

D R A F T

FOR DISCUSSION ONLY

**AMENDMENTS TO UNIFORM FRAUDULENT
TRANSFER ACT**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SECOND YEAR
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**AMENDMENTS TO UNIFORM FRAUDULENT
TRANSFER ACT**

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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May 31, 2013

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AMENDMENTS TO UNIFORM FRAUDULENT TRANSFER ACT

Reporter's Introductory Note

1. Title of the Act. The Drafting Committee is considering recommending that the title of this Act be changed to “Uniform Voidable Transfer Act.” That change is not motivated by the minor revisions made by these amendments. Rather, the word “fraudulent” in the title of the Act is a misleading description of the Act as it presently stands. Fraud is not a necessary element of a claim under the Act. Yet the Act’s title suggests the contrary, and that has had baneful consequences. One is the widespread use in connection with the Act of the oxymoronic term “constructive fraud.” Equally confusing, the term “actual fraud” has come to be used to refer to a provision of the Act that does not in fact require a showing of fraud. See § 4, Comment (9). The misleading association of this Act with common-law fraud has demonstrably led to confusion in the courts. See, *e.g.*, § 4, Comment (11).

The Act inconsistently uses different adjectives to denote a transfer or obligation for which the Act provides a remedy. Sometimes it uses “voidable” (see original § 2(d), §§ 8(a), (d), (e), (f)), and sometimes “fraudulent” (see original § 4(a), §§ 5(a), (b), § 9). The amendments resolve that inconsistency by consistently using “voidable” or deleting the adjective as unnecessary. As a result, “fraudulent” does not appear in the Act as amended. Apart from a standard provision included in other uniform laws (see § 11 [original § 10]), the only derivative of “fraud” used in the Act as amended is “defraud,” which twice appears as part of the litany “hinder, delay, or defraud.” See § 2(c) [original § 2(d)], § 4(a)(1).

The doctrine codified by this Act historically was known as “fraudulent conveyance.” Indeed, the ULC’s first uniform law on the subject, promulgated in 1918, was entitled “Uniform Fraudulent Conveyance Act.” The present Act was promulgated in 1984 to replace that earlier statute, and the present Act replaced the historical name with “Uniform Fraudulent Transfer Act,” because “conveyance” misleadingly suggested that the doctrine applies only to real property. A further change would continue the ULC’s tradition of prizing accuracy over inertia.

The comments to the Act have always noted that the Act, like its predecessor, does not purport to be an exclusive codification of the law of voidable transfers. See Prefatory Note (1984), ¶ 5; § 1, Comment (2), ¶ 6; § 4, Comment (10) [originally Comment (8)]. Hence no confusion on that point would seem likely if the title of the Act were changed.

The Drafting Committee welcomes the views of Commissioners on such a name change.

2. Contents of this Document. This document includes the Official Text, Comments and Prefatory Note to the Act as promulgated in 1984. They are marked to show the amendments.

The text of the Comments and Prefatory Note used in this draft is from the Word file provided by the ULC named “ufta_final_84” (the “ULC Text”). That text differs minutely from the text maintained by West Publishing Company and included in Uniform Laws Annotated (the “West Text”). In the Comments and Prefatory Note, typographical corrections and other plainly insubstantial changes (*e.g.*, correction of citation form) have not been marked.

1 **PREFATORY NOTE (1984)**

2 The Uniform Fraudulent Conveyance Act was promulgated by the Conference of
3 Commissioners on Uniform State Laws in 1918. The Act has been adopted in 25 jurisdictions,
4 including the Virgin Islands. It has also been adopted in the sections of the Bankruptcy Act of
5 1938 and the Bankruptcy Reform Act of 1978 that deal with fraudulent transfers and obligations.
6

7 The Uniform Act was a codification of the “better” decisions applying the Statute of 13
8 Elizabeth. See Analysis of H.R. 12339, 74th Cong., 2d Sess. 213 (1936). The English statute
9 was enacted in some form in many states, but, whether or not so enacted, the voidability of
10 fraudulent transfer was part of the law of every American jurisdiction. Since the intent to hinder,
11 delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on badges of
12 fraud. The weight given these badges varied greatly from jurisdiction to jurisdiction, and the
13 Conference sought to minimize or eliminate the diversity by providing that proof of certain fact
14 combinations would conclusively establish fraud. In the absence of evidence of the existence of
15 such facts, proof of a fraudulent transfer was to depend on evidence of actual intent. An
16 important reform effected by the Uniform Act was the elimination of any requirement that a
17 creditor have obtained a judgment or execution returned unsatisfied before bringing an action to
18 avoid a transfer as fraudulent. See *American Surety Co. v. Conner*, 251 N.Y. 1, 166 N.E. 783, 67
19 A.L.R. 244 (1929) (per C.J. Cardozo).
20

21 The Conference was persuaded in 1979 to appoint a committee to undertake a study of
22 the Uniform Act with a view to preparing the draft of a revision. The Conference was influenced
23 by the following considerations:
24

25 (1) The Bankruptcy Reform Act of 1978 has made numerous changes in the
26 section of that Act dealing with fraudulent transfers and obligations, thereby substantially
27 reducing the correspondence of the provisions of the federal bankruptcy law on fraudulent
28 transfers with the Uniform Act.
29

30 (2) The Committee on Corporate Laws of the Section of Corporations, Banking
31 & Business Law of the American Bar Association, engaged in revising the Model Corporation
32 Act, suggested that the Conference review provisions of the Uniform Act with a view to
33 determining whether the Acts are consistent in respect to the treatment of dividend distributions.
34

35 (3) The Uniform Commercial Code, enacted at least in part by all 50 states, had
36 substantially modified related rules of law regulating transfers of personal property, notably by
37 facilitating the making and perfection of security transfers against attack by unsecured creditors.
38

39 (4) Debtors and trustees in a number of cases have avoided foreclosure of
40 security interests by invoking the fraudulent transfer section of the Bankruptcy Reform Act.
41

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

1 The Drafting Committee appointed by the Conference held its first meeting in January of
2 1983. A first reading of a draft of the revision of the Uniform Fraudulent Conveyance Act was
3 had at the Conference’s meeting in Boca Raton, Florida, on July 27, 1983. The Committee held
4 four meetings in addition to a meeting held in connection with the Conference meeting in Boca
5 Raton. Meetings were also attended by the following representatives of interested organizations:

6
7 Robert Rosenberg, Esq., of the American Bar Association;

8
9 Richard Cherin, Esq., of the Commercial Financial Services Committee of the
10 Corporation, Banking and Business Law Section of the American Bar Association;

11
12 Robert Zinman, Esq., of the American College of Real Estate Lawyers;

13
14 Bruce Bernstein, Esq., of the National Commercial Finance Association;

15
16 Ernest E. Specks, Esq., of the Real Property, Probate and Trust Law Section of
17 the American Bar Association.

18
19 The Committee determined to rename the Act the Uniform Fraudulent Transfer Act in
20 recognition of its applicability to transfers of personal property as well as real property,
21 “conveyance” having a connotation restricting it to a transfer of personal property. As noted in
22 Comment (2) accompanying ~~§ 1(2)~~ § 1 and Comment ~~(8)~~ (10) accompanying § 4, however, this
23 Act, like the original Uniform Act, does not purport to cover the whole law of voidable transfers
24 and obligations. The limited scope of the original Act did not impair its effectiveness in
25 achieving uniformity in the areas covered. See McLaughlin, *Application of the Uniform*
26 *Fraudulent Conveyance Act*, 46 Harv.L.Rev. 404, 405 (1933).

27
28 The basic structure and approach of the Uniform Fraudulent Conveyance Act are
29 preserved in the Uniform Fraudulent Transfer Act. There are two sections in the new Act
30 delineating what transfers and obligations are fraudulent. Section 4(a) is an adaptation of three
31 sections of the U.F.C.A.; § 5(a) is an adaptation of another section of the U.F.C.A.; and § 5(b) is
32 new. One section of the U.F.C.A. (§ 8) is not carried forward into the new Act because deemed
33 to be redundant in part and in part susceptible of inequitable application. Both Acts declare a
34 transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors to
35 be fraudulent. Both Acts render a transfer made or obligation incurred without adequate
36 consideration to be constructively fraudulent—*i.e.*, without regard to the actual intent of the
37 parties—under one of the following conditions:

38
39 (1) the debtor was left by the transfer or obligation with unreasonably small assets
40 for a transaction or the business in which he was engaged or was about to engage;

41
42 (2) the debtor intended to incur, or believed or reasonably should have believed
43 that he would incur, more debts than he would be able to pay; or

44
45 (3) the debtor was insolvent at the time or as a result of the transfer or obligation.

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

7
8 Reasonably equivalent value is required in order to constitute adequate consideration
9 under the revised Act. The revision follows the Bankruptcy Code in eliminating good faith on
10 the part of the transferee or obligee as an issue in the determination of whether adequate
11 consideration is given by a transferee or obligee. The new Act, like the Bankruptcy ~~Act~~ Code,
12 allows the transferee or obligee to show good faith in defense after a creditor establishes that a
13 fraudulent transfer has been made or a fraudulent obligation has been incurred. Thus a showing
14 by a defendant that a reasonable equivalent has been given in good faith for a transfer or
15 obligation is a complete defense although the debtor is shown to have intended to hinder, delay,
16 or defraud creditors.

17
18 A good faith transferee or obligee who has given less than a reasonable equivalent is
19 nevertheless allowed a reduction in liability to the extent of the value given. The new Act, like
20 the Bankruptcy Code, eliminates the provision of the Uniform Fraudulent Conveyance Act that
21 enables a creditor to attack a security transfer on the ground that the value of the property
22 transferred is disproportionate to the debt secured. The premise of the new Act is that the value
23 of the interest transferred for security is measured by and thus corresponds exactly to the debt
24 secured. Foreclosure of a debtor's interest by a regularly conducted, noncollusive sale on default
25 under a mortgage or other security agreement may not be avoided under the Act as a transfer for
26 less than a reasonably equivalent value.

27
28 The definition of insolvency under the Act is adapted from the definition of the term in
29 the Bankruptcy Code. Insolvency is presumed from proof of a failure generally to pay debts as
30 they become due.

31
32 The new Act adds a new category of fraudulent transfer, namely, a preferential transfer
33 by an insolvent insider to a creditor who had reasonable cause to believe the debtor to be
34 insolvent. An insider is defined in much the same way as in the Bankruptcy Code and includes a
35 relative, also defined as in the Bankruptcy Code, a director or officer of a corporate debtor, a
36 partner, or a person in control of a debtor. This provision is available only to an existing
37 creditor. Its premise is that an insolvent debtor is obliged to pay debts to creditors not related to
38 him before paying those who are insiders.

39
40 The new Act omits any provision directed particularly at transfers or obligations of
41 insolvent partnership debtors. Under § 8 of the Uniform Fraudulent Conveyance Act any
42 transfer made or obligation incurred by an insolvent partnership to a partner is fraudulent without
43 regard to intent or adequacy of consideration. So categorical a condemnation of a partnership
44 transaction with a partner may unfairly prejudice the interests of a partner's separate creditors.
45 The new Act also omits as redundant a provision in the original Act that makes fraudulent a
46 transfer made or obligation incurred by an insolvent partnership for less than a fair consideration

1 to the partnership.
2

3 Section 7 lists the remedies available to creditors under the new Act. It eliminates as
4 unnecessary and confusing a differentiation made in the original Act between the remedies
5 available to holders of matured claims and those holding unmatured claims. Since promulgation
6 of the Uniform Fraudulent Conveyance Act the Supreme Court has imposed restrictions on the
7 availability and use of prejudgment remedies. As a result many states have amended their
8 statutes and rules applicable to such remedies, and it is frequently unclear whether a state's
9 procedures include a prejudgment remedy against a fraudulent transfer or obligation. A
10 bracketed paragraph is included in Section 7 for adoption by those states that elect to make such
11 a remedy available.
12

13 Section 8 prescribes the measure of liability of a transferee or obligee under the Act and
14 enumerates defenses. Defenses against avoidance of a preferential transfer to an insider under
15 § 5(b) include an adaptation of defenses available under § 547(c)(2) and (4) of the Bankruptcy
16 Code when such a transfer is sought to be avoided as a preference by the trustee in bankruptcy.
17 In addition a preferential transfer may be justified when shown to be made pursuant to a good
18 faith effort to stave off forced liquidation and rehabilitate the debtor. Section 8 also precludes
19 avoidance, as a constructively fraudulent transfer, of the termination of a lease on default or the
20 enforcement of a security interest in compliance with Article 9 of the Uniform Commercial
21 Code.
22

23 The new Act includes a new section specifying when a transfer is made or an obligation
24 is incurred. The section specifying the time when a transfer occurs is adapted from Section
25 548(d) of the Bankruptcy Code. Its premise is that if the law prescribes a mode for making the
26 transfer a matter of public record or notice, it is not deemed to be made for any purpose under the
27 Act until it has become such a matter of record or notice.
28

29 The new Act also includes a statute of limitations that bars the right rather than the
30 remedy on expiration of the statutory periods prescribed. The law governing limitations on
31 actions to avoid fraudulent transfers among the states is unclear and full of diversity. The Act
32 recognizes that laches and estoppel may operate to preclude a particular creditor from pursuing a
33 remedy against a fraudulent transfer or obligation even though the statutory period of limitations
34 has not run.
35

36 **PREFATORY NOTE (2014) [Proposed]**

37
38 In 2014 the Uniform Law Commission approved a set of amendments to the Uniform
39 Fraudulent Transfer Act. The amendment project was instituted to address a small number of
40 narrowly-defined issues, and was not a comprehensive revision. The principal features of the
41 amendments are listed below. Further explanation of provisions added or revised by the
42 amendments may be found in the comments to those provisions.
43

44 Choice of Law. The amendments add a new § 10, which sets forth a choice of law rule
45 for voidable transfers and obligations of the nature governed by the Act.

1 Evidentiary Matters. New § 4(c), § 5(c) and § 8(g) add uniform rules allocating the
2 burden of proof and defining the standard of proof with respect to claims and defenses under the
3 Act.
4

5 Deletion of the Special Definition of “Insolvency” for Partnerships. Section 2(c) of the
6 original Act set forth a special definition of “insolvency” applicable to partnerships. The
7 amendments delete original § 2(c), with the result that the general definition of “insolvency” in
8 § 2(a) now applies to partnerships. One reason for this change is that original § 2(c) gave a
9 partnership full credit for the net worth of each of its general partners. That makes sense only if
10 each general partner is liable for all debts of the partnership, but such is not the case under
11 modern partnership statutes. A more fundamental reason is that the general definition of
12 “insolvency” in § 2(a) does not credit a non-partnership debtor with any part of the net worth of
13 its guarantors. To the extent that a general partner is liable for the debts of the partnership, the
14 general partner is essentially a guarantor by operation of law. There is no good reason to define
15 “insolvency” more generously for a partnership debtor than for a non-partnership debtor some of
16 whose debts are guaranteed by contract. Differing treatment may have been natural in the past,
17 when a partnership was not ordinarily conceived of as being an entity distinct from its partners.
18 Today, the conception of a partnership as an entity distinct from its partners is dominant.
19

20 Series Organizations. A definition of “series organization” has been added at § 1(15),
21 and the definition of “person,” now at § 1(11), has been revised. Together those changes provide
22 that each “series” of a “series organization” is to be treated as a person for purposes of the Act.
23

24 Medium Neutrality. In order to accommodate modern storage media, the references in
25 original § 6 to a “writing” have been replaced with “record” and related definitions added.
26

27 “Voidable.” The original Act inconsistently used different adjectives to denote a transfer
28 or obligation for which the Act provides a remedy: sometimes it used “voidable” (see original
29 § 2(d), §§ 8(a), (d), (e), (f)), and sometimes “fraudulent” (see original § 4(a), §§ 5(a), (b), § 9).
30 The amendments resolve that inconsistency by consistently using “voidable” or deleting the
31 adjective as unnecessary. No change in meaning is intended. It should be noted that this Act,
32 like the previous Uniform Fraudulent Conveyance Act, has never purported to be an exclusive
33 law on the subject of voidable transfers and obligations. See Prefatory Note (1984), ¶5; § 1,
34 Comment (2); § 4, Comment (10).¶
35

36 Official Comments. Comments were added explaining the provisions added by the
37 amendments, and the original Comments and Prefatory Note were supplemented and otherwise
38 refreshed.
39

40 [If § 8(a) is revised, an appropriate reference will be added.]
41

42 [If the title of the Act is changed, a reference will be added noting the fact and
43 disavowing any intention to effect substantive change thereby.]

