parallel language in section 10 might be explained by the fact that section 10 empowers the court to “[m]ake any order which the circumstances of the case may require,” and the drafters may have felt it unnecessary to tell courts to employ that power to protect good-faith transferees.

169. Bankruptcy Code § 548(c) (2014).

The effect of section 8(a) is marginal, at least in the ordinary situation in which the value given by the transferee does go to the debtor. A good-faith transferee who gives the debtor reasonably equivalent value in exchange for a transfer of property is protected by section 8(d) to the extent of the value so given the debtor. The additional effect of section 8(a) is to give the transferee the excess of the actual value of the property over the value given by the transferee to the debtor. Because the section 8(a) defense is available only if the value given is “reasonably equivalent” to the actual value of the property, the difference between the actual value of the property and the value given should not be great, at least in relative terms.

Like section 8(d), section 8(a) carries forward into the UFTA a protection afforded by the former UFCA.¹⁷⁰ As noted earlier, however, the drafters of the Bankruptcy Code deviated from the UFCA in some ways that are inexplicable.¹⁷¹ This is one of them. The Bankruptcy Code’s integral voidable transfer provision contains nothing parallel to section 8(a). Why the Bankruptcy Code’s drafters chose to omit this additional protection for good-faith transferees is a mystery, at least to this author.

With this background, we can turn to the issue that provoked the interest of the Drafting Committee in section 8(a). It is easily stated. In order for a good-faith transferee to qualify for the benefit of section 8(a), must the “reasonably equivalent value” given by the transferee go to the debtor?

The following example makes the issue concrete:

Example: Firm is a business corporation. At relevant times it may or may not be solvent. Boss holds a position of authority in Firm; perhaps Boss owns Firm. Boss wishes to procure property or services for his own benefit. Boss approaches Merchant to negotiate the acquisition of the desired property or services. Merchant is a professional in the relevant line of business, completely independent of Firm and Boss. Merchant sells to Boss the desired property or services at a fair price. Boss pays for the property or services with funds from Firm’s account. Merchant accepts the payment without knowledge of that fact, and without any other guilty knowledge. Later, a Creditor of Firm sues Merchant under the act to recover the payment that Firm made to Merchant. Creditor is able to establish that the payment was made by Firm with intent to hinder, delay, or defraud creditors. Is Merchant entitled to the section 8(a) defense?

Merchant may very well be able to establish his own good faith. Merchant unquestionably gave reasonably equivalent value in exchange for the payment Merchant received, in the form of the fairly priced property or services Merchant provided to Boss. But that value did not go to Firm, the debtor. Does that matter?

Observe that the section 8(a) defense is, at least on the face of things, Merchant’s only way to prevent complete avoidance of the payment Merchant received. Merchant gets no help from section 8(d), because that provision protects

170. UFCA § 9(1) (1918). The observations made *supra* in note 168 apply.

171. See *supra* notes 42–43 and accompanying text.

the transferee only “to the extent of the value given the debtor for the transfer.” Here Merchant gave Firm, the debtor, no value.

As written in 1984 and before the 2014 amendments, the defense afforded by section 8(a) extends to a good-faith transferee who gives reasonably equivalent value whether or not that value goes to the debtor.¹⁷² It is hard to believe that this drafting was accidental. Several provisions of the act are written to count value for certain purposes only if the value goes to the debtor. Thus, the so-called “constructive fraud” provisions of the act do not count value unless it goes to the debtor.¹⁷³ Likewise, as just noted, the protection afforded by section 8(d) to a good-faith transferee who gives value applies only to value that goes to the debtor. By contrast, pre-2014 section 8(a) is not written to count only value that goes to the debtor. Moreover, pre-2014 section 8(a) is not the only provision referring to the giving of value that is written to count value that does not go to the debtor. The provision designated as section 8(b)(2) before the 2014 amendments protects a subsequent transferee who takes in good faith and for value.¹⁷⁴ That provision does not say that the only value that counts is value that goes to the debtor. There is no possible doubt that section 8(b)(2) means what it says in that respect, because the debtor is out of the picture in such a subsequent transfer.

Notwithstanding its clear language, cases are divided on how section 8(a) should be interpreted. Most take the position that only value that goes to the debtor counts. Many cases that have touched upon section 8(a) have not noticed that its language differs from that of the more familiar constructive fraud provisions, and simply assumed that conclusion.¹⁷⁵ The few cases that have noticed the issue and reached that conclusion have reasoned that the purpose of voidable transfer law is to protect the debtor’s creditors, and that value that does not go to the debtor should not count because the debtor’s creditors get no benefit from it.¹⁷⁶

That reasoning is flawed, or at least is radically insufficient. Avoidance law is not only about creditors’ interests. It is also about transferees’ interests. It is true that in some cases the transferee’s interest deserves little respect, because the transferee was in cahoots with a slimy debtor, or at least got something for

172. Before it was amended in 2014, section 8(a) read as follows: “A transfer or obligation is not voidable under Section 4(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.”

173. UFTA § 4(a)(2) (1984) (not changed by the 2014 amendments) (rendering a transfer voidable if, *inter alia*, “the debtor made the transfer . . . without receiving a reasonably equivalent value in exchange for the transfer”); *id.* § 5(a) (identical).

174. UFTA § 8(b)(2) (1984). The 2014 amendments redesignated that provision as section 8(b)(1)(ii) and revised its wording for other reasons (see *infra* Part III.G), but did not change this point.

175. See, e.g., *Barclay v. Mackenzie (In re AFI Holding, Inc.)*, 525 F.3d 700, 707 (9th Cir. 2008); *SEC v. Res. Int’l, LLC*, 487 F.3d 295, 301–02 (5th Cir. 2007); *Slone v. Lassiter (In re Grove-Merritt)*, 406 B.R. 778, 810 (Bankr. S.D. Ohio 2009).

176. See, e.g., *Klein v. King & King & Jones*, 571 F. App’x 702, 704–05 (10th Cir. 2014); *Calvert v. Prevost Car (US) Inc. (In re Consolidated Meridian Funds)*, Bankr. No. 10-17952, 2014 WL 1329238, at *2–5 (Bankr. W.D. Wash. Mar. 27, 2014). For a case holding that value under section 8(a) need not go to the debtor, see *Quad City Bank v. Berstler (In re Chapman Lumber Co.)*, Bankr. No. 05-00408, 2007 WL 2316528, at *4–6 (Bankr. N.D. Iowa Aug. 8, 2007).

nothing. But that is not the case with Merchant in the Example above. From a policy perspective, the question must be whether the interest of Creditor should outweigh that of Merchant. It will not do to simply brush off Merchant's interest. To ignore the transferee's interest is an error surprisingly common in discourse on avoidance law, but it is nonetheless an error.¹⁷⁷

Of course the foregoing does not necessarily mean that Merchant should prevail over Creditor. It only means that there is no facile answer to the question of which of them should prevail.

