MEMORANDUM

To: Richard T. Cassidy
Chair, Committee on Scope and Program
Uniform Law Commission

Date: June 6, 2012

From: Edwin E. Smith
Chair, Study Committee on Choice of Law for Fraudulent Transfer

Re: Study Committee on Choice of Law for Fraudulent Transfer (the "Study Committee") Supplemental Report

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I. Purpose of this Supplemental Report. The Study Committee submitted its original report on January 9, 2012, a copy of which is enclosed herewith. The original report recommended that a drafting committee be formed to prepare a uniform law on (a) choice of law for fraudulent transfer and (b) presumptions and burdens of proof for fraudulent transfer. It further recommended that those new provisions be added to uniform law by amending the Uniform Fraudulent Transfer Act ("UFTA"). That report was submitted in response to the Study Committee's relatively narrow original charge, which was to study the feasibility and desirability of drafting a uniform law on choice of law for fraudulent transfer.

By letter of February 6, 2012, you advised me that the Committee on Scope and Program had adopted a resolution broadening the charge of the Study Committee "to consider the need for and feasibility of revising and updating the Uniform Fraudulent Transfer Act." The Study Committee has considered that question, and this supplemental report, drafted primarily by our "informal reporter," Professor Kenneth Kettering, and approved by the Study Committee, sets forth the Study Committee's recommendations.

II. Conclusions. The Study Committee and observers are unanimously of the view that no revision of the UFTA is clearly necessary beyond the two subjects referred to in the original report.

In the view of the Study Committee, the only potentially useful activity beyond revision of the UFTA with respect to the two original subjects would be to update the official comments to the UFTA as necessary. Two matters on which revision to the comments appears to be desirable are noted in parts IV.C and IV.D below. Bearing in mind that the UFTA is now more than a quarter-century old, the Study Committee believes it possible, and even likely, that a need for clarification of other comments may emerge in the course of the limited drafting project that is proposed. Furthermore, it is possible that further study by the drafting committee may lead to the conclusion that the matter discussed in part IV.C, pertaining to the proper interpretation of UFTA § 8(a), cannot adequately be dealt with by change to the comments alone, but instead requires a change to the statutory text. It would be desirable for the drafting committee's mandate to be broad enough to permit the making of such a statutory change in that eventuality.

The Study Committee reaffirms its previous recommendation that a drafting committee be formed to amend the UFTA on choice of law for fraudulent transfer and presumptions and burdens of proof for fraudulent transfer. The Study Committee also recommends that the drafting committee consider any revision to the comments to the UFTA as to matters other than those two subjects. Of course, any revisions to the comments would be subject to the approval of the Executive Committee.

III. Actions Taken by the Study Committee. After the Study Committee's charge was broadened, the Study Committee met by conference call once, on March 15, 2012. Observers were invited to participate in the meeting. This resulting memorandum was circulated in draft form for approval by the members, and for comment by observers, before its submission.

Before the March 15 meeting, members and observers solicited views on the question posed by the broadened charge from various potentially interested persons. These included, among others, members of the American Bankers Association, members of the Commercial Transactions Committee of the Business Law Section of the State Bar of California, and a selection of academics who have published in scholarly journals on the subject of fraudulent transfer law in recent years. In addition, after the March 15 meeting members of the Study Committee contacted individuals known to be involved in current litigation or in efforts to enact nonuniform amendments to state enactments of the UFTA.

Solicitation of outside groups and individuals resulted in very few expressions of interest in revising the UFTA, beyond the two original subjects of choice of law and burdens of proof. The only amendment suggested from outside the academic community came from a group seeking to amend Florida's enactment of the UFTA for the purpose of insulating charitable organizations from liability. Three outside academics responded substantively. One of the three stated that he saw no need for any revision beyond the two original subjects. The suggestions made by the other two were independent and diverse, and are discussed below.

IV. Revisions to the UFTA Considered by the Study Committee.

Some of the revisions considered by the Study Committee were suggested by outsiders, as described above; others were put forward by members or observers. The revisions considered by the Study Committee are discussed in this part IV. As previously noted, the Study Committee in each case concluded that revision of the statutory text of the UFTA is not warranted, with the possible exception of the matter discussed in part IV.C.

A. Immunity for Charitable Contributions. Amendment of the UFTA to insulate charitable donees from fraudulent transfer liability merits consideration for two reasons. First, the Bankruptcy Code's integral fraudulent transfer provision, § 548, provides such insulation. Second, there has recently been activity in two states (successful in one of them) to amend their enactments of the UFTA to provide such insulation.