1 **AMENDMENTS TO UNIFORM FRAUDULENT TRANSFER ACT**

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

3 (1) “Affiliate” means:

4 (i) a person who directly or indirectly owns, controls, or holds with power to vote,
5 20 percent or more of the outstanding voting securities of the debtor, other than a person who
6 holds the securities,

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

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

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

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

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

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

20 (iv) a person who operates the debtor’s business under a lease or other agreement
21 or controls substantially all of the debtor’s assets.

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

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

1 (ii) property to the extent it is generally exempt under nonbankruptcy law; or
2 (iii) an interest in property held in tenancy by the entireties to the extent it is not
3 subject to process by a creditor holding a claim against only one tenant.

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

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

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

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

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

12 ~~(7)~~ (8) "Insider" includes:

13 (i) if the debtor is an individual,
14 (A) a relative of the debtor or of a general partner of the debtor;
15 (B) a partnership in which the debtor is a general partner;
16 (C) a general partner in a partnership described in clause (B); or
17 (D) a corporation of which the debtor is a director, officer, or person in
18 control;

19 (ii) if the debtor is a corporation,
20 (A) a director of the debtor;
21 (B) an officer of the debtor;
22 (C) a person in control of the debtor;
23 (D) a partnership in which the debtor is a general partner;

1 (E) a general partner in a partnership described in clause (D); or
2 (F) a relative of a general partner, director, officer, or person in control of
3 the debtor;

4 (iii) if the debtor is a partnership,

5 (A) a general partner in the debtor;

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

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

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

10 (E) a person in control of the debtor;

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

12 (v) a managing agent of the debtor.

13 ~~(8)~~ (9) “Lien” means a charge against or an interest in property to secure payment of a
14 debt or performance of an obligation, and includes a security interest created by agreement, a
15 judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a
16 statutory lien.

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

20 (10) “Organization” means a person other than an individual.

21 (11) “Person” means an individual, estate, business or nonprofit entity, public
22 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
23 entity. If an organization is a series organization, the organization and each series of the

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

3 ~~(10)~~ (12) “Property” means anything that may be the subject of ownership.

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

6 ~~(11)~~ (14) “Relative” means an individual related by consanguinity within the third
7 degree as determined by the common law, a spouse, or an individual related to a spouse within
8 the third degree as so determined, and includes an individual in an adoptive relationship within
9 the third degree.

10 (15) “Series organization” means an organization that, pursuant to the statute under
11 which the organization is organized, satisfies the following conditions:

12 (i) The organic record of the organization provides for creation by the
13 organization of one or more series (however denominated) with respect to specified property of
14 the organization, and provides for records to be maintained for each series that identify the
15 property of the series.

16 (ii) Debt incurred or existing with respect to the activities or property of a
17 particular series is enforceable against the property of the series only, and not against the
18 property of the series organization or of other series thereof.

19 (iii) Debt incurred or existing with respect to the activities or property of a series
20 organization is enforceable against the property of the series organization only, and not against
21 the property of any series thereof.

22 (16) “Sign” means, with present intent to authenticate or adopt a record:

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

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

3 ~~(12)~~ (17) “Transfer” means every mode, direct or indirect, absolute or conditional,
4 voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and
5 includes payment of money, release, lease, and creation of a lien or other encumbrance.

6 ~~(13)~~ (18) “Valid lien” means a lien that is effective against the holder of a judicial lien
7 subsequently obtained by legal or equitable process or proceedings.

8 **Official Comment**

9
10 (1) The definition of “affiliate” is derived from Bankruptcy Code § 101(2) (1984). ~~of the~~
11 ~~Bankruptcy Code.~~

12
13 (2) The definition of “asset” is substantially to the same effect as the definition of
14 “assets” in § 1 of the Uniform Fraudulent Conveyance Act. The definition in this Act, unlike
15 that in the earlier Act, does not, however, require a determination that the property is liable for
16 the debts of the debtor. Thus, an unliquidated claim for damages resulting from personal injury
17 or a contingent claim of a surety for reimbursement, contribution, or subrogation may be counted
18 as an asset for the purpose of determining whether the holder of the claim is solvent as a debtor
19 under § 2 of this Act, although applicable law may not allow such an asset to be levied on and
20 sold by a creditor. *Cf. Manufacturers & Traders Trust Co. v. Goldman (In re Ollag Construction*
21 *Equipment Corp.)*, 578 F.2d 904, 907-09 (2d Cir. 1978).

22
23 Subparagraphs (i), (ii), and (iii) provide clarification by excluding from the term not only
24 generally exempt property but also an interest in a tenancy by the entirety in many states and an
25 interest that is generally beyond reach by unsecured creditors because subject to a valid lien.
26 This Act, like its immediate predecessor and the Statute of 13 Elizabeth, declares rights and
27 provides remedies for unsecured creditors against transfers that impede them in the collection of
28 their claims. The laws protecting valid liens against impairment by levying creditors, exemption
29 statutes, and the rules restricting levyability of interest in entireties property are limitations on
30 the rights and remedies of unsecured creditors, and it is therefore appropriate to exclude property
31 interests that are beyond the reach of unsecured creditors from the definition of “asset” for the
32 purposes of this Act.

33
34 A creditor of a joint tenant or tenant in common may ordinarily collect a judgment by
35 process against the tenant’s interest, and in some states a creditor of a tenant by the entirety may
36 likewise collect a judgment by process against the tenant’s interest. See 2 American Law of
37 Property 10, 22, 28-32 (1952); Craig, *An Analysis of Estates by the Entirety in Bankruptcy*, 48
38 *Am.Bankr.L.J.* 255, 258-59 (1974). The levyable interest of such a tenant is included as an asset
39 under this Act.

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

11
12 The reference to “generally exempt” property in § 1(2)(ii) recognizes that all exemptions
13 are subject to exceptions. Creditors having special rights against generally exempt property
14 typically include claimants for alimony, taxes, wages, the purchase price of the property, and
15 labor or materials that improve the property. See Uniform Exemptions Act § 10 (1979) and the
16 accompanying Comment. The fact that a particular creditor may reach generally exempt
17 property by resorting to judicial process does not warrant its inclusion as an asset in determining
18 whether the debtor is insolvent.

19
20 Since this Act is not an exclusive law on the subject of voidable transfers and obligations
21 (see Comment (8) (10) to § 4 *infra*), it does not preclude the holder of a claim that may be
22 collected by process against property generally exempt as to other creditors from obtaining relief
23 from a transfer of such property that hinders, delays, or defrauds the holder of such a claim.
24 Likewise the holder of an unsecured claim enforceable against tenants by the entirety is not
25 precluded by the Act from pursuing a remedy against a transfer of property held by the entirety
26 that hinders, delays, or defrauds the holder of such a claim.

27
28 Nonbankruptcy law is the law of a state or federal law that is not part of the Bankruptcy
29 Code, Title 11 of the United States Code. The definition of an “asset” thus does not include
30 property that would be subject to administration for the benefit of creditors under the Bankruptcy
31 Code unless it is subject under other applicable law, state or federal, to process for the collection
32 of a creditor’s claim against a single debtor.

33
34 (3) The definition of “claim” is derived from Bankruptcy Code § 101(4) (1984). ~~of the~~
35 ~~Bankruptcy Code~~. Since the purpose of this Act is primarily to protect unsecured creditors
36 against transfers and obligations injurious to their rights, the words “claim” and “debt” as used in
37 the Act generally have reference to an unsecured claim and debt. As the context may indicate,
38 however, usage of the terms is not so restricted. See, e.g., §§ (1)(i)(B) and 1(8) §§ 1(1)(i)(B)
39 and 1(9).

40
41 (4) The definition of “creditor” in combination with the definition of “claim” has
42 substantially the same effect as the definition of “creditor” under § 1 of the Uniform Fraudulent
43 Conveyance Act. As under that Act, the holder of an unliquidated tort claim or a contingent
44 claim may be a creditor protected by this Act.

45
46 (5) The definition of “debt” is derived from Bankruptcy Code § 101(11) (1984). ~~of the~~

1 ~~Bankruptcy Code.~~

2
3 (6) The definition of “debtor” is new.

4
5 (7) The definition of “electronic” is the standard definition of that term used in acts
6 prepared by the Uniform Law Commission as of 2014.

7
8 ~~(7)~~ (8) The definition of “insider” is derived from Bankruptcy Code § 101(28) (1984)
9 ~~of the Bankruptcy Code~~. The definition has been restricted in clauses (i)(C), (ii)(E), and (iii)(D)
10 to make clear that a partner is not an insider of an individual, corporation, or partnership if any of
11 these latter three persons is only a limited partner. The definition of “insider” in the Bankruptcy
12 Code does not purport to make a limited partner an insider of the partners or of the partnership
13 with which the limited partner is associated, but it is susceptible of a contrary interpretation and
14 one which would extend unduly the scope of the defined relationship when the limited partner is
15 not a person in control of the partnership. The definition of “insider” in this Act also differs
16 from the definition in the Bankruptcy Code in omitting the reference in ~~11 U.S.C.~~ § 101(28)(D)
17 to an elected official or relative of such an official as an insider of a municipality. As in the
18 Bankruptcy Code (see ~~11 U.S.C.~~ § 102(3)), the word “includes” is not limiting, however. Thus,
19 a court may find a person living with an individual for an extended time in the same household
20 or as a permanent companion to have the kind of close relationship intended to be covered by the
21 term “insider.” Likewise, a trust may be found to be an insider of a beneficiary.

22
23 ~~(8)~~ (9) The definition of “lien” is derived from paragraphs (30), (31), (43), and (45) of
24 Bankruptcy Code § 101 (1984), ~~of the Bankruptcy Code~~, which define “judicial lien,” “lien,”
25 “security interest,” and “statutory lien” respectively.

26
27 ~~(9)~~ The definition of “person” is adapted from paragraphs (28) and (30) of § 1-201 of the
28 Uniform Commercial Code, defining “organization” and “person” respectively.

29
30 (10) The definition of “organization” is derived from Uniform Commercial Code
31 § 1-201(b)(25) (2014).

32
33 (11) The first sentence of the definition of “person” is the standard definition of that term
34 used in acts prepared by the Uniform Law Commission as of 2014. As to the second sentence,
35 which pertains to series organizations, see Comment (15) *infra*.

36
37 ~~(10)~~ (12) The definition of “property” is derived from Uniform Probate Code
38 § 1-201(33) (1969), ~~of the Uniform Probate Code~~. Property includes both real and personal
39 property, whether tangible or intangible, and any interest in property, whether legal or equitable.

40
41 (13) The definition of “record” is the standard definition of that term used in acts
42 prepared by the Uniform Law Commission as of 2014.

43
44 ~~(11)~~ (14) The definition of “relative” is derived from Bankruptcy Code § 101(37) (1984)
45 ~~of the Bankruptcy Code~~ but is explicit in its references to the spouse of a debtor in view of
46 uncertainty as to whether the common law determines degrees of relationship by affinity.

1 (15) The definition of “series organization” is adapted from Uniform Statutory Trust
2 Entity Act §§ 401-402 (2009). This definition, together with the related language in the
3 definition of “person,” accommodates developments in business organization statutes
4 exemplified by the foregoing uniform law and by Del. Code Ann. tit. 6, § 18-215 (2012)
5 (pertaining to Delaware limited liability companies). If the statute under which an organization
6 is organized permits it to divide its assets and debts among “series” (however denominated),
7 such that assets and debts of each “series” are separated in accordance with subparagraphs (ii)
8 and (iii) of this definition, and if the organization does so, then the provisions of this Act should
9 apply to each “series” as if it were a legal entity, regardless of whether it is considered to be a
10 legal entity for other purposes. For purposes of this definition, the conditions referred to in
11 subparagraphs (ii) and (iii) are satisfied if the statute under which the organization is organized
12 so provides. It does not matter whether the separation of assets and debts described in
13 subparagraphs (ii) and (iii) would be respected by another jurisdiction in which the organization
14 does business, or would be given effect by the Bankruptcy Code in the bankruptcy of the
15 organization. An organization may be a “series organization” having “series,” as those terms are
16 used in this Act, even though the statute under which the organization is organized uses different
17 terminology.

18
19 (16) The definition of “sign” is the standard definition of that term used in acts prepared
20 by the Uniform Law Commission as of 2014.

21
22 ~~(17)~~ (17) The definition of “transfer” is derived principally from Bankruptcy Code
23 § 101(48) (1984). of the Bankruptcy Code. The definition of “conveyance” in § 1 of the
24 Uniform Fraudulent Conveyance Act was similarly comprehensive, and the references in this
25 Act to “payment of money, release, lease, and the creation of a lien or incumbrance” are derived
26 from the Uniform Fraudulent Conveyance Act. While the definition in the Uniform Fraudulent
27 Conveyance Act did not explicitly refer to an involuntary transfer, the decisions under that Act
28 were generally consistent with an interpretation that covered such a transfer. See, e.g., *Hearn 45*
29 *St. Corp. v. Jano*, 283 N.Y. 139, 27 N.E.2d 814, 128 A.L.R. 1285 (1940) (execution and
30 foreclosure sales); *Lefkowitz v. Finkelstein Trading Corp.*, 14 F.Supp. 898, 899 (S.D.N.Y. 1936)
31 (execution sale); *Langan v. First Trust & Deposit Co.*, 277 App.Div. 1090, 101 N.Y.S.2d 36 (4th
32 Dept. 1950), *aff’d*, 302 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); *Catabene v.*
33 *Wallner*, 16 N.J.Super. 597, 602, 85 A.2d 300, 302 (1951) (mortgage foreclosure).

34
35 ~~(18)~~ (18) The definition of “valid lien” is new. A valid lien includes an equitable lien
36 that may not be defeated by a judicial lien creditor. See, e.g., *Pearlman v. Reliance Insurance*
37 *Co.*, 371 U.S. 132, 136 (1962) (upholding a surety’s equitable lien in respect to a fund owing a
38 bankrupt contractor).

39 40 **SECTION 2. INSOLVENCY.**

41 (a) A debtor is insolvent if the sum of the debtor’s debts is greater than all of the debtor’s
42 assets at a fair valuation.

43 (b) A debtor who is generally not paying ~~his [or her]~~ the debtor’s debts as they become

1 due is presumed to be insolvent.

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

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

9 ~~(e)~~ (d) Debts under this section do not include an obligation to the extent it is secured by
10 a valid lien on property of the debtor not included as an asset.

11 Official Comment

12
13 (1) Subsection (a) is derived from the definition of "insolvent" in Bankruptcy Code
14 § 101(29)(A) (1984). ~~of the Bankruptcy Code.~~ The definition in subsection (a) ~~and the~~
15 ~~correlated definition of partnership insolvency in subsection (c) contemplate~~ contemplates a fair
16 valuation of the debts as well as the assets of the debtor. As under the definition of the same
17 term in § 2 of the Uniform Fraudulent Conveyance Act exempt property is excluded from the
18 computation of the value of the assets. See § 1(2) *supra*. For similar reasons interests in valid
19 spendthrift trusts and interests in tenancies by the entireties that cannot be severed by a creditor
20 of only one tenant are not included. See ~~the Comment to § 1(2)~~ Comment (2) to § 1 *supra*.
21 Since a valid lien also precludes an unsecured creditor from collecting the creditor's claim from
22 the encumbered interest in a debtor's property, both the encumbered interest and the debt secured
23 thereby are excluded from the computation of insolvency under this Act. See § 1(2) *supra* and
24 subsection ~~(e)~~ (d) of this section.

25
26 The requirement of § 550(b)(1) of the Bankruptcy Code that a transferee be "without
27 knowledge of the voidability of the transfer" in order to be protected has been omitted as
28 inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with
29 the good faith that is required of a protected transferee. Knowledge of the voidability of a
30 transfer would seem to involve a legal conclusion. Determination of the voidability of the
31 transfer ought not to require the court to inquire into the legal sophistication of the transferee.

32
33 (2) Section 2(b) establishes a rebuttable presumption of insolvency from the fact of
34 general nonpayment of debts as they become due. Such general nonpayment is a ground for the
35 filing of an involuntary petition under Bankruptcy Code § 303(h)(1) (1984). ~~of the Bankruptcy~~
36 ~~Code.~~ See also U.C.C. § 1-201(23), which declares a person to be "insolvent" who "has ceased

1 ~~to pay his debts in the ordinary course of business.”~~ See also U.C.C. § 1-201(b)(23) (2014),
2 which defines “insolvency” to include “having generally ceased to pay debts in the ordinary
3 course of business other than as a result of bona fide dispute.” The presumption imposes on the
4 party against whom the presumption is directed the burden of proving that the nonexistence of
5 insolvency as defined in § 2(a) is more probable than its existence. See Uniform Rules of
6 Evidence (1974 Act), Rule 301(a). The 1974 Uniform Rule 301(a) conforms to the Final Draft
7 of Federal Rule 301 as submitted to the United States Supreme Court by the Advisory
8 Committee on Federal Rules of Evidence. “The so-called ‘bursting bubble’ theory, under which
9 a presumption vanishes upon the introduction of evidence which would support a finding of the
10 nonexistence of the presumed fact, even though not believed, is rejected as according
11 presumptions too ‘slight and evanescent’ an effect.” Advisory Committee’s Note to Rule 301.
12 See also 1 J. Weinstein & M. Berger, Evidence ¶ 301 [01] (1982).