Naturally the Drafting Committee focused not on how to interpret the current statute, but rather on what the statute ought to say. That proved to be no brief task. The committee oscillated between three quite different resolutions, each plausible. One possibility was to emulate the Bankruptcy Code and delete section 8(a). A second possibility was to revise at least the comment to section 8(a) (and possibly the statutory language as well) to say unmistakably that value given by the transferee counts whether or not it goes to the debtor. The third possibility, which the committee finally settled upon, was to revise section 8(a) to say that value counts only if it goes to the debtor.

The case for deleting section 8(a) is mainly the abstract desirability of conformity between the act and the Bankruptcy Code, coupled with the fact that the absence of an equivalent to section 8(a) in the Code does not appear to have engendered any complaints.

The case for an unmistakable statement that value counts for purposes of section 8(a) even if the debtor does not receive it rests on the idea of protecting good-faith purchasers for value. In many other settings, the law shields such a purchaser from adverse claims to the purchased property even though the value given by the purchaser went to someone other than the adverse claimant. Familiar examples include a person who gives value to a thief in exchange for stolen currency or a stolen bearer instrument.¹⁷⁸ The protection afforded by section 8(a) under this interpretation would be quite similar to the protection given to a good-faith purchaser of goods under the "voidable title" rule of UCC Article 2.¹⁷⁹ A fraudster who receives an item in a fraud-induced sale has flawed title, because the defrauded seller can recover the item by rescinding the sale. But if the fraudster transfers the item to a purchaser who gives value to the fraudster and takes in good faith, the "voidable title" rule vests the purchaser with good title, and hence with immunity from any claim by the defrauded seller. In the same way, the title received by the transferee in a transfer voidable under the UFTA is ordinarily voidable, and section 8(a) can be viewed as similarly wiping away that flaw in title if the property is taken by a good-faith purchaser for value.

177. See Kettering, *supra* note 18, at 350.

178. As to a stolen bearer instrument, see U.C.C. § 3-306 (2014). Currency is not governed by UCC Article 3, but common law has applied the same rule to currency since at least *Miller v. Race*, (1758) 97 Eng. Rep. 398 (K.B.).

179. U.C.C. § 2-403(1) (2014).

The case for the committee's choice, under which value counts for purposes of section 8(a) only if the value goes to the debtor, rests largely on the fact that no matter what section 8(a) said on that subject, Merchant in the above Example would still be at risk if attacked under the constructive fraud rules. Thus, if it happened that Firm was insolvent when the transfer was made, then the transfer of Firm's funds to Merchant would be voidable under the constructive fraud rule of section 5(a). A transfer of property by an insolvent debtor is voidable under that rule unless the debtor receives reasonably equivalent value in exchange—i.e., only value that goes to Firm counts. Merchant gets no help from the section 8(a) defense, which applies only to attack based on the primordial rule. Merchant also gets no help from section 8(d), because it protects a transferee only “to the extent of the value given the debtor for the transfer”—i.e., again, only value that goes to Firm counts. Hence on these facts, the payment by Firm to Merchant is avoidable in its entirety. If Merchant is susceptible to constructive fraud attack in the event that Firm is in parlous financial condition when the transfer occurs, there may not be much point in protecting Merchant from attack based on the primordial rule.

A possible response to the foregoing would be to revise section 8(a) to protect Merchant against attack based on constructive fraud, as well as the primordial rule. Indeed, the drafters of the UFTA may have intended originally to give Merchant that protection. The initial version of the provision that eventually became section 8(a) would have given Merchant a complete defense against attack based on either theory.¹⁸⁰ Why did the 1984 drafters later narrow section 8(a) to apply only to attack based on the primordial rule? Did they have situations like Merchant's in mind, and intentionally deny Merchant this protection? Or did they act under a misapprehension that the change was merely stylistic, thinking that the section 8(a) defense could never come into play in a constructive fraud action? At this distance it is hard to judge. The issues under discussion arise in situations like the above Example, in which transfers take place between three persons. The issues do not arise in the paradigmatic voidable transfer, which involves reciprocal transfers between two persons (X conveys a valuable asset to Y, and Y in exchange conveys to X either nothing at all or something worth very much less). Did the 1984 drafters have in mind the possibility of a three-party situation when they drafted?

Whatever the 1984 drafters intended, it certainly would have been possible for the present Drafting Committee to amend section 8(a) in order to provide Merchant with a complete defense against attack based on the primordial rule or constructive fraud. One state, Alabama, has made a nonuniform change to its enactment of the UFTA that similarly protects Merchant against attack

180. When the UFTA was drafted, the provision that eventually became section 8(a) was introduced in the draft of January 13, 1984, in which it was designated section 7(a). In that draft the provision read as follows: “A transfer or obligation is not voidable under this act as against a person who took in good faith and for a reasonably equivalent value.” The provision of the former UFCA from which “section 7(a)” derived, section 9(1), likewise did not limit its protection to attack based on the primordial rule.

based on either theory, but to a slightly lesser degree. Alabama did not alter its enactment of section 8(a) in any relevant way, but it altered its enactment of section 8(d) to provide that the lien that provision gives to a good-faith transferee secures all of the value that the transferee gave in exchange for the property whose transfer is being avoided, whether or not that value went to the debtor.¹⁸¹ Hence, in the above Example, the Alabama approach does not give the good-faith Merchant a complete defense to avoidance of the payment Merchant received from Firm. But it does give Merchant a lien on that payment that secures the value of the property and services Merchant provided to Boss. The difference between that value and the amount of the payment Merchant received is likely small and may well be zero. Hence the practical difference between the Alabama approach and affording Merchant a complete defense to avoidance is slight.

The Drafting Committee was aware of these possibilities, but did not adopt them. In effect, the Drafting Committee chose to conform section 8(a) to section 8(d) on this point, so that both provisions count only value that goes to the debtor, rather than conforming section 8(d) to section 8(a), which would have made both provisions count value given by the transferee whether or not it goes to the debtor. This choice doubtless was influenced by a fact not related to the merits: namely, the Drafting Committee could do nothing to alter section 548 of the Bankruptcy Code, whose analogue to section 8(d) follows section 8(d) in protecting the transferee only to the extent of value that goes to the debtor.¹⁸²

Looming in the background is the possibility that, even with the section 8(a) defense limited to value that goes to the debtor, and even if Firm is insolvent, a court might be willing to protect Merchant from avoidance based either on the primordial rule or constructive fraud. A court could do that by recharacterizing the transaction so that the funds in Firm's account are viewed as being first transferred by Firm to Boss, and then transferred by Boss to Merchant in exchange for the goods. Under that characterization, Merchant would qualify as a "subsequent transferee" of the funds who is protected from Creditor's avoidance action by section 8(b), assuming Merchant's good faith.