The provisions of the Bankruptcy Code that insulate charitable donees from fraudulent transfer liability were added in 1998. The core of the 1998 amendments was an addition to the Bankruptcy Code's integral fraudulent transfer provision, at § 548(a)(2), with related definitions at § 548(d)(3), (4). Those provisions immunize from constructive fraud attack under § 548 a debtor's "charitable contribution" to a "qualified religious or charitable entity or organization" if the contribution is *either* (i) less than 15% of the debtor's gross income for the year,[1] *or* (ii) "consistent with the practices of the debtor in making charitable contributions." The phrases "charitable contribution" and "qualified religious or charitable entity or organization" are defined to have meanings consistent with § 170 of the Internal Revenue Code, pertaining to deductibility of charitable contributions for purposes of the federal income tax, with two limitations: (x) a "charitable contribution" is immunized from fraudulent transfer attack only if made by a natural person, and only if in the form of cash or certain financial instruments, and (y) contributions to a relatively small class of entities that are eligible to receive deductable contributions under IRC § 170 are not immunized from fraudulent transfer attack. Because the reachback period for any fraudulent transfer action under § 548 is two years preceding the date of the bankruptcy petition, charitable contributions made before the start of that two year period are not subject to fraudulent transfer attack under § 548 in any case.[2] Furthermore, these provisions do not immunize any charitable contribution from attack on the basis of actual intent to defraud creditors.

The 1998 amendments to the Bankruptcy Code also extended the foregoing immunity to attack on the basis of *state* fraudulent transfer law in the debtor's bankruptcy proceeding. See Bankruptcy Code § 544(b)(2). It is not clear from the language of that provision whether the

[1] The 1998 amendments were enacted hastily, and include several drafting glitches or ambiguities. One glitch is that the "15% of annual gross income" ceiling is written to apply on a contribution-by-contribution basis, so that, literally, a debtor could contribute 14% of his annual gross income on day 1, another 14% on day 2, another 14% on day 3, etc., and each contribution would be exempt from constructive fraud attack because each is below the 15% ceiling. 5 COLLIER ON BANKRUPTCY ¶548.09[6][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012) cites legislative history in support of the reasonable but atextual proposition that a court should instead apply the "15% of annual gross income" ceiling to the aggregate of all contributions made by the debtor during the year in question. However, a student commentator, after presenting the legislative history at length, concludes that "a court…would be hard-pressed to evince clear legislative intent from the congressional debate." Lawrence A. Reicher, Note, *Drafting Glitches in the Religious Liberty and Charitable Donation Protection Act of 1998: Amend § 548(a)(2) of the Bankruptcy Code*, 24 EMORY BANKR. DEV. J. 159, 177 (2008). What appears to be the only reported case on point to date applied aggregation, *Universal Church v. Geltzer*, 463 F.3d 218 (2d Cir. 2006), though dictum in an earlier case is to the contrary, *In re Zahdi*, 234 B.R. 371, 380 n.20 (Bankr. M.D. La. 1999). (The actual holding in *Zahdi* was also provocative: namely, that a contribution that exceeds the 15% ceiling and that is not "consistent with past practices of the debtor" is avoidable in its entirely, not merely the portion above 15%.)

[2] When the 1998 amendments were enacted, the reachback period for an action under § 548 was only one year. The period was extended to two years in 2005. (The 2005 amendments also created a ten year reachback period for a narrow set of transactions that does not include charitable contributions.)

immunization from attack under state law in a bankruptcy proceeding applies only to contributions made during the two-year reachback period for which § 548 applies, or also applies to earlier contributions for which a state-law avoidance action may be brought in bankruptcy (which is possible because the reachback period under the UFTA is longer than two years). This ambiguity has received relatively little attention in the literature, and it appears not to have been the subject of a reported case thus far.[3]

There are at least three plausible motivations for amending the UFTA to add an immunity for charitable contributions equivalent or comparable to that added by the 1998 amendments to the Bankruptcy Code. First, the 1998 amendments apply only if the donor-debtor becomes subject to a proceeding under the Bankruptcy Code. They offer a charitable donee no protection if the donor-debtor does not file for bankruptcy voluntarily or is not placed into bankruptcy involuntarily.[4]

Second, even if the donor-debtor becomes subject to a bankruptcy proceeding, the above-noted ambiguity in the 1998 amendment to Bankruptcy Code § 544(b) means that, dependent upon how that ambiguity is resolved, a charitable donee may be at risk of a state-law constructive fraud attack on donations made before the two-year reachback period applicable under § 548, absent an amendment to state law to parallel the immunity provided by § 548.