13
14 The presumption is established in recognition of the difficulties typically imposed on a
15 creditor in proving insolvency in the bankruptcy sense, as provided in subsection (a). See
16 generally Levit, *The Archaic Concept of Balance-Sheet Insolvency*, 47 Am.Bankr.L.J. 215
17 (1973). Not only is the relevant information in the possession of a noncooperative debtor but the
18 debtor’s records are more often than not incomplete and inaccurate. As a practical matter,
19 insolvency is most cogently evidenced by a general cessation of payment of debts, as has long
20 been recognized by the laws of other countries and is now reflected in the Bankruptcy Code. See
21 Honsberger, *Failure to Pay One’s Debts Generally as They Become Due: The Experience of*
22 *France and Canada*, 54 Am.Bankr.L.J. 153 (1980); J. MacLachlan, *Bankruptcy* 13, 63-64, 436
23 (1956). In determining whether a debtor is paying its debts generally as they become due, the
24 court should look at more than the amount and due dates of the indebtedness. The court should
25 also take into account such factors as the number of the debtor’s debts, the proportion of those
26 debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or
27 other special circumstances alleged to constitute an explanation for the stoppage of payments.
28 The court’s determination may be affected by a consideration of the debtor’s payment practices
29 prior to the period of alleged nonpayment and the payment practices of the trade or industry in
30 which the debtor is engaged. The case law that has developed under Bankruptcy Code
31 § 303(h)(1) (1984) ~~of the Bankruptcy Code~~ has not required a showing that a debtor has failed or
32 refused to pay a majority in number and amount of his or her debts in order to prove general
33 nonpayment of debts as they become due. See, e.g., *Hill v. Cargill, Inc. (In re Hill)*, 8 B.R. 779,
34 3 C.B.C.2d 920 (Bankr. D.Minn. 1981) (nonpayment of three largest debts held to constitute
35 general nonpayment, although small debts were being paid); *In re All Media Properties, Inc.*, 5
36 B.R. 126, 6 B.C.D. 586, 2 C.B.C.2d 449 (Bankr. S.D.Tex. 1980) (missing significant number of
37 payments or regularly missing payments significant in amount said to constitute general
38 nonpayment; missing payments on more than 50% of aggregate of claims said not to be required
39 to show general nonpayment; nonpayment for more than 30 days after billing held to establish
40 nonpayment of a debt when it is due); *In re Kreidler Import Corp.*, 4 B.R. 256, 6 B.C.D. 608, 2
41 C.B.C.2d 159 (Bankr. D.Md. 1980) (nonpayment of one debt constituting 97% of debtor’s total
42 indebtedness held to constitute general nonpayment). A presumption of insolvency does not
43 arise from nonpayment of a debt as to which there is a genuine bona fide dispute, even though
44 the debt is a substantial part of the debtor’s indebtedness. Cf. ~~11 U.S.C. § 303(h)(1), as amended~~
45 ~~by § 426(b) of Public Law No. 98-882, the Bankruptcy Amendments and Federal Judgeship Act~~
46 ~~of 1984.~~ Bankruptcy Code § 303(h)(1) (1984) (as amended by § 426(b) of Public Law No. 98-

1 882, the Bankruptcy Amendments and Federal Judgeship Act of 1984).

2
3 ~~(3) Subsection (e) is derived from the definition of partnership insolvency in~~
4 ~~§ 101(29)(B) of the Bankruptcy Code. The definition conforms generally to the definition of the~~
5 ~~same term in § 2(2) of the Uniform Fraudulent Conveyance Act.~~

6
7 ~~(4) (3) Subsection (d) (c) follows the approach of the definition of “insolvency” in~~
8 ~~Bankruptcy Code § 101(29) (1984) of the Bankruptcy Code by excluding from the computation~~
9 ~~of the value of the debtor’s assets any value that can be realized only by avoiding a transfer of an~~
10 ~~interest formerly held by the debtor or by discovery or pursuit of property that has been~~
11 ~~fraudulently concealed or removed with intent to hinder, delay, or defraud creditors.~~

12
13 ~~(5) (4) Subsection (e) (d) is new. It makes clear the purpose not to render a person~~
14 ~~insolvent under this section by counting as a debt an obligation secured by property of the debtor~~
15 ~~that is not counted as an asset. See also Comments to §§ 1(2) and 2(a) supra Comment (2) to § 1~~
16 ~~and Comment (1) to § 2 supra.~~

17
18 **SECTION 3. VALUE.**

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

23 (b) For the purposes of Sections 4(a)(2) and 5, a person gives a reasonably equivalent
24 value if the person acquires an interest of the debtor in an asset pursuant to a regularly
25 conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or
26 disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security
27 agreement.

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

31 **Official Comment**

32
33 ~~(1) This section defines “value” as used in various contexts in this Act, frequently with a~~

1 qualifying adjective. The word appears in the following sections:

2
3 4(a)(2) (“reasonably equivalent value”);
4 4(b)(8) (“value ... reasonably equivalent”);
5 5(a) (“reasonably equivalent value”);
6 5(b) (“present, reasonably equivalent value”);
7 8(a) (“reasonably equivalent value”);
8 8(b), (c), (d), and (e) (“value”);
9 8(f)(1) (“new value”); and
10 8(f)(3) (“present value”).

11
12 (1) This section defines when “value” is given for a transfer or an obligation. “Value” is
13 used in that sense in various contexts in this Act, frequently with a qualifying adjective. Used in
14 that sense the word appears in the following provisions:

15 4(a)(2) (“reasonably equivalent value”);
16 4(b)(8) (“value ... reasonably equivalent”);
17 5(a) (“reasonably equivalent value”);
18 8(a) (“reasonably equivalent value”);
19 8(b)(2) and (d) (“value”);
20 8(f)(1) (“new value”); and
21 8(f)(3) (“present value”).

22
23 “Value” is also used in other senses in this Act, to which this section is not relevant. See, e.g.,
24 §§ 8(b), 8(c) (“value” in the sense of the value of an asset voidably transferred).

25
26 (2) Section 3(a) is adapted from Bankruptcy Code § 548(d)(2)(A) (1984), ~~of the~~
27 ~~Bankruptcy Code~~. See also § 3(a) of the Uniform Fraudulent Conveyance Act. The definition in
28 Section 3 is not exclusive. “Value” is to be determined in light of the purpose of the Act to
29 protect a debtor’s estate from being depleted to the prejudice of the debtor’s unsecured creditors.
30 Consideration having no utility from a creditor’s viewpoint does not satisfy the statutory
31 definition. The definition does not specify all the kinds of consideration that do not constitute
32 value for the purposes of this Act—*e.g.*, love and affection. See, *e.g.*, *United States v. West*, 299
33 F.Supp. 661, 666 (D.Del. 1969).

34
35 (3) Section 3(a) does not indicate what is “reasonably equivalent value” for a transfer or
36 obligation. Under this Act, as under Bankruptcy Code § 548(a)(2) (1984), ~~of the Bankruptcy~~
37 ~~Code~~, a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a
38 discrepancy between the value of the asset transferred and the debt secured, since the amount of
39 the debt is the measure of the value of the interest in the asset that is transferred. See, *e.g.*,
40 *Peoples-Pittsburgh Trust Co. v. Holy Family Polish Nat’l Catholic Church, Carnegie, Pa.*, 341
41 Pa. 390, 19 A.2d 360 (1941). If, however, a transfer purports to secure more than the debt
42 actually incurred or to be incurred, it may be found to be for less than a reasonably equivalent
43 value. See, *e.g.*, *In re Peoria Braumeister Co.*, 138 F.2d 520, 523 (7th Cir. 1943) (chattel
44 mortgage securing a \$3,000 note held to be fraudulent voidable when the debt secured was only
45 \$2,500); *Hartford Acc. & Indemnity Co. v. Jirasek*, 254 Mich. 131, 140, 235 N.W. 836, 839

1 (1931) (quitclaim deed given as mortgage held to be ~~fraudulent~~ voidable to the extent the value
2 of the property transferred exceeded the indebtedness secured). If the debt is a ~~fraudulent~~
3 voidable obligation under this Act, a transfer to secure it as well as the obligation would be
4 ~~vulnerable to attack as fraudulent~~ voidable. A transfer to satisfy or secure an antecedent debt
5 owed an insider is also subject to avoidance under the conditions specified in Section 5(b).
6

7 (4) Section 3(a) of the Uniform Fraudulent Conveyance Act has been thought not to
8 recognize that an unperformed promise could constitute fair consideration. See McLaughlin,
9 *Application of the Uniform Fraudulent Conveyance Act*, 46 Harv.L.Rev. 404, 414 (1933).
10 Courts construing these provisions of the prior law nevertheless have held unperformed promises
11 to constitute value in a variety of circumstances. See, e.g., *Harper v. Lloyd's Factors, Inc.*, 214
12 F.2d 662 (2d Cir. 1954) (transfer of money for promise of factor to discount transferor's
13 purchase-money notes given to fur dealer); *Schlecht v. Schlecht*, 168 Minn. 168, 176-77, 209
14 N.W. 883, 886-87 (1926) (transfer for promise to make repairs and improvements on transferor's
15 homestead); *Farmer's Exchange Bank v. Oneida Motor Truck Co.*, 202 Wis. 266, 232 N.W. 536
16 (1930) (transfer in consideration of assumption of certain of transferor's liabilities); see also
17 *Hummel v. Cernocky*, 161 F.2d 685 (7th Cir. 1947) (transfer in consideration of cash, assumption
18 of a mortgage, payment of certain debts, and agreement to pay other debts). Likewise a transfer
19 in consideration of a negotiable note discountable at a commercial bank, or the purchase from an
20 established, solvent institution of an insurance policy, annuity, or contract to provide care and
21 accommodations clearly appears to be for value. On the other hand, a transfer for an
22 unperformed promise by an individual to support a parent or other transferor has generally been
23 held voidable as a ~~fraud on creditors of the transferor~~. See, e.g., *Springfield Ins. Co. v. Fry*, 267
24 F.Supp. 693 (N.D.Okla. 1967); *Sandler v. Parlapiano*, 236 App.Div. 70, 258 N.Y.Supp. 88 (1st
25 Dep't 1932); *Warwick Municipal Employees Credit Union v. Higham*, 106 R.I. 363, 259 A.2d
26 852 (1969); *Hulsether v. Sanders*, 54 S.D. 412, 223 N.W. 335 (1929); *Cooper v. Cooper*, 22
27 Tenn.App. 473, 477, 124 S.W.2d 264, 267 (1939); Note, *Rights of Creditors in Property*
28 *Conveyed in Consideration of Future Support*, 45 Iowa L.Rev. 546, 550-62 (1960). This Act
29 adopts the view taken in the cases cited in determining whether an unperformed promise is value.
30

31 (5) Subsection (b) rejects the rule of such cases as *Durrett v. Washington Nat. Ins. Co.*,
32 621 F.2d 201 (5th Cir. 1980) (nonjudicial foreclosure of a mortgage avoided as a ~~fraudulent~~
33 voidable transfer when the property of an insolvent mortgagor was sold for less than 70% of its
34 fair value); and *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547 (5th Cir. 1981), *cert.*
35 *denied*, 454 U.S. 1164 (1982) (nonjudicial foreclosure held to be ~~fraudulent~~ voidable transfer if
36 made without fair consideration). Subsection (b) adopts the view taken in *Lawyers Title Ins.*
37 *Corp. v. Madrid (In re Madrid)*, 21 B.R. 424 (B.A.P. 9th Cir. 1982), *aff'd on another ground*,
38 725 F.2d 1197 (9th Cir. 1984), that the price bid at a public foreclosure sale determines the fair
39 value of the property sold. See also *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994)
40 (similarly construing Bankruptcy Code § 548). Subsection (b) prescribes the effect of a sale
41 meeting its requirements, whether the asset sold is personal or real property. The rule of this
42 subsection applies to a foreclosure by sale of the interest of a vendee under an installment land
43 contract in accordance with applicable law that requires or permits the foreclosure to be effected
44 by a sale in the same manner as the foreclosure of a mortgage. See G. Osborne, G. Nelson, & D.
45 Whitman, *Real Estate Finance Law* 83-84, 95-97 (1979). ~~The premise of the subsection is that~~
46 ~~"a sale of the collateral by the secured party as the normal consequence of default . . . [is] the~~

1 ~~safest way of establishing the fair value of the collateral . . .” 2 G. Gilmore, Security Interests in~~
2 ~~Personal Property 1227 (1965).~~

3
4 If a lien given an insider for a present consideration is not perfected as against a
5 subsequent bona fide purchaser or is so perfected after a delay following an extension of credit
6 secured by the lien, foreclosure of the lien may result in a transfer for an antecedent debt that is
7 voidable under Section 5(b) *infra*. Subsection (b) does not apply to an action under Section
8 4(a)(1) to avoid a transfer or obligation because made or incurred with actual intent to hinder,
9 delay, or defraud any creditor.

10
11 (6) Subsection (c) is an adaptation of Bankruptcy Code § 547(c)(1) (1984). ~~of the~~
12 ~~Bankruptcy Code~~. A transfer to an insider for an antecedent debt may be voidable under § 5(b)
13 *infra*.

14
15 **SECTION 4. TRANSFERS FRAUDULENT AS TO VOIDABLE BY PRESENT**
16 **AND FUTURE CREDITORS.**

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

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

21 (2) without receiving a reasonably equivalent value in exchange for the transfer or
22 obligation, and the debtor:

23 (i) was engaged or was about to engage in a business or a transaction for
24 which the remaining assets of the debtor were unreasonably small in relation to the business or
25 transaction; or

26 (ii) intended to incur, or believed or reasonably should have believed that
27 ~~he [or she]~~ the debtor would incur, debts beyond ~~his [or her]~~ the debtor’s ability to pay as they
28 became due.

29 (b) In determining actual intent under subsection (a)(1), consideration may be given,
30 among other factors, to whether:

- 1 (1) the transfer or obligation was to an insider;
- 2 (2) the debtor retained possession or control of the property transferred after the
3 transfer;
- 4 (3) the transfer or obligation was disclosed or concealed;
- 5 (4) before the transfer was made or obligation was incurred, the debtor had been
6 sued or threatened with suit;
- 7 (5) the transfer was of substantially all the debtor's assets;
- 8 (6) the debtor absconded;
- 9 (7) the debtor removed or concealed assets;
- 10 (8) the value of the consideration received by the debtor was reasonably
11 equivalent to the value of the asset transferred or the amount of the obligation incurred;
- 12 (9) the debtor was insolvent or became insolvent shortly after the transfer was
13 made or the obligation was incurred;
- 14 (10) the transfer occurred shortly before or shortly after a substantial debt was
15 incurred; and
- 16 (11) the debtor transferred the essential assets of the business to a lienor who
17 transferred the assets to an insider of the debtor.

18 (c) A party making a claim based on subsection (a) has the burden of proving the
19 elements of the claim by a preponderance of the evidence.

20 **Official Comment**

21
22 (1) Section 4(a)(1) is derived from § 7 of the Uniform Fraudulent Conveyance Act,
23 which in turn was derived from the Statute of 13 Elizabeth, c. 5 (1571). Factors appropriate for
24 consideration in determining actual intent under paragraph (1) are specified in subsection (b).