Courts have often recharacterized transactions for the purpose of applying avoidance law in what the court perceives to be an equitable way. Such courts often speak of "looking beyond the mere form of a transaction to its true substance." A familiar example arises in the financing of leveraged acquisitions. If a lender finances an acquisition, taking a security interest in the assets of the target company to secure the acquisition loan made to the target, and the target company later fails and is eventually determined to have been insolvent after it took on the acquisition debt, courts commonly have been willing to avoid the lender's security interests under the constructive fraud rules. In fact the

181. ALA. CODE § 8-9A-8(d) (2002).

182. Bankruptcy Code § 548(c) (2014) (vesting a good-faith transferee for value with a lien in the property transferred only "to the extent that such transferee . . . gave value to the debtor in exchange for such transfer").

lender does give reasonably equivalent value to the target in exchange for the security interests, for the lender will have paid to the target real dollars equal to the amount of the secured debt. But courts generally have preferred to recharacterize the transaction and treat the lender as if it had paid the proceeds of its loan to the former equity holders of the target, to whom the target will have paid the loan proceeds after it received them from the lender.¹⁸³

In the acquisition setting recharacterization is employed offensively, to impose avoidance liability on a person who would not otherwise be liable. Recharacterization has also been employed defensively, as a defense to an avoidance claim. A common defensive use of recharacterization is the notion that a transferee who is a “mere conduit” should not be treated as a transferee.¹⁸⁴

The circumstances that justify recharacterization are not codified, and it may be doubted that it would be possible to codify effective rules on the subject. The Drafting Committee had no desire to make an attempt.

If there is a moral to this story, it is that a person who sells property or services, like Merchant in the above Example, should be aware that if he delivers property or renders services to Boss, and takes in payment funds that turn out to be Firm’s, then Merchant is at risk of having to disgorge that payment, be he ever so innocent and unknowing. That risk existed as to attack based on constructive fraud before the 2014 amendments, and the amendments do not change that risk. That risk also existed as to attack based on the primordial rule, because the change made by the amendments to section 8(a) codifies most courts’ interpretation of that provision, which was contrary to that provision’s actual language. It is certainly debatable whether the Drafting Committee’s choice strikes the wisest balance between the interests of the creditors of Firm and the interests of Merchant. It is at least clear that the question is not one that has a facile answer.

F. SAFE HARBOR FOR ARTICLE 9 REMEDIES: EXCLUSION OF STRICT FORECLOSURE

When the UFTA was promulgated in 1984, one of the hottest topics in avoidance law was whether a low-price foreclosure sale of collateral of an insolvent debtor might be avoided under the so-called “constructive fraud” rules, notwithstanding that the sale was made in accordance with the procedure prescribed by

183. There are many cases and much literature on the application of recharacterization to the financing of leveraged acquisitions, especially during and after the first wave of such cases in the 1980s. See, e.g., *Boyer v. Crown Stock Distribution, Inc.*, 587 F.3d 787, 791–92 (7th Cir. 2009).

184. See, e.g., *Martinez v. Hutton (In re Harwell)*, 628 F.3d 1312, 1323 (11th Cir. 2010) (stating that cases excusing a “mere conduit” have adopted “a flexible, pragmatic, equitable approach of looking beyond the particular transfer in question to the circumstances of the transaction in its entirety. . . . Equitable considerations play a major role . . .”). For other recent cases employing recharacterization defensively, see Michael J. Heyman, *The Step-Transaction Defense: Collapsing Multi-Step Transactions to Defend Against Fraudulent Conveyance Allegations*, 30 CAL. BANKR. J. 1 (2009). For a case in which a transferee was saved from avoidance by the court’s characterization of the transfers in a setting involving transfers among three parties, see *Plotkin v. Pomona Valley Imports, Inc. (In re Cohen)*, 199 B.R. 709 (B.A.P. 9th Cir. 1996).

the law governing the lien being foreclosed.¹⁸⁵ That topic will forever be associated with the *Durrett* case, decided in 1980, which famously held that a nonjudicial foreclosure of a real estate mortgage could be avoided when the mortgagor was insolvent and the property was sold for less than 70 percent of its fair value.¹⁸⁶

Much of the steam has since gone out of the topic. That is because the UFTA introduced safe harbor rules for such transactions that effectively overrule *Durrett* so far as state avoidance law is concerned, and the Supreme Court in *BFP v. Resolution Trust Co.*¹⁸⁷ construed section 548 of the Bankruptcy Code to have a meaning similar to that of the UFTA's basic safe harbor. The topic remains of considerable interest, however, because those statutory and judicial safe harbors do not answer all of the questions that may arise. For example, those safe harbors apply only to enforcement of voluntary liens, and so leave open the treatment of such transactions as tax sales and execution sales.¹⁸⁸ The safe harbors are defenses only to an attack based on the constructive fraud rules; no one seems to have had the temerity to suggest that the recipient of a transfer made with intent to hinder, delay, or defraud creditors should be entitled to such a defense.

The UFTA's basic safe harbor rule—"basic" in the sense that it was the only safe harbor its drafters contemplated until the very end of the 1984 drafting process—is section 3(b). That provision immunizes from constructive fraud attack a transfer of property pursuant to "a regularly conducted, noncollusive foreclosure sale," a phrase the drafters lifted from a contemporary case that disagreed with *Durrett*.¹⁸⁹ At the very last moment of the 1984 drafting process, in the midst of the meeting of the full membership of NCCUSL that ended by approving the UFTA, and in response to comments made from the floor earlier in that meeting, the drafters introduced a set of amendments that, among other things, added to the UFTA a second safe harbor rule that is codified as section 8(e).¹⁹⁰ Section 8(e)(2) immunizes

185. On the term "constructive fraud," see *supra* note 25.

186. *Durrett v. Wash. Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980).

187. 511 U.S. 531 (1994).

188. The safe harbor in UVTA § 3(b) (2014) applies only to "a mortgage, deed of trust, or security agreement," and the safe harbor in *id.* § 8(e)(2) applies only to security interests under Article 9 of the Uniform Commercial Code. *BFP* expressly limited its holding to foreclosure of real estate mortgages, stating that "[t]he considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different." 511 U.S. at 537 n.3. Of course a court might conclude that the principles underlying these safe harbors also apply to enforcement of an involuntary lien. The Supreme Court did not say in *BFP* that a tax sale should be analyzed differently than a mortgage foreclosure; it simply declined to address the subject.

189. *Lawyers Title Ins. Corp. v. Madrid (In re Madrid)*, 21 B.R. 424, 427 (B.A.P. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir. 1984). Section 3(b) rounds out this language by adding to it "or execution of a power of sale," obviously with deeds of trust in mind. "Exercise" would have been more felicitous than "execution," as the intended reference plainly is not to the act of signing the instrument that creates the power of sale, but the meaning is clear enough.