Finally, some charitable organizations are being sued on fraudulent transfer theories to disgorge amounts they received as "winning" investors in Ponzi schemes, and (as discussed below) are unhappy about that fact. Even if the debtor that ran the Ponzi scheme becomes subject to a bankruptcy proceeding, it is unlikely that the 1998 amendments would insulate a charitable organization from liability in such a case. That is because the 1998 amendments apply only to "charitable contributions," and it is unlikely that distributions received by a charitable investor from a Ponzi scheme qualify as such. Insofar as charitable organizations wish to immunize themselves from liability to disgorge such amounts, the first step would be to amend state fraudulent transfer law to that end. Such an amendment obviously would have to provide an immunity broader than that provided by the 1998 amendments to the Bankruptcy Code. Such an amendment to state law would still leave charitable investors exposed to a fraudulent transfer action brought under Bankruptcy Code § 548, absent amendment of that provision as well, but at least that exposure would be limited to the relatively short reachback period applicable under § 548.

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3 This ambiguity is, however, noted in Steven Walt, *Generosity in Bankruptcy: The New Place of Charitable Contributions in Fraudulent Conveyance Law*, 32 LOY. L.A. L. REV. 1030, 1035-37 (1999).

4 Because current law gives charitable donees an immunity from fraudulent transfer attack in the debtor's bankruptcy proceeding that they do not enjoy if the debtor does not enter bankruptcy, a charitable donee has an incentive to maneuver the debtor into bankruptcy. It is doubtful that a charitable donee qualifies as a creditor of the debtor that has standing to join in an involuntary bankruptcy petition. A recipient of a fraudulent transfer generally has a claim against the debtor (see, e.g., Bankruptcy Code § 502(d), (h)), but only a person with a "noncontingent, undisputed claim" has standing to file an involuntary bankruptcy petition (Bankruptcy Code § 303(b)(1)), and a charitable donee would not seem to qualify if it contests the avoidability of the donation. Other creditors of the debtor have an incentive not to put the debtor into bankruptcy lest they trigger the charitable immunity, which would diminish the debtor's estate and hence their recovery. This is a sterling example of the forum-shopping problems that can arise whenever property entitlements outside of bankruptcy vary from those allotted in bankruptcy.

Efforts have recently been made in two states to amend their fraudulent transfer laws to insulate charitable organizations from liability. In Minnesota that effort was crowned with success on April 3, 2012, when its governor signed into law a bill amending Minnesota's enactment of the UFTA.[5] According to proponents of the Minnesota amendment, it was a response to disgorgement actions filed against charitable organizations in the bankruptcy cases of Tom Petters and associated entities, Petters having run a large long-term Ponzi scheme. (Indeed the Minnesota amendment purports to apply to those and other existing causes of action.) The Minnesota amendment probably would not have occurred, however, but for a nonuniformity in Minnesota's original enactment of the UFTA. Specifically, Minnesota's original enactment did not include the uniform reachback period, or any reachback period at all. Hence the reachback period was governed by Minnesota's general statute of limitations on fraud, which bars actions brought more than six years *after discovery* of the fraud. As Petters' fraud was discovered only recently, the nonuniform Minnesota provisions did not prevent the bankruptcy trustees from pursuing actions to avoid payments received indefinitely far in the past by charitable donees of Petters and by winning investors in his Ponzi scheme. The bankruptcy trustees pursued such actions, and that provoked a backlash that drove the Minnesota amendment.

The Minnesota amendment is more protective of charities than mere enactment of the UFTA's reachback period (which the Minnesota amendment does not do). Rather, the Minnesota amendment immunizes from attack under the Minnesota UFTA (i) any contribution[6] to a "qualified charitable or religious organization"[7] made more than two years before the commencement of a fraudulent transfer action, and (ii) any such contribution made within that two year period unless it would be avoidable under essentially the same test applied by the 1998 amendments to the Bankruptcy Code. However, the Minnesota amendment does not apply to "a return on investment made by a qualified charitable or religious organization or entity," and it so does not appear to immunize distributions received by a charitable investor in a Ponzi scheme.