25
26 (2) Section 4, unlike § 5, protects creditors of a debtor whose claims arise after as well as
27 before the debtor made or incurred the challenged transfer or obligation. Similarly, there is no

1 requirement in § 4(a)(1) that the intent referred to be directed at a creditor existing or identified
2 at the time of transfer or incurrence. For example, promptly after the invention in Pennsylvania
3 of the spendthrift trust, the assets and beneficial interest of which are immune from attachment
4 by the beneficiary’s creditors, courts held that a debtor’s establishment of a spendthrift trust for
5 his own benefit is a voidable transfer *per se* under the Statute of 13 Elizabeth. *Mackason’s*
6 *Appeal*, 42 Pa. 330, 338-39 (1862); see also *Ghormley v. Smith*, 139 Pa. 584, 591-94 (1891);
7 *Patrick v. Smith*, 2 Pa. Super. 113, 119 (1896). Likewise, for centuries § 4(a)(1) and its
8 predecessors have been employed to invalidate nonpossessory property interests that are thought
9 to be potentially deceptive, without regard to whether the deception is directed at an existing or
10 identified creditor. See, e.g., *McGann v. Capital Sav. Bank & Trust Co.*, 89 A.2d 123, 183-84
11 (Vt. 1952) (seller’s retention of possession of goods after sale held voidable *per se* as to creditors
12 of the seller); *Superior Partners v. Prof’l Educ. Network, Inc.*, 485 N.E.2d 1218, 1221 (Ill. App.
13 Ct. 1985) (similar); *Clow v. Woods*, 5 Serg. & Rawle 275 (Pa. 1819) (holding, in the absence of a
14 public notice system, that a nonpossessory chattel mortgage is voidable *per se*).
15

16 (2) (3) Section 4(a)(2) is derived from §§ 5 and 6 of the Uniform Fraudulent Conveyance
17 Act but substitutes “reasonably equivalent value” for “fair consideration.” The transferee’s good
18 faith was an element of “fair consideration” as defined in § 3 of the Uniform Fraudulent
19 Conveyance Act, and lack of fair consideration was one of the elements of a fraudulent transfer
20 as defined in four sections of the Uniform Act. The transferee’s good faith is irrelevant to a
21 determination of the adequacy of the consideration under this Act, but lack of good faith may be
22 a basis for withholding protection of a transferee or obligee under § 8 *infra*.
23

24 (3) (4) Unlike the Uniform Fraudulent Conveyance Act as originally promulgated, this
25 Act does not prescribe different tests when a transfer is made for the purpose of security and
26 when it is intended to be absolute. The premise of this Act is that when a transfer is for security
27 only, the equity or value of the asset that exceeds the amount of the debt secured remains
28 available to unsecured creditors and thus cannot be regarded as the subject of a voidable transfer
29 merely because of the encumbrance resulting from an otherwise valid security transfer.
30 Disproportion between the value of the asset securing the debt and the size of the debt secured
31 does not, in the absence of circumstances indicating a purpose to hinder, delay, or defraud
32 creditors, constitute an impermissible hindrance to the enforcement of other creditors’ rights
33 against the debtor-transferor. Cf. U.C.C. § 9-311; U.C.C. § 9-401 (2014).
34

35 (4) (5) Subparagraph (i) of § 4(a)(2) is an adaptation of § 5 of the Uniform Fraudulent
36 Conveyance Act but substitutes “unreasonably small [assets] in relation to the business or
37 transaction” for “unreasonably small capital.” The reference to “capital” in the Uniform Act is
38 ambiguous in that it may refer to net worth or to the par value of stock or to the consideration
39 received for stock issued. The special meanings of “capital” in corporation law have no
40 relevance in the law of fraudulent voidable transfers. The subparagraph focuses attention on
41 whether the amount of all the assets retained by the debtor was inadequate, *i.e.*, unreasonably
42 small, in light of the needs of the business or transaction in which the debtor was engaged or
43 about to engage.
44

45 (5) (6) Subsection (b) is a nonexclusive catalogue of factors appropriate for
46 consideration by the court in determining whether the debtor had an actual intent to hinder,

1 delay, or defraud one or more creditors. Proof of the existence of any one or more of the factors
2 enumerated in subsection (b) may be relevant evidence as to the debtor’s actual intent but does
3 not create a presumption that the debtor has made a ~~fraudulent~~ voidable transfer or incurred a
4 ~~fraudulent~~ voidable obligation. The list of factors includes most of the so-called “badges of
5 fraud” that have been recognized by the courts in construing and applying the Statute of 13
6 Elizabeth and § 7 of the Uniform Fraudulent Conveyance Act. Proof of the presence of certain
7 badges in combination establishes ~~fraud~~ voidability conclusively—*i.e.*, without regard to the
8 actual intent of the parties—when they concur as provided in § 4(a)(2) or in § 5. The fact that a
9 transfer has been made to a relative or to an affiliated corporation has not been regarded as a
10 badge of fraud sufficient to warrant avoidance when unaccompanied by any other evidence of
11 ~~fraud~~ intent to hinder, delay, or defraud creditors. The courts have uniformly recognized,
12 however, that a transfer to a closely related person warrants close scrutiny of the other
13 circumstances, including the nature and extent of the consideration exchanged. See 1 G. Glenn,
14 Fraudulent Conveyances and Preferences § 307 (Rev. ed. 1940). The second, third, fourth, and
15 fifth factors listed are all adapted from the classic catalogue of badges of fraud provided by Lord
16 Coke in *Twyne’s Case*, 3 Coke 80b, 76 Eng.Rep. 809 (Star Chamber 1601). Lord Coke also
17 included the use of a trust and the recitation in the instrument of transfer that it “was made
18 honestly, truly, and bona fide,” but the use of the trust is ~~fraudulent~~ voidable only when
19 accompanied by elements or badges specified in this Act, and recitals of “good faith” can no
20 longer be regarded as significant evidence of a ~~fraudulent~~ intent to hinder, delay, or defraud
21 creditors.

22
23 (6) (7) In considering the factors listed in § 4(b) a court should evaluate all the relevant
24 circumstances involving a challenged transfer or obligation. Thus the court may appropriately
25 take into account all indicia negating as well as those suggesting ~~fraud~~ intent to hinder, delay,
26 or defraud creditors, as illustrated in the following reported cases:

27
28 (a) Whether the transfer or obligation was to an insider: *Salomon v. Kaiser (In re*
29 *Kaiser)*, 722 F.2d 1574, 1582-83 (2d Cir. 1983) (insolvent debtor’s purchase of two
30 residences in the name of his spouse and the creation of a dummy corporation for the
31 purpose of concealing assets held to evidence ~~fraudulent~~ intent to hinder, delay, or defraud
32 creditors); *Banner Construction Corp. v. Arnold*, 128 So.2d 893 (Fla. Dist. App. 1961)
33 (assignment by one corporation to another having identical directors and stockholders
34 constituted a badge of fraud); *Travelers Indemnity Co. v. Cormaney*, 258 Iowa 237, 138
35 N.W.2d 50 (1965) (transfer between spouses said to be a circumstance that shed suspicion
36 on the transfer and that with other circumstances warranted avoidance); *Hatheway v.*
37 *Hanson*, 230 Iowa 386, 297 N.W. 824 (1941) (transfer from parent to child said to require a
38 critical examination of surrounding circumstances, which, together with other indicia of
39 ~~fraud~~ intent to hinder, delay, or defraud creditors, warranted avoidance); *Lumpkins v.*
40 *McPhee*, 59 N.M. 442, 286 P.2d 299 (1955) (transfer from daughter to mother said to be
41 indicative of ~~fraud~~ intent to hinder, delay, or defraud creditors, but transfer held not to be
42 ~~fraudulent~~ voidable due to adequacy of consideration and delivery of possession by
43 transferor).

44
45 (b) Whether the transferor retained possession or control of the property after the
46 transfer: *Harris v. Shaw*, 224 Ark. 150, 272 S.W.2d 53 (1954) (retention of property by

1 transferor said to be a badge of fraud and, together with other badges, to warrant avoidance
2 of transfer); *Stephens v. Reginstein*, 89 Ala. 561, 8 So. 68 (1890) (transferor's retention of
3 control and management of property and business after transfer held material in determining
4 transfer to be ~~fraudulent~~ voidable); *Allen v. Massey*, 84 U.S. (17 Wall.) 351 (1872) (joint
5 possession of furniture by transferor and transferee considered in holding transfer to be
6 fraudulent); *Warner v. Norton*, 61 U.S. (20 How.) 448 (1857) (surrender of possession by
7 transferor deemed to negate allegations of ~~fraud~~ intent to hinder, delay, or defraud creditors).
8

9 (c) Whether the transfer or obligation was concealed or disclosed: *Walton v. First*
10 *National Bank*, 13 Colo. 265, 22 P. 440 (1889) (agreement between parties to conceal the
11 transfer from the public said to be one of the strongest badges of fraud); *Warner v. Norton*,
12 61 U.S. (20 How.) 448 (1857) (although secrecy said to be a circumstance from which,
13 when coupled with other badges, ~~fraud~~ intent to hinder, delay, or defraud creditors may be
14 inferred, transfer was held not to be ~~fraudulent~~ voidable when made in good faith and
15 transferor surrendered possession); *W.T. Raleigh Co. v. Barnett*, 253 Ala. 433, 44 So.2d 585
16 (1950) (failure to record a deed in itself said not to evidence ~~fraud~~ intent to hinder, delay, or
17 defraud creditors, and transfer held not to be ~~fraudulent~~ voidable).
18

19 (d) Whether, before the transfer was made or obligation was incurred, a creditor sued or
20 threatened to sue the debtor: *Harris v. Shaw*, 224 Ark. 150, 272 S.W.2d 53 (1954) (transfer
21 held to be ~~fraudulent~~ voidable when causally connected to pendency of litigation and
22 accompanied by other badges of fraud); *Pergrem v. Smith*, 255 S.W.2d 42 (Ky.App. 1953)
23 (transfer in anticipation of suit deemed to be a badge of fraud; transfer held ~~fraudulent~~
24 voidable when accompanied by insolvency of transferor who was related to transferee);
25 *Bank of Sun Prairie v. Hovig*, 218 F.Supp. 769 (W.D.Ark. 1963) (although threat or
26 pendency of litigation said to be an indicator of ~~fraud~~ intent to hinder, delay, or defraud
27 creditors, transfer was held not to be ~~fraudulent~~ voidable when adequate consideration and
28 good faith were shown).
29

30 (e) Whether the transfer was of substantially all the debtor's assets: *Walbrun v. Babbitt*,
31 83 U.S. (16 Wall.) 577 (1872) (sale by insolvent retail shop owner of all of his inventory in a
32 single transaction held to be ~~fraudulent~~ voidable); *Cole v. Mercantile Trust Co.*, 133 N.Y.
33 164, 30 N.E. 847 (1892) (transfer of all property before plaintiff could obtain a judgment
34 held to be ~~fraudulent~~ voidable); *Lumpkins v. McPhee*, 59 N.M. 442, 286 P.2d 299 (1955)
35 (although transfer of all assets said to indicate ~~fraud~~ intent to hinder, delay, or defraud
36 creditors, transfer held not to be ~~fraudulent~~ voidability because full consideration was paid
37 and transferor surrendered possession).
38

39 (f) Whether the debtor had absconded: *In re Thomas*, 199 F. 214 (N.D.N.Y. 1912)
40 (when debtor collected all of his money and property with the intent to abscond, ~~fraudulent~~
41 intent to hinder, delay, or defraud creditors was held to be shown).
42

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

1 proceeds out of the country held to be ~~fraudulent~~ voidable notwithstanding adequacy of
2 consideration).

3
4 (h) Whether the value of the consideration received by the debtor was reasonably
5 equivalent to the value of the asset transferred or the amount of the obligation incurred:
6 *Toomay v. Graham*, 151 S.W.2d 119 (Mo.App. 1941) (although mere inadequacy of
7 consideration said not to be a badge of fraud, transfer held to be ~~fraudulent~~ voidable when
8 accompanied by badges of fraud); *Texas Sand Co. v. Shield*, 381 S.W.2d 48 (Tex. 1964)
9 (inadequate consideration said to be an indicator of ~~fraud~~ intent to hinder, delay, or defraud
10 creditors, and transfer held to be ~~fraudulent~~ voidable because of inadequate consideration,
11 pendency of suit, family relationship of transferee, and fact that all nonexempt property was
12 transferred); *Weigel v. Wood*, 355 Mo. 11, 194 S.W.2d 40 (1946) (although inadequate
13 consideration said to be a badge of fraud, transfer held not to be ~~fraudulent~~ voidable when
14 inadequacy not gross and not accompanied by any other badge; fact that transfer was from
15 father to son held not sufficient to establish ~~fraud~~ intent to hinder, delay, or defraud
16 creditors).

17
18 (i) Whether the debtor was insolvent or became insolvent shortly after the transfer was
19 made or obligation was incurred: *Harris v. Shaw*, 224 Ark. 150, 272 S.W.2d 53 (1954)
20 (insolvency of transferor said to be a badge of fraud and transfer held ~~fraudulent~~ voidable
21 when accompanied by other badges of fraud); *Bank of Sun Prairie v. Hovig*, 218 F.Supp.
22 769 (W.D. Ark. 1963) (although the insolvency of the debtor said to be a badge of fraud,
23 transfer held not ~~fraudulent~~ voidable when debtor was shown to be solvent, adequate
24 consideration was paid, and good faith was shown, despite the pendency of suit); *Wareheim*
25 *v. Bayliss*, 149 Md. 103, 131 A. 27 (1925) (although insolvency of debtor acknowledged to
26 be an indicator of ~~fraud~~ intent to hinder, delay, or defraud creditors, transfer held not to be
27 ~~fraudulent~~ voidable when adequate consideration was paid and whether debtor was insolvent
28 in fact was doubtful).

29
30 (j) Whether the transfer occurred shortly before or shortly after a substantial debt was
31 incurred: *Commerce Bank of Lebanon v. Halladale A Corp.*, 618 S.W.2d 288, 292
32 (Mo.App. 1981) (when transferors incurred substantial debts near in time to the transfer,
33 transfer was held to be ~~fraudulent~~ voidable due to inadequate consideration, close family
34 relationship, the debtor's retention of possession, and the fact that almost all the debtor's
35 property was transferred).

36
37 (↔) (8) The effect of the two transfers described in § 4(b)(11), if not avoided, may be to
38 permit a debtor and a lienor to deprive the debtor's unsecured creditors of access to the debtor's
39 assets for the purpose of collecting their claims while the debtor, the debtor's affiliate or insider,
40 and the lienor arrange for the beneficial use or disposition of the assets in accordance with their
41 interests. The kind of disposition sought to be reached here is exemplified by that found in
42 *Northern Pacific Co. v. Boyd*, 228 U.S. 482 (1913), the leading case in establishing the absolute
43 priority doctrine in reorganization law. There the Court held that a reorganization whereby the
44 secured creditors and the management-owners retained their economic interests in a railroad
45 through a foreclosure that cut off claims of unsecured creditors against its assets was in effect a
46 ~~fraudulent~~ voidable disposition (*id.* at 502-05). See Frank, *Some Realistic Reflections on Some*

1 *Aspects of Corporate Reorganization*, 19 Va.L.Rev. 541, 693 (1933). For cases in which an
2 analogous injury to unsecured creditors was inflicted by a lienor and a debtor, see *Jackson v. Star*
3 *Sprinkler Corp. of Florida*, 575 F.2d 1223, 1231-34 (8th Cir. 1978); *Heath v. Helmick*, 173 F.2d
4 157, 161-62 (9th Cir. 1949); *Toner v. Nuss*, 234 F.Supp. 457, 461-62 (E.D.Pa. 1964); and see *In*
5 *re Spotless Tavern Co., Inc.*, 4 F.Supp. 752, 753, 755 (D.Md. 1933).

6
7 (9) The phrase “hinder, delay, or defraud” in § 4(a)(1), carried forward from the
8 primordial Statute of 13 Elizabeth, is potentially applicable to any transaction that unacceptably
9 contravenes norms of creditors’ rights. Section 4(a)(1) is sometimes said to require “actual
10 fraud,” by contrast to § 4(a)(2) and § 5(a), which are said to require “constructive fraud.” That
11 shorthand is highly misleading. Fraud is not a necessary element of a claim under any of those
12 provisions. By its terms, § 4(a)(1) applies to a transaction that “hinders” or “delays” a creditor,
13 even if it does not “defraud” him. See, e.g., *Shapiro v. Wilgus*, 287 U.S. 348, 354 (1932); *Means*
14 *v. Dowd*, 128 U.S. 273, 280-83, 288 (1888); *Consove v. Cohen (In re Roco Corp.)*, 701 F.2d 978,
15 984 (1st Cir. 1983); *Empire Lighting Fixture Co. v. Practical Lighting Fixture Co.*, 20 F.2d 295,
16 297 (2d Cir. 1927); *Lippe v. Bairnco Corp.*, 249 F. Supp. 2d 357, 374 (S.D.N.Y. 2003). “Hinder,
17 delay, or defraud” is best considered as a single term of art describing a transaction that
18 unacceptably contravenes norms of creditors’ rights. Such a transaction need not bear any
19 resemblance to common-law fraud. Thus, the Supreme Court held a given transfer voidable
20 because made with intent to “hinder, delay, or defraud” creditors, but emphasized: “We have no
21 thought in so holding to impute to [the debtor] a willingness to participate in conduct known to
22 be fraudulent.... [He] acted in the genuine belief that what [he] planned was fair and lawful.
23 Genuine the belief was, but mistaken it was also. Conduct and purpose have a quality imprinted
24 on them by the law.” *Shapiro v. Wilgus*. 287 U.S. 348, 357 (1932).