190. The committee that drafted the UFTA first met in January 1983, and after many drafts the UFTA was submitted to and approved by the full membership of NCCUSL at its annual meeting on July 27 through August 3, 1984. The proposed final draft was considered by the full membership of NCCUSL at two sessions held on July 28 and 29. The drafting committee then prepared and submitted a set of amendments, dated July 29, in response to comments and motions made during those two sessions. Those amendments, which were considered at the third and final session held on the

from constructive fraud attack a transfer of property resulting from “enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.”

The drafting of this matter as two separate provisions, distant from each other and without even a cross-reference linking them, is dubious style. Both provisions deal with the same subject, and they overlap substantially, as both apply to Article 9 foreclosure sales. That style has not caused any evident confusion in the cases, however, so the drafters of the 2014 amendments were content to leave well enough alone in that respect.

The two safe harbors differ in several ways. One is that section 3(b) immunizes a transfer of property pursuant to enforcement of a lien only if the transfer is a sale. Section 8(e)(2), by contrast, is not limited to transfer by sale. It immunizes any transfer of property resulting from enforcement of a security interest in compliance with Article 9. Hence section 8(e)(2) applies to enforcement of an Article 9 security interest by strict foreclosure—that is, acceptance by the secured party of the collateral in partial or complete satisfaction of the secured debt. Strict foreclosure is a transfer of property, but it is not a “sale” (or at least it is clear that the 1984 drafters contemplated that a strict foreclosure should not be considered a “sale” to which section 3(b) applies).¹⁹¹ Hence enforcement of a lien by strict foreclosure is not immunized by section 3(b). But Article 9 does authorize strict foreclosure as a method of enforcing a security interest.¹⁹² As a result, strict foreclosure of a security interest in compliance with Article 9 is immunized by section 8(e)(2). By contrast, strict foreclosure of a real estate mortgage is not immunized by either provision.

The 2014 amendments change this, by excluding strict foreclosure from the transactions immunized by section 8(e)(2).

When the 1984 drafters added section 8(e)(2) they were well aware that it would immunize strict foreclosure under Article 9 from avoidance under the UFTA. However, they evidently acted under the misapprehension that Article 9 requires a strict foreclosure to be “commercially reasonable.” That misapprehension is reflected in the transcript of the 1984 meeting of NCCUSL’s full membership at which section 8(e)(2) was considered,¹⁹³ and in the later-written official

UFTA on July 30, were the first appearance of section 8(e) (then designated section 8(g)). See Transcript at 124–39, Proceedings in Committee of the Whole of the National Conference of Commissioners on Uniform State Laws, Uniform Fraudulent Transfer Act (July 28–30, 1984) [hereinafter 1984 Transcript]; Amendments to Uniform Fraudulent Transfer Act 8 (July 29, 1984) (both available from NCCUSL).

191. Whether a strict foreclosure might be considered a sale to the secured party can be debated. See *infra* note 200. However, there is no doubt that the drafters of section 3(b) intended that a strict foreclosure is not a sale to which section 3(b) applies. See 1984 Transcript, *supra* note 190, at 129 (remarks of Grant S. Nelson, member of the 1984 drafting committee); *id.* at 132 (remarks of Gerald L. Bepko, member of the 1984 drafting committee, and of Richard F. Dole).

192. Article 9 today deals with strict foreclosure in U.C.C. §§ 9-620 to 9-622 (2014). Before the 1998 revision the subject was dealt with in U.C.C. § 9-505 (1962, as amended 1972).

193. In the floor proceeding at which section 8(e) was considered by the full membership of NCCUSL, Chancellor William Hawkland defended section 8(e)(2) against a motion to strike it, saying “Remember, under Article 9 foreclosures you do have standards of commercial reasonableness, and so forth, that you may not have at the real estate level.” 1984 Transcript, *supra* note 190, at 137. Not

comments.¹⁹⁴ Article 9 does not, and never did, provide that a strict foreclosure must be commercially reasonable. That contrasts with enforcement of a security interest by foreclosure sale, which Article 9 does require, without exception, to be conducted in a commercially reasonable manner.¹⁹⁵

This difference between the Article 9 rules governing foreclosure sale and the Article 9 rules governing strict foreclosure is not accidental. As to both remedies, Article 9 is concerned with protecting persons other than the secured party who have a property interest in the secured party's collateral—i.e., the debtor and other secured parties, chiefly—from oppressive behavior by the secured party that would unjustly impair the value of their property interests. Article 9 allows a secured party to enforce its security interest by foreclosure sale, without judicial supervision, and without the consent of the debtor or any other person having an interest in the property. That foreclosure sale wipes out the property interests of the debtor and junior secured parties, but in exchange those persons are entitled to be credited with any amount received in the sale in excess of the amount necessary to pay the secured obligation and expenses of sale.¹⁹⁶ The requirement that the sale be commercially reasonable is necessary to protect those persons from impairment of the value of their property interests (i.e., the amount they are entitled to receive in exchange for those interests) resulting from the secured party's failure to conduct the sale in a reasonable way. By contrast, a reasonableness requirement is not necessary to protect those other persons from unjust impairment of the value of their property interests in a strict foreclosure. That is because Article 9 protects their interests in a much more direct way: namely, the strict foreclosure cannot be effected if any of those persons objects.¹⁹⁷

all of the commissioners shared that misapprehension. *Id.* at 139 (remarks of Richard F. Dole). The motion to strike was nonetheless defeated on a voice vote. *Id.*

194. Before it was revised in 2014, UFTA § 8 cmt. 5 (1984) included the statement “The ‘commercially reasonable’ constraint . . . is implicit in § 9-505 [the provision of Article 9 that addressed strict foreclosure in 1984],” citing 2 GILMORE, *supra* note 134, § 44.3, at 1224-27. The relevant passage in the cited pages of Gilmore's great treatise, at 1224, addresses the question of what information must be included in the advance notice of a proposed strict foreclosure that Article 9 requires the secured party to give the debtor and other secured parties. Article 9 was silent on that subject when Gilmore wrote. Gilmore noted the lacuna and suggested blandly that the notice must provide reasonable information. The necessary filling-in of a deliberate statutory lacuna in this way is a matter very different from reading Article 9 to create by implication an independent requirement of reasonableness, not tied to any provision of Article 9, that would invalidate a strict foreclosure that satisfies the statutory requirements. Nothing in the cited discussion suggests that Gilmore understood Article 9 to impose any such independent requirement by implication, and Article 9 certainly does not do so expressly.

195. U.C.C. §§ 9-602(7), 9-610(b) (2014). Before the 1998 revision, see U.C.C. § 9-504(1) (1962).

196. U.C.C. §§ 9-615(a), (d), 9-617(a) (2014).

197. *Id.* § 9-620(a)(1), (2). In the case of the debtor Article 9 goes further by requiring his consent, not merely his failure to object, though in some circumstances the debtor's failure to object is deemed to be consent. *Id.* § 9-620(c)(2). As to persons other than the debtor who have an interest in the collateral, in principle an aggressive secured party might assure that none will object simply by declining to send them notice of the proposed strict foreclosure, in defiance of the secured party's statutory duty to do so. In that event Article 9 provides that the strict foreclosure is effected, but the secured

Article 9 is concerned with property interests in collateral, and is not generally concerned with other matters. “Other matters” include protection of the interests of unsecured creditors of the debtor, who have no property interest in the collateral. Unsecured creditors do have an interest in not having their prospect of collection impaired by a transfer of their debtor’s property for less than reasonably equivalent value. Avoidance law is what generally protects interests of that nature. Article 9 imposes the commercial reasonableness requirement for foreclosure sales for the Article 9 reasons just described, but by happy accident that requirement also operates to provide a reasonable degree of protection for that interest of the debtor’s unsecured creditors. Hence that protection can reasonably replace the protection of avoidance law as to a transfer by way of foreclosure sale, as section 8(e)(2) does.¹⁹⁸ By contrast, Article 9 relies on the debtor to protect any equity he has in collateral from being lost in a strict foreclosure, by declining to consent to the strict foreclosure and thereby preventing it. If, by accident or by design, the debtor does consent, and the other mechanical conditions of Article 9 are satisfied, then the strict foreclosure occurs, as far as Article 9 is concerned.¹⁹⁹ Hence the debtor’s unsecured creditors have the same need for voidable transfer law to protect their interests as to a transfer by way of strict foreclosure as they do to protect against a voluntary transfer by the debtor that is not made in connection with a secured transaction.²⁰⁰

Even before the 2014 amendments, several states perceived the logic of the foregoing and altered their enactments of the UFTA to exclude strict foreclosure from the safe harbor of section 8(e)(2).²⁰¹

party will be liable in damages to those persons to the extent the strict foreclosure impaired the value of their interests. *Id.* § 9-622(b) & cmt. 2.

198. Of course there is an affirmative justification for displacing avoidance law with the protection afforded by Article 9. A contrary policy would damage the utility of security interests, because enforcement of a security interest would be more difficult if the buyer at a properly conducted foreclosure sale were subjected to the risk that his title may be avoided. Note that section 8(e)(2) displaces avoidance law only as to a properly conducted foreclosure sale. If a foreclosure sale does not comply with Article 9, the safe harbor of section 8(e)(2) does not apply and the debtor’s unsecured creditors can pursue their rights under avoidance law.

199. The UCC imposes an overarching requirement of “good faith,” U.C.C. § 1-304 (2014), but it is doubtful that unsecured creditors can derive much from an argument that the debtor or the secured party did not act in “good faith” in a strict foreclosure, if they complied with unambiguous requirements of Article 9 without dispute between them. *See* U.C.C. § 1-304 cmt. 1 (2014) (“the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached”); PERMANENT EDITORIAL BD. FOR THE UNIF. COMMERCIAL CODE, COMMENTARY NO. 10 (Feb. 10, 1994).

200. Another problem with allowing strict foreclosure to have the benefit of the section 8(e)(2) safe harbor is that, because strict foreclosure cannot be effected without the debtor’s consent, it is difficult, perhaps impossible, to distinguish satisfactorily between a strict foreclosure (which is entitled to the section 8(e)(2) safe harbor) and a sale of the collateral by the debtor to the secured party (which is not entitled to a safe harbor under section 3(b) or section 8(e)(2), unless the sale happens to be a foreclosure sale at which the secured party buys in compliance with U.C.C. § 9-610(c) (2014)). *Cf. id.* § 9-624 cmt. 2 (noting the identity in all but name of a strict foreclosure and a private foreclosure sale at which the secured party is the buyer).

201. These states include at least California, Connecticut, and Pennsylvania. Pennsylvania excluded Article 9 strict foreclosure from its enactment of section 8(e)(2) in a way similar to the 2014 amendments. Connecticut was content to rely upon the section 3(b) safe harbor and declined

The exclusion of strict foreclosure from the section 8(e)(2) safe harbor drains that provision of most of its practical effect. Amended section 8(e)(2) remains applicable to Article 9 foreclosure sales, but it is hard to imagine a foreclosure sale that qualifies under section 8(e)(2) but does not also qualify under section 3(b). How could a foreclosure sale that complies with the requirements of Article 9 possibly fail to be “regularly conducted”? How could a sale that is “collusive” possibly qualify as “commercially reasonable”? Still, the continued applicability of amended section 8(e)(2) to Article 9 foreclosure sales at least relieves the buyer at such a sale from any possible need to argue such points. Amended section 8(e)(2) also continues to apply to a type of property transfer to which section 3(b) would not seem to apply, namely the secured party’s enforcement of a security interest in a right to payment by collecting the payment. Article 9 authorizes enforcement by collection, but it requires the collection activity to be commercially reasonable (except in certain situations in which the debtor is not affected by the success or failure of the collection activity).²⁰² As with Article 9 foreclosure sales, this requirement of commercial reasonableness affords a reasonable degree of protection to the interests of the debtor’s unsecured creditors.

G. TECHNICAL CORRECTIONS RELATING TO DEFENSES AND REMEDIES

The amendments round out the mild substantive changes to the act’s provisions on defenses with further changes that are in the nature of technical corrections. The most extensive of these relates to section 8(b). That provision is derived from sections 550(a) and (b) of the Bankruptcy Code, which set forth the remedies available if a transfer of property is avoidable under section 548. Section 550 sets forth both the particular remedies that are available (namely, avoidance of the transfer or a money judgment for the value of the transferred property) and the persons who are liable. To simplify slightly, the persons liable are the initial transferee (that is, the person who received the transfer from the debtor), and any person who took the transferred property directly or remotely from that initial transferee. However, an elaborate savings clause shields persons other than the initial transferee who took for value and in good faith, as well as persons who took in good faith from a person thus shielded. The UFTA likewise provides for both avoidance and money damages, but unlike the Bankruptcy Code it deals with those remedies in two different sections. As a result, section 8(b), which creates the damage remedy, contains provisions *a la* section 550 that define the persons liable for those damages. As written, however, those provisions do not apply to the avoidance remedy, which is dealt with separately in

to enact section 8(e)(2) at all. California’s enactment folds section 3(b) into section 8(e)(2) and modifies the combined provision in various ways, some dubious, but it does exclude Article 9 strict foreclosure. CAL. CIV. CODE §§ 3439.03, 3439.08(e)(2) (West 1997); CONN. GEN. STAT. ANN. §§ 52-552d(b), 52-552i(e) (West 2013); 12 PA. CONS. STAT. ANN. §§ 5103(b), 5108(e)(2) (West 1999).