25
26 Diminution of the assets available to the debtor’s creditors is not necessarily required to
27 “hinder, delay, or defraud” creditors. For example, the age-old legal skepticism of
28 nonpossessory property interests, which stems from their potential for deception, has often
29 resulted in their avoidance under § 4(a)(1) or its predecessors. See Comments (2) and (7(b)). A
30 transaction may “hinder, delay, or defraud” creditors even though it neither reduces the assets
31 available to the debtor’s creditors nor involves any potential deception. See, e.g., *Shapiro v.*
32 *Wilgus*, 287 U.S. 348 (1932) (holding voidable a solvent individual debtor’s conveyance of his
33 assets to a wholly-owned corporation for the purpose of instituting a receivership proceeding not
34 available to an individual).

35
36 A transaction that does not place an asset entirely beyond the reach of creditors may
37 nevertheless “hinder, delay, or defraud” creditors if it makes the asset more difficult for creditors
38 to reach. Simple exchange by a debtor of an asset for a less liquid asset, or disposition of liquid
39 assets while retaining illiquid assets, may be voidable for that reason. See, e.g., *Empire Lighting*
40 *Fixture Co. v. Practical Lighting Fixture Co.*, 20 F.2d 295, 297 (2d Cir. 1927) (L. Hand, J.)
41 (credit sale by a corporation to an affiliate of its plant, leaving the seller solvent with ample
42 accounts receivable, held avoidable because made for the purpose of hindering creditors of the
43 seller, due to the comparative difficulty of creditors realizing on accounts receivable under then-
44 current collection practice). Overcollateralization of a debt for the purpose of making the
45 debtor’s equity in the collateral more difficult for creditors to reach is similarly voidable. See
46 Comment (4) *supra*. Likewise, it is voidable for a debtor intentionally to hinder creditors by

1 transferring assets to a wholly-owned corporation or other organization, as may be the case if the
2 equity interest in the organization is more difficult to realize upon than the assets (either because
3 the equity interest is less liquid, or because the applicable procedural rules are more demanding).
4 See, e.g., *Addison v. Tessier*, 335 P.2d 554, 557 (N.M. 1959); *First Nat'l Bank v. F. C. Trebein*
5 *Co.*, 52 N.E. 834, 837-38 (Ohio 1898); Anno., 85 A.L.R. 133 (1933).

6
7 Under the same principle, § 4(a)(1) would render voidable an attempt by the owners of a
8 corporation to convert it to a different legal form (e.g., limited liability company or partnership)
9 for the purpose of hindering the owners' creditors, as may be the case if an owner's interest in
10 the alternative organization would be subject only to a charging order, and not to execution
11 (which would typically be available against stock in a corporation). See, e.g., *Firmani v.*
12 *Firmani*, 752 A.2d 854, 857 (N.J. Super. Ct. App. Div. 2000); cf. *Interpool Ltd. v. Patterson*, 890
13 F. Supp. 259, 266-68 (S.D.N.Y. 1995). If such a conversion is done with intent to hinder
14 creditors, it contravenes § 4(a)(1) regardless of whether it is effected by conveyance of the
15 corporation's assets to a new entity or by conversion of the corporation to the alternative form.
16 In both cases the owner begins with the stock of the corporation and ends with an ownership
17 interest in the alternative organization, a property right with different attributes. Either is a
18 "transfer" under the designedly sweeping language of § 1(14), which encompasses "every
19 mode...of...parting with an asset or an interest in an asset." Cf., e.g., *United States v. Sims (In re*
20 *Feiler*), 218 F.3d 948 (9th Cir. 2000) (debtor's irrevocable election under the Internal Revenue
21 Code to waive carryback of net operating losses is a "transfer" under the substantially similar
22 definition in the Bankruptcy Code); *Weaver v. Kellogg*, 216 B.R. 563, 573-74 (S.D. Tex. 1997)
23 (debtor's receipt of new notes from its shareholders, replacing existing notes but with different
24 terms, is a "transfer" under that definition).

25
26 Obviously it cannot be the case that every transaction that literally "hinders" or "delays"
27 creditors contravenes § 4(a)(1). For example, every grant of a security interest necessarily
28 "hinders" the debtor's unsecured creditors. Nor can the line between the permissible and the
29 impermissible be drawn coherently by reference to the debtor's mental state, for a sane person
30 knows the natural consequences of his actions, and that includes the adverse consequences to
31 unsecured creditors of the grant of a security interest. Yet it obviously cannot be the case that
32 every grant of a security interest contravenes § 4(a)(1). The answer ultimately must turn on
33 whether the transaction in question unacceptably contravenes norms of creditors' rights, given
34 the devices legislators and courts have allowed debtors that may interfere with those rights.
35 Section 4(a)(1) is the regulatory tool of last resort that restrains debtor ingenuity to decent limits.
36 Thus, for example, it may be one thing to organize a business as a limited liability corporation
37 when none of the owners has reason to anticipate personal liability or financial stress,
38 notwithstanding that the relevant state's LLC statute offers the asset-protecting feature of
39 insulating equity interests in the LLC from execution and provides only for charging orders. It
40 may be quite another for owners to reorganize their business as such an LLC when the clouds of
41 personal liability or financial stress have gathered.

42
43 (8) Nothing in § 4(b) is intended to affect the application of § 2-402(2), 9-205, 9-301, or
44 6-105 of the Uniform Commercial Code. Section 2-402(2) recognizes the generally prevailing
45 rule that retention of possession of goods by a seller may be fraudulent but limits the application
46 of the rule by negating any imputation of fraud from "retention of possession in good faith and

1 current course of trade by a merchant-seller for a commercially reasonable time after a sale or
2 identification.” Section 9-205 explicitly negates any imputation of fraud from the grant of
3 liberty by a secured creditor to a debtor to use, commingle, or dispose of personal property
4 collateral or to account for its proceeds. The section recognizes that it does not relax prevailing
5 requirements for delivery of possession by a pledgor. Moreover, the section does not mitigate
6 the general requirement of § 9-301(1)(b) that a nonpossessory security interest in personal
7 property must be accompanied by notice-filing to be effective against a levying creditor. Finally,
8 like the Uniform Fraudulent Conveyance Act this Act does not pre-empt the statutes governing
9 bulk transfers, such as Article 6 of the Uniform Commercial Code. Compliance with the cited
10 sections of the Uniform Commercial Code does not, however, insulate a transfer or obligation
11 from avoidance. Thus a sale by an insolvent debtor for less than a reasonably equivalent value
12 would be voidable under this Act notwithstanding compliance with the Uniform Commercial
13 Code.

14
15 (10) This Act is not an exclusive law on the subject of voidable transfers and obligations.
16 See § 1, Comment (2). Nothing in this Act is intended to affect the application of Uniform
17 Commercial Code §§ 2-402(2), 9-205, or 9-310 (2014). Section 2-402(2) recognizes the
18 generally prevailing rule that retention of possession of goods by a seller may be voidable, but
19 limits the application of the rule by negating any imputation of voidability from “retention of
20 possession in good faith and current course of trade by a merchant-seller for a commercially
21 reasonable time after a sale or identification.” (Indeed, independently of § 2-402(2), retention of
22 possession of goods in good faith and current course of trade by a merchant-seller for a
23 commercially reasonable time after a sale or identification should not in itself be considered to
24 “hinder, delay, or defraud” any creditor of the merchant-seller under § 4(a)(1) in any case.)
25 Section 9-205 explicitly negates any imputation of voidability from the grant of liberty by a
26 secured creditor to a debtor to use, commingle, or dispose of personal property collateral or to
27 account for its proceeds. The section recognizes that it does not relax prevailing requirements
28 for delivery of possession by a pledgor. Moreover, the section does not mitigate the requirement
29 of § 9-310 that a nonpossessory security interest in personal property generally must be
30 accompanied by a notice-filing in order to be perfected (and a security interest that is not
31 perfected generally will not prevail against a competing interest in the property under the rules of
32 Article 9 of the Uniform Commercial Code). Finally, like the Uniform Fraudulent Conveyance
33 Act, this Act does not preempt statutes governing bulk transfers (including Article 6 of the
34 Uniform Commercial Code, to the extent it remains in force). Compliance with the cited
35 provisions of the Uniform Commercial Code does not, however, insulate a transfer or obligation
36 from being voidable under this Act. Thus a sale by an insolvent debtor for less than a reasonably
37 equivalent value would be voidable under this Act notwithstanding compliance with the Uniform
38 Commercial Code.

39
40 In the same way, this Act operates independently of rules in an organic statute applicable
41 to a business organization that limit distributions by the organization to its equity owners.
42 Compliance with those rules does not insulate such a distribution from being voidable under this
43 Act. It is conceivable that such an organic statute might contain a provision preempting the
44 application of this Act law to such distributions. Cf. Model Business Corporation Act § 152
45 (optional provision added in 1979 preempting the application of “any other statutes of this state
46 with respect to the legality of distributions;” deleted 1984). Such a preemptive provision of

1 course must be respected if applicable, but choice of law considerations may render the provision
2 inapplicable. For example, suppose that the business corporation statute of state X includes such
3 a preemptive provision, and a distribution made by a corporation organized under that statute is
4 challenged as being excessive. Regardless of the forum in which the action is brought, a claim
5 based on business corporation law ordinarily would be expected to be governed by the law of
6 state X, as that claim relates to the internal affairs of the corporation. However, a claim based on
7 avoidance law might well be governed by the law of a jurisdiction other than state X (regardless
8 of whether § 10 of this Act is in force in the forum). In that event state X’s preemptive provision
9 would not apply to bar the avoidance claim. See, e.g., *Faulkner v. Kornman (In re The Heritage*
10 *Organization, L.L.C.*, 413 B.R. 438, 462-63 (Bankr. N.D. Tex. 2009).

11
12 (11) Pursuant to subsection (c), proof of intent to “hinder, delay, or defraud” a creditor
13 under § 4(a)(1) is sufficient if made by a preponderance of the evidence. That is the standard of
14 proof ordinarily applied in civil actions. Subsection (c) thus rejects cases that have imposed an
15 extraordinary standard, typically “clear and convincing evidence,” by analogy to the standard
16 commonly applied to proof of common-law fraud. That analogy is misguided. By its terms,
17 § 4(a)(1) applies to a transaction that “hinders” or “delays” a creditor even if it does not
18 “defraud,” and a transaction that contravenes § 4(a)(1) need not bear any resemblance to
19 common-law fraud. See Comment (9) *supra*. Furthermore, the extraordinary standard of proof
20 commonly applied to common-law fraud originated in cases that were thought to involve a
21 special danger that claims might be fabricated. In the earliest such cases, a court of equity was
22 asked to grant relief on claims that were unenforceable at law for failure to comply with the
23 Statute of Frauds, the Statute of Wills, or the parol evidence rule. In time, extraordinary proof
24 also came to be required in actions seeking to set aside or alter the terms of written instruments.
25 See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 388-89 (1983) and sources cited therein.
26 Those reasons for extraordinary proof do not apply to claims under § 4(a)(1).

27
28 For similar reasons, a procedural rule that imposes extraordinary pleading requirements
29 on a claim of “fraud,” without further gloss, should not be applied to a claim based on § 4(a)(1).
30 The elements of a claim based on § 4(a)(1) are very different from the elements of a claim of
31 common-law fraud. Furthermore, the reasons for such extraordinary pleading requirements do
32 not apply to a claim under § 4(a)(1). Unlike common-law fraud, a claim under § 4(a)(1) is
33 unlikely to cause significant harm to the defendant’s reputation, for the defendant is the
34 transferee or obligee, and the elements of the claim do not require the defendant to have
35 committed even an arguable wrong. Likewise, a claim under § 4(a)(1) is not unusually
36 susceptible to abusive use in a “strike suit,” nor is it apt to be of use to a plaintiff seeking to
37 discover unknown wrongs. See *Janvey v. Alguire*, 846 F.Supp.2d 662, 675-77 (N.D. Tex. 2011);
38 *Carter-Jones Lumber Co. v. Benune*, 725 N.E.2d 330, 331-33 (Ohio App. 1999). Cf. Federal
39 Rules of Civil Procedure, Appendix, Form 21 (2010) (illustrative form of complaint for a claim
40 based on § 4(a)(1) or similar law, which Rule 84 declares sufficient to comply with federal
41 pleading rules).

42
43 (12) Subsection (c) allocates to the party making a claim under § 4 the burden of
44 persuasion as to the elements of the claim. Courts should not apply nonstatutory presumptions
45 that reverse that allocation, and should be wary of nonstatutory presumptions that would dilute it.
46 The command of § 12—that this Act is to be applied so as to effectuate its purpose of making

1 uniform the law among states enacting it—applies with particular cogency to nonstatutory
2 presumptions, for given the elasticity of key terms of this Act (e.g., “hinder, delay, or defraud”)
3 and the potential difficulty of proving others (e.g., the financial condition tests in § 4(a)(2) and
4 § 5), employment of divergent nonstatutory presumptions by enacting jurisdictions may render
5 the law nonuniform as a practical matter. It is not the purpose of subsection (c) to forbid
6 employment of any and all nonstatutory presumptions. Indeed, in some instances a rule of
7 avoidance law applied with a judicially-crafted presumption has won such favor as to be codified
8 in a separate statutory creation, such as the bulk sales laws, the absolute priority rule applicable
9 to reorganizations under Bankruptcy Code § 1129(b)(2)(B)(ii) (2014), and the so-called
10 “constructive fraud” provisions of § 4(a)(2) and § 5(a) of this Act itself. However, subsection (c)
11 and § 12 mean, at the least, that a nonstatutory presumption is suspect if it would alter the
12 statutorily-allocated burden of persuasion, would upset the policy of uniformity, or is an
13 unwarranted carrying-forward of obsolescent principles. Examples of nonstatutory presumptions
14 that should be rejected for those reasons are a presumption that the transferee bears the burden of
15 persuasion as to the debtor’s compliance with the financial condition tests in § 4(a)(2) and § 5, in
16 an action under those provisions, if the transfer was for less than reasonably equivalent value, or
17 if the debtor was merely in debt at the time of the transfer. See *Fidelity Bond & Mtg. Co. v.*
18 *Brand*, 371 B.R. 708, 716-22 (E.D. Pa. 2007) (rejecting such a presumption previously applied in
19 Pennsylvania). *Cf.*, e.g., *Neumeyer v. Crown Funding Corp.*, 128 Cal.Rptr. 366, 371-73 (Cal. Ct.
20 App. 1976); *Ohio Corrugating Co. v. Security Pacific Bus. Cred. (In re Ohio Corrugating Co.)*,
21 70 B.R. 920, 927 (Bankr. N.D. Ohio 1987).
22

23 **SECTION 5. TRANSFERS ~~FRAUDULENT AS TO~~ VOIDABLE BY PRESENT**
24 **CREDITORS.**

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

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

34 (c) A party making a claim based on subsection (a) or (b) has the burden of proving the

1 elements of the claim by a preponderance of the evidence.

2 **Official Comment**

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

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

25
26 (3) Subsection (b) does not extend as far as § 8(a) of the Uniform Fraudulent
27 Conveyance Act and Bankruptcy Code § 548(b) (1984) ~~of the Bankruptcy Code~~ in rendering
28 voidable a transfer or obligation incurred by an insolvent partnership to a partner, who is an
29 insider of the partnership. The transfer to the partner is not vulnerable to avoidance under ~~§ 4(b)~~
30 § 5(b) unless the transfer was for an antecedent debt and the partner had reasonable cause to
31 believe that the partnership was insolvent. The cited provisions of the Uniform Fraudulent
32 Conveyance Act and the Bankruptcy Act make any transfer by an insolvent partnership to a
33 partner voidable. Avoidance of the partnership transfer without reference to the partner’s state of
34 mind and the nature of the consideration exchanged would be unduly harsh treatment of the
35 creditors of the partner and unduly favorable to the creditors of the partnership.

36
37 (4) The principles stated in Comment (12) to § 4 apply to subsection (c) of this section.

38
39 **SECTION 6. WHEN TRANSFER IS MADE OR OBLIGATION IS INCURRED.**

40 For the purposes of this [Act]:

41 (1) a transfer is made:

42 (i) with respect to an asset that is real property other than a fixture, but including

1 the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is
2 so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable
3 law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to
4 the interest of the transferee; and

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

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

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

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

15 (5) an obligation is incurred:

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

17 (ii) if evidenced by a writing record, when the writing executed record signed by

18 the obligor is delivered to or for the benefit of the obligee.