202. U.C.C. § 9-607(a), (c) (2014).

section 7. Obviously that makes no sense; the same limitations on persons liable should apply to both remedies. The amendments correct that.²⁰³

Furthermore, the elaborate savings clause set forth in section 550(b) was not carried over fluently into the UFTA. The original drafters completely rewrote that language at the last minute, during the period of stylistic refinement that followed the approval of the UFTA by NCCUSL's membership, and the hasty workmanship shows.²⁰⁴ The amendments follow more closely the language of section 550(b).²⁰⁵

None of these changes should be considered substantive. Moreover, the amendments do not alter the most notable difference between the act and sections 550(a) and (b), which is that the act allows money damages as of right, while money damages are available under section 550 only if the court exercises its discretion to allow that remedy.²⁰⁶

A technical correction was also made to section 7(a)(2), which relates to attachment and other provisional remedies against the transferee. As written in 1984, that provision called for the enacting state to list all local statutes authorizing provisional remedies. The amendment removes the list and replaces it with the simple statement that provisional remedies may be granted if available under applicable law. The list may create a spurious litigation issue in the all-too-likely event that the list proves to be incomplete, or state law on provisional remedies is revised after the state enacts the act and the list is not correspondingly amended. Moreover, local law on provisional remedies is unlikely to apply in a case litigated in a nonlocal forum.²⁰⁷

H. SERIES ORGANIZATIONS

One may or may not like the 2014 amendments, but at least they are easy to understand, as a rule. An exception to that rule is new section 11, which is apt to puzzle the uninitiated.

Section 11 relates to “series organizations”—that is, organizations that are empowered to create “series.” Series organizations are the latest fashion in forms of business organization.²⁰⁸ Statutes authorizing the formation of series

203. See UVTA § 8(b)(2) (2014) (added by the 2014 amendments).

204. Indeed, after the “final” version of the UFTA was prepared it was discovered that this provision included some meaningless language, which was excised by a later technical correction that not all enacting states received. See the 1984 technical corrections to UFTA § 8(b)(2), *infra* note 233.

205. Compare UFTA § 8(b)(2) (1984), with UVTA § 8(b)(1)(ii) (2014).

206. Compare Bankruptcy Code § 550(a) (2014), with UFTA § 8(b) (1984) (not altered in this respect by the 2014 amendments). Some courts applying the act may nevertheless consider themselves entitled to deny money damages to a creditor who wants that remedy instead of avoidance. See, e.g., *Bakwin v. Mardirosian*, 6 N.E.3d 1078, 1084–85 (Mass. 2014) (“None of these remedies [provided by the UFTA] is mandatory, and the statute commits the form of the judgment to the discretion of the trial judge.”).

207. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 130 (1971).

208. A concise introduction to the series concept is the Reporter's Introductory Note to the current draft, dated October 23, 2014, of the Series of Unincorporated Business Entities Act. That draft is the work in progress of the Series Project referred to in the text *infra* at note 215. The Reporter for that drafting committee is Daniel S. Kleinberger. The draft is available from the drafting committee's page

organizations have been enacted to date in twelve states, the District of Columbia, and Puerto Rico. The terminology of those enactments differs; not all of them use the word “series.” Indeed the “series” terminology is unfortunate, because “series” in this context has nothing to do with the traditional use of that word to denote a class of securities. Most series enactments to date apply to limited liability companies (“LLCs”), but any form of business organization might be empowered to create series, and in 2009 NCCUSL promulgated a uniform act that empowers a statutory business trust to create series.²⁰⁹ For specificity, let us consider a series organization that is an LLC.

If the law of an LLC’s state of organization empowers the LLC to create series, what does that mean? It means that the LLC may, if it wishes, create on its books an account called a “series,” and identify a set of the LLC’s assets as being associated with that series. The LLC may create more than one series (for example, Series A and Series B), allocating different assets to each. The enabling law will provide that each series is responsible to pay obligations pertaining to its own assigned assets or activities, but neither the assets of Series B nor the unassigned assets of the “mother ship” LLC may be charged with liability for obligations pertaining to the assets or activities of Series A, nor may the assets of Series A be charged with liability for obligations pertaining to the assets or activities of Series B or of the “mother ship” LLC. This liability shield between any two series, and between each series and the mother ship, is the central feature of the series concept. The effect is to make the LLC and its series analogous to a parent corporation and its subsidiary corporations. When a series is formed, the documentation may provide that profits of the series are to be distributed to designated persons associated with the series (who are thus the equivalent of equity owners of the series); absent such a designation, distributions go to the “mother ship” LLC.

The original use of the series concept seems to have been by investment companies regulated by the Securities and Exchange Commission. An investment manager commonly will form a family of different mutual funds, each with a different investment objective. It is convenient to organize the whole fund family as a single series organization, each fund being a series and the investors in each fund being the persons entitled to receive distributions from that series. That is because the SEC will allow the whole fund family to file a single registration statement under the Investment Company Act of 1940, resulting in a saving of the paperwork and filing fees that would be required if each fund had to file separately.²¹⁰ Captive insurance companies, another highly regulated group, also use the series concept. A captive insurer’s contractual obligation to a given participant is often segregated into a series, together with the assets to fund that obligation. That allows each series to function, for regulatory purposes, more or

at NCCUSL’s website, www.uniformlaws.org. The foregoing Reporter’s Introductory Note is referred to hereinafter as the “Kleinberger Note.” See also Thomas E. Rutledge, *Again, For the Want of a Theory: The Challenge of the “Series” to Business Organization Law*, 46 AM. BUS. L.J. 311 (2009).

209. UNIF. STATUTORY TRUST ENTITY ACT §§ 401–404 (2009).

210. See Kleinberger Note, *supra* note 208, at 4; Rutledge, *supra* note 208, at 313.

less as if it were a separate captive insurance company.²¹¹ In 1996 Delaware became the first state to enact legislation extending the series concept to LLCs, and it did so without restricting the uses to which that form of organization may be put. Since then this form of organization has been widely used, in several states, by the unregulated.

The 2014 amendments add new section 11 to the UVTA in response to an eccentric feature of the emerging law of series organizations: namely, it may not be clear whether a series is a legal person distinct from the mother ship and other series, or whether a series is instead a nonperson akin to a division of a corporation. Compliance with the regulations to which investment companies and captive insurance companies are subject may necessitate treatment of a series as a nonperson.²¹² NCCUSL's 2009 uniform act on statutory business trusts straightforwardly declares that a series is not an entity separate from the mother ship statutory trust,²¹³ but for no very clear reason the various state enactments to date mostly duck the "personhood" issue or address it opaquely.²¹⁴ In 2013 NCCUSL appointed a committee to draft a uniform act to provide for creation of series by unincorporated business organizations of all types (the "Series Project"). As of this writing in November 2014 the participants in the Series Project are still wrestling with what their act should say about the personhood *vel non* of a series.²¹⁵

No small degree of metaphysical confusion would arise from a regime that purported to declare that a series is not a legal person, yet can own property (for, while the concept of "ownership" can be fuzzy, ownership by the series seems to follow inevitably from the asset allocation and liability shields that are the core of the series concept). One point, however, is clear. If a series is not a legal person, then no disposition of the property allocated to it to another series or to the "mother ship" can possibly be a voidable transfer under the UFTA. That is because a "transfer" avoidable under the UFTA can be made only by a "person."²¹⁶ As a result, if an LLC's insolvent Series A were to convey a valuable asset gratis to Series B, a creditor of Series A could not reach that asset in the hands of Series B: the liability shield provided by the law enabling the creation of the series allows the creditor to pursue only property of Series A, and the

211. For captive insurers, the series concept was early implemented by state laws limited to insurers (and which typically used terminology such as "cell" rather than "series"). Lately, some states have allowed captive insurers to make use of general series enactments. See Matthew J. O'Toole & Robert L. Symonds, Jr., *A Winning Combination*, CAPTIVE REV., Jan. 2011, at 19, 19 (Supp., Del. Report 2011), available at www.delawarecaptive.org/files/Symonds&O'Toole2.pdf.

212. See Kleinberger Note, *supra* note 208, at 5.

213. UNIF. STATUTORY TRUST ENTITY ACT § 401(b) (2009).

214. See Kleinberger Note, *supra* note 208, at 5; Rutledge, *supra* note 208, at 314–21.

215. See Kleinberger Note, *supra* note 208, at 5–6.

216. UFTA § 1(9) (1984) ("person"); *id.* § 1(12) ("transfer"). The 2014 amendments redesignate those definitions respectively as UVTA §§ 1(11), 1(16) (2014), and amended both slightly, but those amendments have nothing to do with series. The amended definition of "person" merely conforms that definition to the standard wording now used by NCCUSL in uniform acts. The amendment to the definition of "transfer" conforms to an analogous usage in the Uniform Commercial Code. See UVTA § 1 cmts. 11, 16 (2014).

conveyance of the asset in question could not be avoided under the UFTA. That plainly cannot be allowed. That is the purpose of section 11, which simply states, in effect, that Series A is deemed a legal person for purposes of the UVTA, whether or not it is considered a legal person for other purposes.²¹⁷

The desired result arguably could be reached without new section 11. The UVTA has never purported to be an exclusive law of voidable transfers.²¹⁸ The official comments relate two situations in which it would be appropriate for a court to invoke common law to avoid conveyances of property that plainly should be avoided under the spirit of the act but that, for more or less technical reasons, are not subject to the act.²¹⁹ A conveyance by a series such as described above is of the same ilk.

The result prescribed by section 11 is necessary. Yet states that have not enabled the creation of series—the vast majority of states at this writing—may question whether they should enact section 11. It is not clear what future the series concept will have. It is quite possible that bankruptcy courts, or states other than the state under whose law a series organization is organized, will not respect the internal liability shields—especially if a series is not considered to be a distinct “person” (and federal bankruptcy courts are not necessarily bound by state-law characterizations on that point). In that event, the internal shields would be worthless, and the utility of the series concept would largely evaporate. More fundamentally, it is by no means clear that the series concept offers legitimate advantages to users that the law should promote, given that the same result can be achieved by using a traditional structure of parent organization with separately organized affiliates.²²⁰ For these reasons, states that have not enacted series legislation have evinced considerable skepticism about doing so.²²¹

A state whose law does not enable organizations to create series should nonetheless enact section 11, because choice of law considerations might result in a transfer made by a series of an organization formed under the law of State X being governed by the voidable transfer law of State Y, which does not empower

217. Section 11 uses the term “protected series” rather than “series.” It equally well could have used the term “eggplant.” The term is only a placeholder for its definition, and section 11 defines this creature by reference to its attributes, not by reference to names it has been given. “Protected series” was used largely because the participants in the Series Project expect to use that term for the creature defined similarly in the uniform act they are drafting.

218. The official comments and prefatory note to the UVTA note the act’s non-exclusivity no fewer than five times. See UVTA § 15 cmt. 2 (2014).

219. UVTA § 1 cmt. 2 para. 6 (2014) (not substantively changed by the 2014 amendments).

220. See Kleinberger Note, *supra* note 208, at 4 (“[T]he special advantages of protected series remain obscure. . . . [I]t is not clear why traditional arrangements using affiliated organizations are not equally satisfactory.”). The regulatory advantages that use of series offers to investment companies and captive insurance companies are legitimate, insofar as their regulators evidently do not object. Of course, regulatory compliance could be achieved without use of series if the regulators bothered to change their regulations to apply to traditional arrangements using affiliated organizations that have the same effect.

221. The Series Project presented a draft of a uniform act enabling the creation of series to the full membership of NCCUSL for the first time in July 2014. As the reporter for the project noted, the presentation “provoked extensive and spirited discussion, which was at times quite skeptical.” Kleinberger Note, *supra* note 208, at 1.

organizations to create series. Even if State Y rejects the series concept there is no downside to its enactment of section 11, because the comments to that section make it clear that enactment of section 11 is not endorsement of the series concept.²²²

I. DRAFTING OBSERVATIONS

This Part III.I offers some observations on the 2014 amendments that are likely to be of interest more to persons charged with preparing or studying an enacting bill than to those who simply want to understand the amendments.

1. Stylistic Changes

One of the reasons why NCCUSL's uniform acts have endured is that the drafting process entails close attention to style, which includes a thorough vetting by a permanent, independent, and formidable Committee on Style. The 2014 amendments made numerous stylistic changes—that is, changes not intended to alter the meaning of the act. Some of those, such as the retitling of the act and the consistent use of “voidable” in lieu of “fraudulent,” are sufficiently prominent that their significance (or, more precisely, their lack of substantive significance) is explained in the official comments.²²³ Others are not so explicated. Some of the unheralded changes are very obviously not substantive, such as the replacement of clunky old gender-neutral phrasing with NCCUSL's sleeker modern phrasing.²²⁴ In other cases, however, it is possible that a reader might wonder, at least momentarily, whether a change that has no obvious substantive purpose and that is not explained in the comments was intended to have some substantive purpose that is not evident. It would not be reasonable to clutter up the comments with repeated reassurances that there is no monster hiding under the bed, so at some point such matters must be left to the good sense of the reader.