19 **Official Comment**

20
21 (1) One of the uncertainties in the law governing the avoidance of ~~fraudulent~~ transfers
22 and obligations is the difficulty of determining when the cause of action arises. ~~Subsection (b)~~
23 Section 6 clarifies this point in time. For transfers of real estate, ~~section 6(1)~~ subparagraph (1)(i)
24 fixes the time as the date of perfection against a good faith purchaser from the transferor, and for
25 For transfers of fixtures and assets constituting personalty, the time is fixed subparagraph (1)(ii)
26 fixes the time as the date of perfection against a judicial lien creditor not asserting rights under
27 this Act. Perfection under paragraph (1) typically is effected by notice-filing, recordation, or
28 delivery of unequivocal possession. See U.C.C. §§ 9-302, 9-304, and 9-305 U.C.C. §§ 9-310,

1 9-313 (2014) (security interest in personal property generally is perfected by notice-filing or
2 delivery of possession to transferee); 4 American Law of Property §§ 17.10-17.12 (1952)
3 (recording of transfer or delivery of possession to grantee required for perfection against bona
4 fide purchaser from grantor). The provision for postponing the time a transfer is made until its
5 perfection is an adaptation of Bankruptcy Code § 548(d)(1) (1984). ~~of the Bankruptcy Code.~~
6 When no steps are taken to perfect a transfer that applicable law permits to be perfected, the
7 transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to
8 avoid it; without such a provision to cover that eventuality, an unperfected transfer would
9 arguably be immune to attack. Some transfers—*e.g.*, an assignment of a bank account, ~~creation~~
10 ~~of a security interest in money~~, or execution of a marital or premarital agreement for the
11 disposition of property owned by the parties to the agreement—may not be amenable to
12 perfection as against a bona fide purchaser or judicial lien creditor. When a transfer is not
13 perfectible as provided in paragraph ~~(4)~~ (1), the transfer occurs for the purpose of this Act when
14 the transferor effectively parts with an interest in the asset as provided in ~~§ 1(12)~~ § 1(17) *supra*.
15

16 (2) Paragraph (4) requires the transferor to have rights in the asset transferred before the
17 transfer is made for the purpose of this section. This provision makes clear that its purpose may
18 not be circumvented by notice-filing or recording of a document evidencing an interest in an
19 asset to be acquired in the future. *Cf.* Bankruptcy Code § 547(e) (1984); ~~U.C.C. § 9-203(1)(e).~~
20 U.C.C. § 9-203(b)(2) (2014).
21

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

28 An obligation may be avoided ~~as fraudulent~~ under this Act if it is incurred under the
29 circumstances specified in § 4(a) or § 5(a). The debtor may receive reasonably equivalent value
30 in exchange for an obligation incurred even though the benefit to the debtor is indirect. See
31 *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d at 991-92; *Williams v. Twin City Co.*, 251
32 F.2d 678, 681 (9th Cir. 1958); Rosenberg, *supra* at 243-46.
33

34 **SECTION 7. REMEDIES OF CREDITORS.**

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

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

39 [(2) an attachment or other provisional remedy against the asset transferred or

1 other property of the transferee in accordance with the procedure prescribed by [];]

2 (3) subject to applicable principles of equity and in accordance with applicable

3 rules of civil procedure,

4 (i) an injunction against further disposition by the debtor or a transferee, or

5 both, of the asset transferred or of other property;

6 (ii) appointment of a receiver to take charge of the asset transferred or of

7 other property of the transferee; or

8 (iii) any other relief the circumstances may require.

9 (b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the

10 court so orders, may levy execution on the asset transferred or its proceeds.

11 **Official Comment**

12

13 (1) This section is derived from §§ 9 and 10 of the Uniform Fraudulent Conveyance Act.

14 Section 9 of that Act specified the remedies of creditors whose claims have matured, and § 10

15 enumerated the remedies available to creditors whose claims have not matured. A creditor

16 holding an unmatured claim may be denied the right to receive payment ~~for~~ from the proceeds of

17 a sale on execution until his claim has matured, but the proceeds may be deposited in court or in

18 an interest-bearing account pending the maturity of the creditor’s claim. The remedies specified

19 in this section are not exclusive.

20

21 (2) The availability of an attachment or other provisional remedy has been restricted by

22 amendments of statutes and rules of procedure to reflect views of the Supreme Court expressed

23 in *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969), and its progeny. This

24 judicial development and the procedural changes that followed in its wake do not preclude resort

25 to attachment by a creditor in seeking avoidance of a ~~fraudulent~~ transfer or obligation. See, e.g.,

26 *Britton v. Howard Sav. Bank*, 727 F.2d 315, 317-20 (3d Cir. 1984); *Computer Sciences Corp. v.*

27 *Sci-Tek Inc.*, 367 A.2d 658, 661 (Del. Super. 1976); *Great Lakes Carbon Corp. v. Fontana*, 54

28 A.D.2d 548, 387 N.Y.S.2d 115 (1st Dep’t 1976). Section 7(a)(2) continues the authorization for

29 the use of attachment contained in § 9(b) of the Uniform Fraudulent Conveyance Act, or of a

30 similar provisional remedy, when the state’s procedure provides therefor, subject to the

31 constraints imposed by the due process clauses of the United States and state constitutions.

32

33 (3) Subsections (a) and (b) of § 10 of the Uniform Fraudulent Conveyance Act

34 authorized the court, in an action on a ~~fraudulent~~ voidable transfer or obligation, to restrain the

35 defendant from disposing of his property, to appoint a receiver to take charge of his property, or

36 to make any order the circumstances may require. Section 10, however, applied only to a

1 creditor whose claim was unmatured. There is no reason to restrict the availability of these
2 remedies to such a creditor, and the courts have not so restricted them. See, e.g., *Lipskey v.*
3 *Voloshen*, 155 Md. 139, 143-45, 141 Atl. 402, 404-05 (1928) (judgment creditor granted
4 injunction against disposition of property by transferee, but appointment of receiver denied for
5 lack of sufficient showing of need for such relief); *Matthews v. Schusheim*, 36 Misc.2d 918, 922-
6 23, 235 N.Y.S.2d 973, 976-77, 991-92 (Sup.Ct. 1962) (injunction and appointment of receiver
7 granted to holder of claims for fraud, breach of contract, and alimony arrearages; whether
8 creditor's claim was mature said to be immaterial); *Oliphant v. Moore*, 155 Tenn. 359, 362-63,
9 293 S.W. 541, 542 (1927) (tort creditor granted injunction restraining alleged tortfeasor's
10 disposition of property).

11
12 (4) As under the Uniform Fraudulent Conveyance Act, a creditor is not required to
13 obtain a judgment against the debtor-transferor or to have a matured claim in order to proceed
14 under subsection (a). See §§ 1(3) and ~~(4)~~ 1(4) *supra*; *American Surety Co. v. Conner*, 251 N.Y.
15 1, 166 N.E. 783, 65 A.L.R. 244 (1929); 1 G. Glenn, *Fraudulent Conveyances and Preferences*
16 129 (Rev. ed. 1940).

17
18 (5) The provision in subsection (b) for a creditor to levy execution on a ~~fraudulently~~
19 transferred asset continues the availability of a remedy provided in § 9(b) of the Uniform
20 Fraudulent Conveyance Act. See, e.g., *Doland v. Burns Lbr. Co.*, 156 Minn. 238, 194 N.W. 636
21 (1923); *Montana Ass'n of Credit Management v. Hergert*, 181 Mont. 442, 449, 453, 593 P.2d
22 1059, 1063, 1065 (1979); *Corbett v. Hunter*, 292 Pa.Super. 123, 128, 436 A.2d 1036, 1038
23 (1981); see also *American Surety Co. v. Conner*, 251 N.Y. 1, 6, 166 N.E. 783, 784, 65 A.L.R.
24 244, 247 (1929) ("In such circumstances he [the creditor] might find it necessary to indemnify
25 the sheriff and, when the seizure was erroneous, assumed the risk of error"); McLaughlin,
26 *Application of the Uniform Fraudulent Conveyance Act*, 46 Harv.L.Rev. 404, 441-42 (1933).

27
28 (6) The remedies specified in § 7, like those enumerated in §§ 9 and 10 of the Uniform
29 Fraudulent Conveyance Act, are cumulative. *Lind v. O. N. Johnson Co.*, 204 Minn. 30, 40, 282
30 N.W. 661, 667, 119 A.L.R. 940 (1939) (Uniform Fraudulent Conveyance Act held not to impair
31 or limit availability of the "old practice" of obtaining judgment and execution returned
32 unsatisfied before proceeding in equity to set aside a transfer); *Conemaugh Iron Works Co. v.*
33 *Delano Coal Co., Inc.*, 298 Pa. 182, 186, 148 A. 94, 95 (1929) (Uniform Fraudulent Conveyance
34 Act held to give an "additional optional remedy" and not to "deprive a creditor of the right, as
35 formerly, to work out his remedy at law"); 1 G. Glenn, *Fraudulent Conveyances and Preferences*
36 120, 130, 150 (Rev. ed. 1940).

37
38 (7) If a transfer or obligation contravenes § 4 or § 5, the basic remedy provided by this
39 Act is its avoidance under subsection (a)(1). "Avoidance" is a term of art in this Act, for it does
40 not mean that the transfer or obligation is simply rendered void. It has long been established that
41 a transfer avoidable by a creditor under this Act or its predecessors is nevertheless valid as
42 between the debtor and the transferee. For example, in the case of a transfer of property worth
43 \$100 by Debtor to Transferee, held voidable in a suit by Creditor-1 who is owed \$80 by Debtor,
44 "avoidance" of the transfer should leave the \$20 surplus with Transferee. Debtor is not entitled
45 to recover the surplus. Nor is Debtor's Creditor-2 entitled to the windfall, at Transferee's
46 expense, of being able to pursue the surplus by reason of Creditor-1's action (though of course

1 Creditor-2 may be entitled to bring his own avoidance action to pursue the surplus). The
2 foregoing principle is embedded in the language of subsection (a)(1), which prescribes
3 “avoidance” only “to the extent necessary to satisfy the creditor’s claim.” Section 9(a) of the
4 Uniform Fraudulent Conveyance Act was similarly limited. See, e.g., *Becker v. Becker*, 416
5 A.2d 156, 162 (Vt. 1980); *De Martini v. De Martini*, 52 N.E.2d 138, 141 (Ill. 1943); *Markward*
6 *v. Murrah*, 156 S.W.2d 971, 974 (Tex. 1941); *Society Milion Athena, Inc. v. National Bank of*
7 *Greece*, 22 N.E.2d 374, 377 (N.Y. 1939); *National Radiator Corp. v. Parad*, 8 N.E.2d 794, 796-
8 97 (Mass. 1937); *Doty v. Wheeler*, 182 A. 468, 471 (Conn. 1936); *Brownell Realty, Inc. v. Kelly*,
9 303 N.W.2d 871, 875 (Mich. Ct. App. 1981); *Patterson v. Missler*, 48 Cal.Rptr, 215, 222-24
10 (Cal. Dist. Ct. App. 1965); 1 G. Glenn, *Fraudulent Conveyances and Preferences* § 114, at 225
11 (Rev. ed. 1940). Transferee’s mental state is irrelevant to the foregoing, but a good-faith
12 Transferee may also be afforded protection by § 8.

13
14 It follows that “avoidance” of an obligation under subsection (a)(1) likewise should not
15 mean its cancellation, but rather a remedy that recognizes the existence of the obligation and the
16 superiority of the plaintiff creditor’s interest over the obligee’s interest. Ordinarily that should
17 mean subordination of the obligation to the plaintiff creditor’s claim against the debtor. That
18 would entail disgorgement by the obligee of any payments received or receivable on the
19 obligation, to the extent necessary to satisfy the plaintiff creditor’s claim, with the obligee being
20 subrogated to the plaintiff creditor when the latter’s claim is paid. Of course, if the obligation is
21 unenforceable for reasons other than contravention of this Act, contravention of this Act does not
22 render the obligation enforceable.

23
24 This Comment relates to the meaning of subsection (a)(1). If this Act is invoked in a
25 bankruptcy proceeding, the remedial entitlements provided by the Bankruptcy Code may differ
26 from those provided by this Act.

27
28 **SECTION 8. DEFENSES, LIABILITY, AND PROTECTION OF TRANSFEEE.**

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

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

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

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

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

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

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

10 (2) enforcement of any obligation incurred; or

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

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

14 (1) termination of a lease upon default by the debtor when the termination is
15 pursuant to the lease and applicable law; or

16 (2) enforcement of a security interest in compliance with Article 9 of the Uniform
17 Commercial Code.

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

19 (1) to the extent the insider gave new value to or for the benefit of the debtor after
20 the transfer was made unless the new value was secured by a valid lien;

21 (2) if made in the ordinary course of business or financial affairs of the debtor and
22 the insider; or

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

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

2 (g) The following rules determine the burden of proving matters referred to in this
3 section:

4 (1) A party that seeks to invoke subsection (a), (d), (e) or (f) has the burden of
5 proving the applicability of that provision.

6 (2) Except as otherwise provided in paragraphs (3) and (4), the creditor has the
7 burden of proving each applicable element of subsection (b) or (c).

8 (3) The transferee has the burden of proving good faith and value under
9 subsection (b)(2).

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

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

14 **Reporter's Note**

15
16 The defense provided by § 8(a) by its terms applies to a good-faith transferee who gives
17 reasonably equivalent value, and it does not require that value to be received by the debtor. The
18 Drafting Committee is considering the suggestion that the § 8(a) defense should be available to a
19 transferee only if the value given is received by the debtor. The bracketed language in this draft,
20 which remains under consideration, would implement that suggestion.

21
22 Two key provisions of the Act have the effect of protecting a transferee who gives value
23 in certain circumstances, but only if that value goes to the debtor. See § 4(a)(2) (rendering a
24 transfer voidable if “the debtor made the transfer...without receiving a reasonably equivalent
25 value in exchange for the transfer”); § 5(a) (similar). On the other hand, other provisions of the
26 Act have the effect of protecting a transferee who gives value in other circumstances, even if the
27 value goes to someone other than the debtor. See, *e.g.*, § 8(b)(2). Statutes other than this Act
28 also provide comparable protection in some circumstances to a transferee who has given value,
29 even though that value does not go to the person aggrieved by the transfer. See, *e.g.*, UCC
30 § 2-403(1) (awarding good title to a good faith purchaser for value of a good from a person who
31 had only “voidable title”; the value given by the purchaser need not be received by the person
32 whose title is thus expropriated, and indeed in the usual case the value will be received by the
33 transferor who had only “voidable title,” who is by definition a fraudster).

1 Analysis of the § 8(a) defense is confused by the fact that there is no similar defense in
2 the parallel provisions of Bankruptcy Code §§ 548, 550, which were enacted only six years
3 before this Act was promulgated. Furthermore, it is difficult to account for the fact that the
4 defense is available only to a claim under § 4(a)(1) (the so-called “actual fraud” theory), and is
5 not available to a claim under §§ 4(a)(2), 5(a) (the so-called “constructive fraud” theories).
6

7 The situations that have come to the Drafting Committee’s attention in which this issue
8 would arise involve an innocent provider of property or services at a fair price, who receives
9 payment from an affiliate of the person who actually received the property or services. The case
10 that has given the most explicit attention to this issue to date is *Quad City Bank v. Berstler (In re*
11 *Chapman Lumber Co., Inc.)*, 2007 WL 2316528 (Bankr. N.D. Iowa Aug. 8, 2007), the facts of
12 which are as follows: The debtor was a lumber company. In the years before the debtor’s
13 bankruptcy filing its sole officer (Keith) received some \$5800 of hair removal services from an
14 unrelated innocent hair care professional (Rebeka). Keith paid for Rebeka’s services with checks
15 drawn on a bank account of the debtor. After the debtor filed for bankruptcy an action was
16 brought against Rebeka under § 4(a)(1) to recover those payments, on the theory that the debtor
17 had made them with intent to hinder, delay, or defraud creditors. The court held that Rebeka was
18 entitled to the § 8(a) defense because she had acted in good faith and her services were
19 reasonably priced. In the court’s view, Rebeka was entitled to the § 8(a) defense even though the
20 debtor had not received the value Rebeka provided. (The court also held, in the alternative, that
21 intent on the part of the debtor to hinder, delay, or defraud creditors under § 4(a)(1) had not been
22 established. For discussion purposes it is convenient to ignore the alternative holding and
23 assume that a future Rebeka would be confronted by a debtor having the requisite intent.)
24

25 The Drafting Committee has not yet reached a conclusion on this subject. Three basic
26 positions have been tabled.
27

- 28 • Position A: Leave § 8(a) as it stands (and thus allow Rebeka to keep her payment).
29
- 30 • Position B: Retain § 8(a) but add the bracketed language limiting the defense to
31 situations in which the “reasonably equivalent value” given by the transferee goes to
32 the debtor. Under this position, Rebeka would forfeit her payment.
33
- 34 • Position C: Delete § 8(a). Under this position too, Rebeka would forfeit her
35 payment. There are two justifications for this position: (i) it would align this Act
36 with Bankruptcy Code §§ 548, 550, which contain no similar defense, and (ii) § 8(a)
37 as modified per Position B would add little to the protection already afforded by
38 § 8(d) to a good-faith transferee who gives value to the debtor.
39

40 Analysis is complicated by the fact that even if § 8(a) were deleted, a court might be
41 willing to protect a future Rebeka by recharacterizing the transaction so that the funds in the
42 debtor’s bank account are viewed as being first constructively paid by the debtor to Keith, and
43 then paid over by Keith to Rebeka. Under that characterization, Rebeka should qualify as a
44 “subsequent transferee” who is protected by § 8(b)(2). Courts have sometimes recharacterized
45 transactions with a view to achieving equitable results after application of avoidance law
46 (notoriously so in analyzing leveraged acquisitions), but there is no agreed methodology for

1 determining when recharacterization is appropriate. Hence reliance on this theory would be
2 problematic. Furthermore, the § 8(b)(2) defense by its literal terms is available only as a defense
3 to an action for a money judgment under § 8(b), not to an action for avoidance under § 7. That
4 too is an inexplicable difference between this Act and the Bankruptcy Code, which provides a
5 defense similar to § 8(b)(2) both to avoidance and to a money judgment. See Bankruptcy Code
6 § 550(a)(2), (b). It may be desirable to amend § 8(b) to rectify that inconsistency.