This point can be illustrated by examining section 9 of the act, its statute of limitations.²²⁵ The 2014 amendments make a number of changes to section 9. All of those changes are purely stylistic, and none of them is explained by the comments. In essentials the changes reduce to four. The first change, which is repeated several times, is exemplified by its first occurrence, in which “within 4 years” is replaced with “not later than four years.”²²⁶ That change was made because the latter wording has been preferred in modern uniform acts.²²⁷

222. UVTA § 11 cmt. para. 2 (2014).

223. *Id.* § 15 cmts. 1, 4; see also *supra* Part III.B.

224. Compare UFTA §§ 2(b), 4(a)(2)(ii) (1984), with UVTA §§ 2(b), 4(a)(2)(ii) (2014).

225. Strictly speaking, section 9 is not a statute of limitations. Rather, it extinguishes claims that arise under the act. As noted in comment 1, the main purpose of that nuance is to assure that the limitation periods will apply to the United States as plaintiff. Nonetheless, it is convenient to refer loosely to section 9 as a statute of limitations.

226. Compare UFTA § 9(a) (1984), with UVTA § 9(a) (2014).

227. See, e.g., UNIF. CERTIFICATE OF TITLE FOR VESSELS ACT § 21(b), (d) (2011); UNIF. STATUTORY TRUST ENTITY ACT § 805(b)(4), (c) (2009).

The second change to section 9 is use of the single phrase “claim for relief,” replacing the former requirement that the enacting state choose between the phrases “claim for relief” and “cause of action.” That change was made because the phrase “claim for relief” is used in several provisions added to the act by the amendments.²²⁸ Consideration was given to allowing states to use either “cause of action” or “claim for relief” in those new provisions, or rewriting them to avoid use of either phrase. Simply using “claim for relief” consistently throughout was judged most sensible. Preserving the option of using “cause of action” was understandable in 1984, but it makes little sense today, when “claim for relief” has long been familiar from the Federal Rules of Civil Procedure, even in states that continue to use the older phrase in their own procedural rules. There is no possibility of confusion as to meaning. Modern uniform acts tend to use the single phrase “claim for relief,” and the amendments follow that usage.²²⁹

The third change is to section 9(c), which sets forth a one-year limitation period for claims under section 5(b), the rule on insider preferences. Before the amendments, section 9(c) provided that the limitation period is “one year after the transfer was made or the obligation was incurred.” The amendments delete “or the obligation was incurred.” The deleted language is meaningless, because section 5(b) applies only to a transfer of property; it does not apply to the incurring of an obligation.²³⁰

The fourth and final change to section 9 deleted the word “fraudulent” in its preamble. That word is superfluous.²³¹

One can see that it would have been foolish to burden future generations by embedding ephemeral explanations such as the foregoing into the permanent official comments.

2. The 1984 Technical Corrections

A further bit of drafting minutiae derives from the fact that four small technical corrections were made to the official text of the UFTA contemporaneously with its promulgation in 1984, and some states prepared their enacting bills

228. UVTA §§ 4(c), 5(c), 10(b) (2014).

229. See, e.g., UNIF. ASSET-PRESERVATION ORDERS ACT § 8(d)(4) (2014) (*but see id.* § 9(a)(5)); UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 11 (2012). Further bolstering this stylistic choice was the need to correct an almost invisible error in the drafting of the UFTA. Section 1(3) defined the word “claim,” but that definition is not consistent with the meaning of the word in the phrase “claim for relief.” The phrase “claim for relief” is indispensable, at least as an alternative, in section 9, and so the amendments carve the phrase “claim for relief” out of section 1(3). Having validated the phrase for use in section 9, it is natural to use it elsewhere.

230. This error was first noted in Paul M. Shupack, *Confusion in Policy and Language in the Uniform Fraudulent Transfer Act*, 9 CARDOZO L. REV. 811, 834 (1987). Professor Shupack’s article makes other trenchant criticisms of the drafting of the UFTA that would have been well taken when the act was drafted in 1984. At this late date, when the act is well established, the Drafting Committee felt that substantial inertia is appropriate.

231. If “fraudulent” were not superfluous it would have been changed to “voidable,” in keeping with the decision to use the latter word consistently throughout the act. See UVTA § 15 cmt. 4 (2014); see also *supra* Part III.B.

from a text that did not include those corrections.²³² A state that enacts the 2014 amendments obviously should also enact the 1984 corrections to the extent necessary. “To the extent necessary,” because two of the four 1984 corrections are superseded by the 2014 amendments. Notes in the margin separately identify the two 1984 corrections that are not superseded by the 2014 amendments,²³³ and the two that are superseded.²³⁴ The official text of the UVTA incorporates the 1984 corrections, so drafters who work from that text may ignore this note.

3. Transition

Unlike some uniform acts, the 2014 amendments do not contemplate a uniform effective date among enacting states. Each state is left to enact the amendments at its own pace. The amendments include a legislative note that suggests language for an enacting bill on the subject of the effectiveness of the amendments.²³⁵ That language implements the normal expectation that enactment will not have retroactive effect—i.e., the amendments will apply to transfers made and obligations incurred on or after the effective date of the enacting bill, but not to transfers made or obligations incurred before that date.

IV. CONCLUSION

One generation passes away and another generation comes, but voidable transfer law abides forever. Voidable transfer law recognizably similar to the UFTA has been in force for a very long time. Social and economic conditions would have to change in a revolutionary way before rules similar to the current pattern could cease to be a fundamental part of the legal fabric. The 2014 amendments to the UFTA are light, and the lightness of the changes is a token of the permanence of this body of law.

232. *Uniform Laws Annotated* indicates that the following jurisdictions did not make at least the 1984 correction to UFTA § 8(b)(2) (1984) described in the following footnote: Colorado, Delaware, District of Columbia, Georgia, Idaho, Iowa, Maine, Massachusetts, Mississippi, Tennessee, U.S. Virgin Islands, Washington, and Wyoming.

233. The two 1984 corrections that are not superseded by the 2014 amendments are as follows: (i) UFTA § 1(7)(iii)(B) (1984) (redesignated UVTA § 1(8)(iii)(B) (2014)): delete the word “or” appearing after “a general partner in,”; and (ii) UFTA § 8(b)(2) (1984): delete both occurrences of the phrase “or obligee.” Note that the 2014 amendments redesignate the matter in UFTA § 8(b)(2) (1984) as UVTA § 8(b)(1)(ii) (2014) and revise that matter in other respects. See *supra* Part III.G.

234. The two 1984 corrections that are superseded by the 2014 amendments are as follows: (i) UFTA § 2(a) (1984): delete the comma between “assets” and “at”; and (ii) UFTA § 2(c) (1984): delete the phrase “, at a fair valuation,” and insert the same phrase between “aggregate” and “of.” The 2014 amendments rewrite UFTA § 2(a) in a way that supersedes the foregoing correction to that provision, and delete UFTA § 2(c).

235. Legislative Note following UVTA § 16 (2014).