7 8 **Official Comment** 9

10 (1) Subsection (a) states the rule that applies when the transferee establishes a complete
11 defense to the action for avoidance based on Section 4(a)(1). The subsection is an adaptation of
12 the exception stated in § 9 of the Uniform Fraudulent Conveyance Act. The Pursuant to
13 subsection (g), the person who invokes this defense carries the burden of establishing good faith
14 and the reasonable equivalence of the consideration exchanged. *Chorost v. Grand Rapids*
15 *Factory Showrooms, Inc.*, 77 F. Supp. 276, 280 (D.N.J. 1948), *aff'd*, 172 F.2d 327, 329 (3d Cir.
16 1949).

17
18 (2) Subsection (b) is derived from Bankruptcy Code § 550(a) (1984). ~~of the Bankruptcy~~
19 ~~Code.~~ The value of the asset transferred is limited to the value of the levyable interest ~~on~~ of the
20 transferor, exclusive of any interest encumbered by a valid lien. See § 1(2) *supra*.

21
22 The requirement of Bankruptcy Code § 550(b)(1) (1984) that a transferee be “without
23 knowledge of the voidability of the transfer” in order to be protected has been omitted as
24 inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with
25 the good faith that is required of a protected transferee. Knowledge of the voidability of a
26 transfer would seem to involve a legal conclusion. Determination of the voidability of the
27 transfer ought not to require the court to inquire into the legal sophistication of the transferee.

28 29 **Reporter’s Note** 30

31 The new paragraph in Comment (2) is relocated from Section 2, Comment (1). This change is in
32 the West Text and presumably was an earlier official correction.

33
34 (3) Subsection (c) is new. The measure of the recovery of a ~~defrauded~~ creditor against a
35 ~~fraudulent~~ transferee is usually limited to the value of the asset transferred at the time of the
36 transfer. See, e.g., *United States v. Fernon*, 640 F.2d 609, 611 (5th Cir. 1981); *Hamilton Nat’l*
37 *Bank of Boston v. Halstead*, 134 N.Y. 520, 31 N.E. 900 (1892); *cf. Buffum v. Peter Barceloux*
38 *Co.*, 289 U.S. 227 (1932) (transferee’s objection to trial court’s award of highest value of asset
39 between the date of the transfer and the date of the decree of avoidance rejected because an
40 award measured by value as of time of the transfer plus interest from that date would have been
41 larger). The premise of § 8(c) is that changes in value of the asset transferred that occur after the
42 transfer should ordinarily not affect the amount of the creditor’s recovery. Circumstances may
43 require a departure from that measure of the recovery, however, as the cases decided under the
44 Uniform Fraudulent Conveyance Act and other laws derived from the Statute of 13 Elizabeth
45 illustrate. Thus, if the value of the asset at the time of levy and sale to enforce the judgment of
46 the creditor has been enhanced by improvements of the asset transferred or discharge of liens on

1 the property, a good faith transferee should be reimbursed for the outlay for such a purpose to the
2 extent the sale proceeds were increased thereby. See Bankruptcy Code § 550(d) (1984); *Janson*
3 *v. Schier*, 375 A.2d 1159, 1160 (N.H. 1977); Anno., 8 A.L.R. 527 (1920). If the value of the
4 asset has been diminished by severance and disposition of timber or minerals or fixtures, the
5 transferee should be liable for the amount of the resulting reduction. See *Damazo v. Wahby*, 269
6 Md. 252, 257, 305 A.2d 138, 142 (1973). If the transferee has collected rents, harvested crops,
7 or derived other income from the use or occupancy of the asset after the transfer, the liability of
8 the transferee should be limited in any event to the net income after deduction of the expense
9 incurred in earning the income. Anno., 60 A.L.R.2d 593 (1958). On the other hand, adjustment
10 for the equities does not warrant an award to the creditor of consequential damages alleged to
11 accrue from mismanagement of the asset after the transfer.

12
13 (4) Subsection (d) is an adaptation of Bankruptcy Code § 548(c) (1984). ~~of the~~
14 ~~Bankruptcy Code~~. An insider who receives property or an obligation from an insolvent debtor as
15 security for or in satisfaction of an antecedent debt of the transferor or obligor is not a good faith
16 transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at
17 the time the transfer was made or the obligation was incurred. If a foreclosure sale does not
18 qualify for the benefit of § 3(b) or § 8(e)(2) because it was not conducted in accordance with the
19 requirements of applicable law, the buyer, if in good faith, will still be entitled to the benefit of
20 subsection (d) to the extent of the value paid by the buyer in the sale.

21
22 (5) Subsection (e)(1) rejects the rule adopted in *Darby v. Atkinson (In re Farris)*, 415
23 F.Supp. 33, 39-41 (W.D.Okla. 1976), that termination of a lease on default in accordance with its
24 terms and applicable law may constitute a ~~fraudulent~~ voidable transfer. Subsection (e)(2)
25 protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement of
26 a secured creditor's rights pursuant to and in compliance with the provisions of ~~Part 5~~ Part 6 of
27 Article 9 of the Uniform Commercial Code. Cf. *Calaiaro v. Pittsburgh Nat'l Bank (In re Ewing)*,
28 33 B.R. 288, 9 C.B.C.2d 526, CCH B.L.R. ¶ 69,460 (Bankr. W.D.Pa. 1983) (sale of pledged
29 stock held subject to avoidance ~~as fraudulent transfer~~ in § 548 of the Bankruptcy Code), *rev'd*,
30 36 B.R. 476 (W.D.Pa. 1984) (transfer held not voidable because deemed to have occurred more
31 than one year before bankruptcy petition filed). ~~Although a secured creditor may enforce rights~~
32 ~~in collateral without a sale under § 9-502 or § 9-505 of the Code, the creditor must proceed in~~
33 ~~good faith (U.C.C. § 9-103) and in a "commercially reasonable" manner. The "commercially~~
34 ~~reasonable" constraint is explicit in U.C.C. § 9-502(2) and is implicit in § 9-505. See 2 G.~~
35 ~~Gilmore, Security Interests in Personal Property 1224-27 (1965).~~ Although a secured creditor
36 may enforce rights in collateral without a sale under U.C.C. §§ 9-607-9-608 (2014) or U.C.C.
37 §§ 9-620-9-622 (2014), the creditor must proceed in good faith. See U.C.C. § 1-304 (2014). An
38 enforcement of rights in collateral that is purportedly based on §§ 9-607-9-608 or §§ 9-620-
39 9-622 but that is not made in good faith is not protected by subsection (e)(2).

40
41 (6) Subsection (f) provides additional defenses against the avoidance of a preferential
42 transfer to an insider under § 5(b).

43 Paragraph (1) is adapted from Bankruptcy Code § 547(c)(4) (1984), ~~of the Bankruptcy~~
44 ~~Code~~, which permits a preferred creditor to set off the amount of new value subsequently
45 advanced against the recovery of a voidable preference by a trustee in bankruptcy to the debtor

1 without security. The new value may consist not only of money, goods, or services delivered on
2 unsecured credit but also of the release of a valid lien. See, e.g., *In re Ira Haupt & Co.*, 424 F.2d
3 722, 724 (2d Cir. 1970); *Baranow v. Gibraltar Factors Corp. (In re Hygrade Envelope Co.)*, 393
4 F.2d 60, 65-67 (2d Cir.), cert. denied, 393 U.S. 837 (1968); *In re John Morrow & Co.*, 134 F.
5 686, 688 (S.D. Ohio 1901). It does not include an obligation substituted for a prior obligation. If
6 the insider receiving the preference thereafter extends new credit to the debtor but also takes
7 security from the debtor, the injury to the other creditors resulting from the preference remains
8 undiminished by the new credit. On the other hand, if a lien taken to secure the new credit is
9 itself voidable by a judicial lien creditor of the debtor, the new value received by the debtor may
10 appropriately be treated as unsecured and applied to reduce the liability of the insider for the
11 preferential transfer.

12
13 Paragraph (2) is derived from ~~§ 546(e)(2) of the Bankruptcy Code~~ Bankruptcy Code
14 § 547(c)(2) (1984), which excepts certain payments made in the ordinary course of business or
15 financial affairs from avoidance by the trustee in bankruptcy as preferential transfers. Whether a
16 transfer was in the “ordinary course” requires a consideration of the pattern of payments or
17 secured transactions engaged in by the debtor and the insider prior to the transfer challenged
18 under § 5(b). See Tait & Williams, *Bankruptcy Preference Laws: The Scope of Section*
19 *547(c)(2)*, 99 Banking L.J. 55, 63-66 (1982). The defense provided by paragraph (2) is
20 available, irrespective of whether the debtor or the insider or both are engaged in business, but
21 the prior conduct or practice of both the debtor and the insider-transferee is relevant.

22
23 Paragraph (3) is new and reflects a policy judgment that an insider who has previously
24 extended credit to a debtor should not be deterred from extending further credit to the debtor in a
25 good faith effort to save the debtor from a forced liquidation in bankruptcy or otherwise. A
26 similar rationale has sustained the taking of security from an insolvent debtor for an advance to
27 enable the debtor to stave off bankruptcy and extricate itself from financial stringency.
28 *Blackman v. Bechtel*, 80 F.2d 505, 508-09 (8th Cir. 1935); *Olive v. Tyler (In re Chelan Land*
29 *Co.)*, 257 F. 497, 5 A.L.R. 561 (9th Cir. 1919); *In re Robin Bros. Bakeries, Inc.*, 22 F.Supp. 662,
30 663-64 (N.D. Ill. 1937); see *Dean v. Davis*, 242 U.S. 438, 444 (1917). The amount of the present
31 value given, the size of the antecedent debt secured, and the likelihood of success for the
32 rehabilitative effort are relevant considerations in determining whether the transfer was in good
33 faith.

34
35 (7) Subsection (g) is new. Together with § 4(c) and § 5(c), it provides uniform rules on
36 burdens and standards of proof relating to the operation of this Act. The principles stated in
37 Comment (12) to § 4 apply to subsection (g).

38
39 (8) The provisions of § 8 are integral elements of the rights created by this Act.
40 Accordingly, they should apply if this Act is invoked in a bankruptcy proceeding pursuant to
41 Bankruptcy Code § 544(b) (2014). That follows from the fundamental principle that property
42 rights in bankruptcy should be the same as outside bankruptcy, unless a federal interest compels
43 a different result. See *Butner v. United States*, 440 U.S. 48, 55 (1979). Section 8(b) limits
44 damages under this Act to the amount of the plaintiff creditor’s claim, and that limitation is
45 overridden in bankruptcy by the rule of *Moore v. Bay*, 284 U.S. 4 (1931), which Congress
46 unmistakably maintained when it enacted the Bankruptcy Code. In the absence of a clear

1 override by the Bankruptcy Code or clear conflict with its principles, however, other aspects of
2 § 8 should apply if this Act is invoked in bankruptcy. See. e.g., *Decker v. Tramiel (In re JTS*
3 *Corp.*, 617 F.3d 1102, 1110-16 (9th Cir. 2010) (holding that § 8(d) applies to a claim brought
4 under this Act in a bankruptcy proceeding pursuant to Bankruptcy Code § 544(b)).
5

6 **SECTION 9. EXTINGUISHMENT OF [CLAIM FOR RELIEF] [CAUSE OF**

7 **ACTION].** A [claim for relief] [cause of action] with respect to a ~~fraudulent~~ transfer or
8 obligation under this [Act] is extinguished unless action is brought:

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

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

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

16 **Official Comment**

17
18 (1) This section is new. Its purpose is to make clear that lapse of the statutory periods
19 prescribed by the section bars the right and not merely the remedy. ~~See Restatement of Conflict~~
20 ~~of Laws 2d § 143 Comments (b) & (c) (1971).~~ The section rejects the rule applied in *United*
21 *States v. Gleneagles Inv. Co.*, 565 F.Supp. 556, 583 (M.D.Pa. 1983) (state statute of limitations
22 held not to apply to action by United States based on Uniform Fraudulent Conveyance Act).
23 Another consequence of barring the right and not merely the remedy is that, under *Restatement*
24 *(Second) of Conflict of Laws* § 143 (1971), if an action is brought in jurisdiction A and the action
25 is determined to be governed by this Act as enacted in jurisdiction B, the action cannot be
26 maintained if it is time-barred in jurisdiction B. The 1988 revision of §§ 142 and 143 of the
27 *Restatement (Second) of Conflict of Laws*, which eliminated the right/remedy distinction, should
28 not be applied to this Act. Because a voidable transfer or obligation may injure all of a debtor's
29 many creditors, there is need for a uniform and predictable cutoff time.
30

31 (2) Statutes of limitations applicable to the avoidance of ~~fraudulent~~ transfers and
32 obligations vary widely from state to state and are frequently subject to uncertainties in their
33 application. See Hesson, *The Statute of Limitations in Actions to Set Aside Fraudulent*
34 *Conveyances and in Actions Against Directors by Creditors of Corporations*, 32 Cornell L.Q.
35 222 (1946); Annos., 76 A.L.R. 864 (1932), 128 A.L.R. 1289 (1940), 133 A.L.R. 1311 (1941), 14
36 A.L.R.2d 598 (1950), and 100 A.L.R.2d 1094 (1965). Together with § 6, this section should

1 mitigate the uncertainty and diversity that have characterized the decisions applying statutes of
2 limitations to actions to ~~fraudulent~~ avoid transfers and obligations. The periods prescribed apply,
3 whether the action under this Act is brought by ~~the a~~ creditor ~~defrauded~~ or by a purchaser at a
4 sale on execution levied pursuant to § 7(b) and whether the action is brought against the original
5 transferee or subsequent transferee. The prescription of statutory periods of limitation does not
6 preclude the barring of an avoidance action for laches. See ~~§ 10~~ § 11 and the accompanying
7 Comment *infra*.

8
9 (3) Subsection (a) provides that the four year period ordinarily applicable to a claim
10 under § 4(a)(1) is extended to “one year after the transfer or obligation was or could reasonably
11 have been discovered by the claimant.” Antecedents to that “discovery rule” have long existed
12 in common law and in other statutes, and courts may take different approaches to filling out the
13 meaning of subsection (a) by reference to such precedents. Thus, subsection (a) literally starts
14 the one year period when the “transfer” was or could reasonably have been discovered by the
15 claimant, but cases applying subsection (a) have held that the period starts only when the transfer
16 and its wrongful nature were or could reasonably have been discovered. See, e.g., *Freitag v.*
17 *McGhie*, 947 P.2d 1186 (Wash. 1997); *State Farm Mut. Auto. Ins. Co. v. Cordua*, 834 F.Supp.2d
18 301, 306-08 (E.D. Pa. 2011). A recurring situation to which that distinction may be relevant is
19 Spouse X’s transfer of assets beyond reach of creditors, made in anticipation of divorcing
20 Spouse Y after the four year period has elapsed and made for the purpose of thwarting
21 Spouse Y’s economic interests in the divorce. Spouse Y may well know of the transfer long
22 before Spouse Y learns its wrongful purpose. Of course, even if the period specified in
23 subsection (a) is held to have lapsed in a given case, law other than this Act might allow the
24 transferred assets to be considered in making a division of assets in the ensuing divorce case.

Reporter’s Note

26
27
28 The provisions of the *Restatement (Second) of Conflict of Laws* referred to in
29 Comment (1) to Section 9 above are as follows:

[1971] § 142. Statute of Limitations

32 (1) An action will not be maintained if it is barred by the statute of limitations of the
33 forum, including a provision borrowing the statute of limitations of another state.

34 (2) An action will be maintained if it is not barred by the statute of limitations of the
35 forum, even though it would be barred by the statute of limitations of another state,
36 except as stated in § 143.

[1971] § 143. Foreign Statute of Limitations Barring the Right

39 An action will not be entertained in another state if it is barred in the state of the
40 otherwise applicable law by a statute of limitations which bars the right and not merely
41 the remedy.

[1988 Revision] The following § 142 replaces the original §§ 142 and 143:

44 Whether a claim will be maintained against the defense of the statute of limitations is
45 determined under the principles stated in § 6. In general, unless the exceptional
46 circumstances of the case make such a result unreasonable:

- 1 (1) The forum will apply its own statute of limitations barring the claim.
2 (2) The forum will apply its own statute of limitations permitting the claim unless:
3 (a) maintenance of the claim would serve no substantial interest of the forum; and
4 (b) the claim would be barred under the statute of limitations of a state having a
5 more significant relationship to the parties and the occurrence.
6

7 **SECTION 10. GOVERNING LAW.**

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

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

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

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

14 (b) A claim in the nature of a claim based on Section 4 or 5 is governed by the local law
15 of the jurisdiction in which the debtor is located when the transfer is made or the obligation is
16 incurred

17 **Reporter's Note**

18
19 **1. Overview of Section 10.**

20
21 The Act currently has no choice of law provision. The common law principles of choice
22 of law that courts have applied to transfers governed by the Act, or by comparable law in
23 jurisdictions that have not enacted the Act, are diverse, and usually are extremely vague and
24 unpredictable. The need for a clear choice of law rule for transactions of this nature was the
25 principal impetus for this amendment project.
26

27 Section 10 sets forth a simple and comprehensive choice of law rule. It should be
28 thought of as the "baseline" choice of law rule, because there is general agreement among the
29 members of the Drafting Committee that there is need for an "escape hatch" in the event that the
30 baseline rule points to a jurisdiction whose avoidance law is substantially debased. Such a
31 jurisdiction is sometimes referred to in this Note as an "asset haven."

32 The Drafting Committee had little difficulty in concluding that the rule set forth in
33 Section 10 is the appropriate general rule. And, as just noted, the Drafting Committee also had
34 little difficulty in concluding that an escape hatch for asset havens is necessary. Discussion in
35 the Drafting Committee has centered on defining that escape hatch. This draft takes a minimalist

1 approach, for the statutory text sets forth no escape hatch at all. Rather, it contemplates that a
2 comment would state that courts should override the statutory choice of law rule if the statutory
3 rule would point to a jurisdiction that is an asset haven—*i.e.*, its avoidance law is so debased as
4 to violate a fundamental public policy of the forum state.

5
6 The Drafting Committee welcomes the views of Commissioners as to this and other
7 approaches to the escape hatch.

8
9 Part 2 of this Note elaborates on the baseline rule. Part 3 addresses different approaches
10 to the escape hatch. Part 4 sets forth for comparative purposes the version of Section 10
11 considered by the Drafting Committee at its April meeting (draft dated March 26, 2013, referred
12 to in this Note as the “April draft”), which took a different approach to the escape hatch.

13 14 **2. The baseline choice of law rule in Section 10.**

15
16 Section 10(b) provides that a claim in the nature of a claim governed by the Act is
17 governed by the law of the jurisdiction in which the debtor is “located” at the time the challenged
18 transfer is made or the challenged obligation is incurred. Section 6 defines the time at which a
19 transfer is made or obligation is incurred for purposes of the Act. That definition, which was
20 originally included for use in connection with the rule on limitation of actions set forth in § 9,
21 will apply for the purpose of § 10 as well.

22
23 Basing choice of law on the location of the debtor is analogous to the rule set forth in
24 UCC § 9-301, which provides that the priority of a security interest in intangible property is
25 generally governed by the law of the jurisdiction in which the debtor is located. The analogy is
26 apt, because the substantive rules of this Act are a species of priority rule, in that they determine
27 the circumstances in which a debtor’s creditors, rather than the debtor’s transferee, have superior
28 rights in property transferred by the debtor.

29
30 In keeping with that analogy, the definition of the debtor’s “location” in § 10(a) is
31 identical to the baseline definition of that term in UCC § 9-307(b). The definition in § 10(a)
32 does not include any of the exceptions to the baseline definition of that term in UCC Article 9.
33 Those exceptions include the following: (i) UCC § 9-307(e), which provides that the location of
34 a domestic corporation or other “registered organization” is its jurisdiction of organization, and
35 (ii) UCC § 9-307(c), which provides in effect that if the baseline rule would locate a foreign
36 debtor in a jurisdiction that lacks an Article 9-style filing system, then that debtor is instead
37 located in the District of Columbia. Those exceptions are not included in § 10(a) because their
38 purpose (or at least their primary purpose) relates to the operation of Article 9’s perfection rules.
39 That purpose has no analogue in the operation of this Act.

40
41 A comment to § 10 will state that “chief executive office,” “place of business,” and
42 “principal residence” are to be evaluated on the basis of authentic and sustained activity, not on
43 the basis of manipulations employed to establish a location artificially (*e.g.*, by such means as
44 establishing a notional “chief executive office” in an asset haven by use of straw-man officers or
45 directors, or establishing a short-term “principal residence” in an asset haven for the purpose of
46 making an asset transfer while there). Debtors may have a greater incentive to seek to establish

1 an artificial “location” for purposes of avoidance law than for purposes of UCC Article 9.
2

3 The comments to § 10 will also note that “location” under this Act bears no relation to
4 the concept of “center of main interests” (“COMI”), as that term is used in Chapter 15 of the
5 Bankruptcy Code. Chapter 15, enacted in 2005, applies to transnational insolvency proceedings.
6 Chapter 15 requires U.S. courts to defer in various ways to a foreign bankruptcy proceeding in
7 the jurisdiction of the debtor’s COMI. Those consequences are quite different from the
8 consequences of “location” under this Act. Furthermore, a debtor’s jurisdiction of organization
9 (if the debtor is an organization) has no bearing on an organization’s “location” under § 10, by
10 contrast to the presumption in Bankruptcy Code § 1516(c) that the jurisdiction in which a debtor
11 has its registered office (i.e., its jurisdiction of organization) is its COMI.
12

13 **3. Escape hatch if the baseline choice of law rule points to an asset haven.** 14

15 The Drafting Committee’s discussion of the escape hatch can be grouped around three
16 issues, which are summarized in turn below. As previously noted, the Drafting Committee
17 welcomes the views of Commissioners on the proper treatment of the escape hatch.
18

19 *(a) Should the escape hatch be stated in the statutory text, or relegated to the*
20 *comments?* In this Annual Meeting Draft, § 10 makes no reference to any escape hatch from the
21 baseline choice of law rule. A comment would indicate that courts should override the statutory
22 choice of law rule if the statutory rule would point to a jurisdiction that is an asset haven—*i.e.*,
23 its avoidance law is so debased as to violate the fundamental public policy of the forum state.
24

25 This approach has the virtue of simplicity. However, it may render the escape hatch
26 nonexistent, for there is no clear authority for a court to ignore a statutory direction in the manner
27 contemplated by such a comment. There is a venerable tradition of courts overriding an
28 otherwise-applicable choice of law rule on the basis that the result would conflict with public
29 policy. However, in cases of that nature the overridden choice of law rule appears typically to
30 have been merely a common law rule. There is no question that a court has competence to thus
31 modify its own common law rules. But the situation may be different if a court were asked to
32 ignore a statutory choice of law rule that by its terms is unconditional. The proposed comment
33 cannot plausibly be characterized as a mere interpretation of the statutory text.
34

35 In the April draft, set forth below, the escape hatch is set forth in the statutory text.
36

37 *(b) Should the escape hatch apply only to non-U.S. jurisdictions, or should it also*
38 *apply to U.S. jurisdictions?* The April draft provides that the baseline choice of law rule could
39 be overridden by the escape hatch only if the baseline rule points to the avoidance law of a non-
40 U.S. jurisdiction. In other words, the April draft provided that a state of the United States would
41 never be treated as an asset haven for the purpose of § 10. By contrast, the comment
42 contemplated by this Annual Meeting Draft would instruct the court to override the baseline
43 choice of law rule if application of the avoidance law of the chosen jurisdiction would violate a
44 fundamental public policy of the forum. The same test would apply regardless of whether the
45 chosen jurisdiction is a U.S. jurisdiction.

1 Drafting the escape hatch to apply equally to U.S. jurisdictions as well as non-U.S.
2 jurisdictions is simple and symmetrical. On the other hand, limiting the escape hatch to non-U.S.
3 jurisdictions would simplify litigation by removing an issue that could otherwise be contested in
4 all domestic litigation involving this Act. Such removal could plausibly be justified on the
5 ground that no state is likely to debase its avoidance law to a degree that would be fundamentally
6 inconsistent with the shared legal tradition of the several states. Furthermore, there is precedent
7 for such asymmetric treatment of states and foreign jurisdictions, for the choice of law rules of
8 UCC Article 9 contain a comparable asymmetry. Under Article 9, a domestic corporation is
9 located in its state of incorporation. (UCC § 9-307(e)). Hence under Article 9, if a debtor is a
10 domestic corporation, the law of its state of incorporation governs the priority of a security
11 interest in the debtor’s intangible property. (UCC § 9-301(1)). By contrast, a foreign
12 corporation at first cut is located in the jurisdiction in which its chief executive office is located.
13 (UCC § 9-307(b)). However, the foreign corporation is located in the District of Columbia
14 instead, if the first cut points to a jurisdiction that does not have an Article 9-style filing system.
15 (UCC § 9-307(c)). Most foreign jurisdictions do not have such a filing system. Hence in most
16 cases a foreign corporation is located in the District of Columbia for purposes of Article 9, with
17 the result that competing claims to intangible property of a foreign corporation will be resolved
18 by the priority rules of the District of Columbia. (UCC § 9-301(1)). Although these Article 9
19 choice of law rules obviously were drafted with Article 9’s public notice scheme in mind, they
20 also determine the law that governs substantive priority rights in the debtor’s property.

21
22 ***(c) Should the standard for invoking the escape hatch be “conflict with a fundamental***
23 ***public policy of the forum state,” or should a more concrete standard be used?*** The comment
24 contemplated by this Annual Meeting Draft would refer to the standard for departing from the
25 baseline choice of law rule as being “conflict with a fundamental public policy of the forum
26 state.” The April draft, by contrast, sets forth a more concrete standard, namely that “the local
27 law of [the jurisdiction pointed to by the baseline rule] is substantially less protective of the
28 interests of the creditor making the claim than is this [Act].”

29
30 As noted above, courts have long overridden ordinarily-applicable choice of law rules (or
31 at least common-law choice of law rules) on the basis of conflict with public policy. That
32 standard traditionally has been considered to be a very high bar. See *Loucks v. Standard Oil Co.*,
33 120 N.E. 198, 200-02 (N.Y. 1918) (oft-quoted injunction by Justice Cardozo to employ the
34 public policy exception with caution). Moreover, its application has not been easily predictable.
35 Compare, e.g., *Marchlik v. Coronet Insurance Co.*, 239 N.E.2d 799 (Ill. 1968) (declining to
36 permit suit in Illinois against an insurance company by the victim of auto accident that occurred
37 in Wisconsin, pursuant to a Wisconsin statute allowing such direct suits, because contrary to
38 Illinois public policy) with *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 14 N.E.2d 798 (N.Y.
39 1938) (suit on employment contract by Jewish individual fired by German employer pursuant to
40 Nazi Aryan laws; held, the firing was not contrary to New York public policy). Finally,
41 reference to the vague concept of “public policy” may be inevitable in an escape hatch to a
42 doctrine of very general applicability, such as recognition of a foreign judgment, given the many
43 different aspects of public policy that might be at stake as to different judgments. See Uniform
44 Foreign-Country Money Judgments Recognition Act § 4(c)(3) (2005) (foreign judgment need
45 not be recognized if the cause of action on which the judgment is based “is repugnant to the
46 public policy of this state or of the United States”). By contrast, in the setting of this Act the

1 escape hatch would seem to require only a much better defined comparison of the avoidance law
2 of the chosen jurisdiction with American norms.

3 4 **4. April draft of Section 10.**

5
6 The April draft of Section 10, referred to in the above notes and provided here for
7 comparative purposes, reads as follows:

8 _____
9 **SECTION 10. GOVERNING LAW.**

10 (a) *[Same definition of "location" as in this Annual Meeting Draft.]*

11 (b) The following rules determine the law that governs a claim in the nature of a claim
12 based on Section 4 or 5:

13 (1) The claim is governed by the local law of the jurisdiction in which the debtor
14 is located when the transfer is made or the obligation is incurred, unless:

15 (A) that jurisdiction is not the United States or a State, and

16 (B) the local law of that jurisdiction is substantially less protective of the
17 interests of the creditor making the claim than is this [Act].

18 (2) If paragraph (1) does not apply, the claim is governed by the local law of the
19 jurisdiction having the most appropriate relationship to the transaction, the debtor, the
20 transferee or obligee, and [the creditor making the claim] [the debtor's creditors], giving
21 due weight to the public policy of this State that the interests of creditors should be
22 protected at least to an extent comparable to the substantive provisions of this [Act].

23 _____
24
25 The April draft provides that if the jurisdiction of the debtor's location is an asset haven,
26 then the law governing an avoidance claim is determined by paragraph (2) of Section 10(b),
27 which applies a "most appropriate relationship" standard. That is a paraphrase of the choice of
28 law rule for torts under *Restatement (Second) of Choice of Law* § 145(1), which is the rule most
29 commonly applied by courts today to choice of law for avoidance under the Act or similar law.
30 It may be desirable to alter Section 10(b)(1)(B) to provide that classification of a jurisdiction as
31 being an asset haven relates to its treatment of creditors generally, rather than to its treatment of
32 the plaintiff creditor. If so, the phrase "less protective of the interests of the creditor" in Section
33 10(b)(1)(B) in the April draft could be changed to "less protective of the interests of the debtor's
34 creditors".

35
36 The April draft does not disqualify the asset haven from being selected as the jurisdiction
37 having the "most appropriate relationship" under paragraph (2) of Section 10(b). For example, if
38 a voluntary creditor chooses to deal with a debtor that has long been genuinely located (in a real
39 and permanent sense) in an asset haven, it may be appropriate to adjudicate subsequent voidable
40 transfers by the debtor under the law of the asset haven, notwithstanding that suit is brought in
41 the United States. However, a robust law of voidable transfers has been a basic element of
42 Anglo-American law for centuries. In making the choice of law determination, a court should
43 not be indifferent to the public policy that assumes the existence of such a law. For that reason,
44 paragraph (2) of Section 10(b) directs the court to apply the "most appropriate relationship" with
45 a thumb in the scale favoring that public policy: "giving due weight to the public policy of this
46 State that the interests of creditors be protected at least to an extent comparable to the substantive

1 provisions of this [Act].”

2
3 **SECTION ~~10~~ 11. SUPPLEMENTARY PROVISIONS.** Unless displaced by the

4 provisions of this [Act], the principles of law and equity, including the law merchant and the law
5 relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion,
6 mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

7 **Official Comment**

8
9 This section is derived from § 11 of the Uniform Fraudulent Conveyance Act and ~~§ 1-103~~
10 ~~of the~~ Uniform Commercial Code § 1-103 (1984) (later § 1-103(b) (2014)). The section adds a
11 reference to “laches” in recognition of the particular appropriateness of the application of this
12 equitable doctrine to an untimely action to avoid a ~~fraudulent~~ transfer under this Act. See *Louis*
13 *Dreyfus Corp. v. Butler*, 496 F.2d 806, 808 (6th Cir. 1974) (action to avoid transfers to debtor’s
14 wife when debtor was engaged in speculative business held to be barred by laches or applicable
15 statutes of limitations); *Cooch v. Grier*, 30 Del.Ch. 255, 265-66, 59 A.2d 282, 287-88 (1948)
16 (action under the Uniform Fraudulent Conveyance Act held barred by laches when the creditor
17 was chargeable with inexcusable delay and the defendant was prejudiced by the delay).

18
19 **SECTION ~~11~~ 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**

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

22 **SECTION ~~12~~ 13. SHORT TITLE.** This [Act] may be cited as the Uniform Fraudulent

23 Transfer Act.

24 **Reporter’s Note**

25
26 See the “Reporter’s Introductory Note” at the beginning of this draft for discussion of the
27 possibility of changing the title of this Act.

28
29 **SECTION ~~13~~ 14. REPEAL.** The following acts and all other acts and parts of acts

30 inconsistent herewith are hereby repealed:

31 **Official Comment**

32
33 If enacted by this State, the Uniform Fraudulent Conveyance Act should be listed among
34 the statutes repealed.

[Legislative Note on transition to be added, if appropriate.]