Bills were introduced in Florida in the 2012 legislative session to amend Florida's enactment of the UFTA in order to immunize charities from fraudulent transfer attack.[8] Those bills died at the end of the legislative session, but representatives of the charitable organizations that sponsored them have indicated that they will continue their effort to procure enactment of such legislation. The bills introduced in the Florida House and Senate differed significantly in form, though not in substance. They differ markedly from the Minnesota amendment and the 1998 amendment to the Bankruptcy Code. The Florida bills simply declared that an "exempt organization"[9] is deemed to give reasonably equivalent value in exchange for any "charitable

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[5] Laws of Minnesota for 2012, Chap. 151, H.F. 1384, amending MINN. STAT § 513.41(12) (definition of "transfer" in the Minnesota UFTA).

[6] The Minnesota amendment defines more broadly than the 1998 amendment to the Bankruptcy Code the "charitable contributions" that are immunized from fraudulent transfer attack. The 1998 amendment applies only to a contribution by a natural person in the form of cash or certain financial instruments. By contrast, the Minnesota amendment applies to a contribution by any entity of any kind of property.

[7] "Qualified charitable or religious organization or entity" is defined in the Minnesota amendment in a minutely broader way than in the 1998 amendments to the Bankruptcy Code: the former, but not the latter, includes veterans' organizations referred to in IRC § 170(a)(3).

[8] H.B. 451, 2012 Reg. Sess. (Fla. 2011); S.B. 459, 2012 Reg. Sess. (Fla. 2011).

[9] Defined to mean an entity exempt from federal income taxation under IRC § 501(c)(3) or (4). This set is probably larger than the set of entities protected under the 1998 amendments to the Bankruptcy Code, which are entities entitled to receive deductible contributions under IRC § 170(c)(1) or (2). (The comparison is not obvious.

contribution" (not defined) that it accepts in good faith. Assuming good faith on the part of the charitable recipient, the Florida bills thus would have immunized any "charitable contribution" from constructive fraud attack, without regard to its amount. They would also have immunized any such "charitable contribution" from actual fraud attack, because UFTA § 8(a) provides a complete defense to liability on an actual fraud theory to a transferee who gives reasonably equivalent value and acts in good faith. It seems unlikely that the undefined term "charitable contribution" would be read so broadly as to extend to excess distributions received by a winning charitable investor in a Ponzi scheme. However, the descriptions accompanying these bills in the legislature stated that they were designed to insulate charities from liability for disgorgement of distributions that they received in a Ponzi scheme. The wording of future bills might well be changed to achieve that purpose.

A representative of the National Council of Nonprofits advised on April 10, 2012 that the Minnesota and Florida bills were the only bills on the subject of which the representative was aware. Furthermore, at least as of that time there was no indication of a coordinated effort to sponsor similar legislation in other states. But nothing succeeds like success, and the enactment of the Minnesota amendment may encourage action in other states. If that were to occur, action on this subject might be forced upon the ULC in order to preserve uniformity and to provide the precise drafting that the ULC process affords.

Unless such a situation were to arise, the Study Committee does not believe that action on this subject is desirable. At present, the only action that merits consideration is amendment of the UFTA to mirror the 1998 amendments to the Bankruptcy Code, so that a charitable organization would be entitled to the same immunity from constructive fraud attack regardless of whether the donor-debtor is subject to a bankruptcy case, and regardless of how long ago the contribution was made. However, the Study Committee regards the 1998 amendments as special interest legislation that should not be emulated by the states. The fundamental command of transfer law is "be just before you are generous"—a debtor may not make gifts at the expense of its creditors. A debtor in financial distress should not be entitled to give his assets to his church or charity, rather than use them to pay creditors. The National Bankruptcy Conference opposed the 1998 amendments for the same reason, and though it lost to a tidal wave of lobbying by charitable organizations, the states are not compelled to drink the same Kool-Aid that Congress drank in 1998.[10]

B. Attorney's Fees. At least two large states have nonuniform statutory provisions that permit or require award of attorneys' fees to a creditor who prevails in a fraudulent transfer action. New York, one of the few states in which the UFTA's predecessor, the Uniform

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For instance, donations to entities exempt under IRC § 501(c)(4) are not deductible. On the other hand, IRC § 170(c)(1) includes governmental entities while IRC § 501(c)(3) and (4) do not. However, donations to governmental entities seem unlikely to be a subject of fraudulent transfer attack.)

[10] "Congress should not slice up our fraudulent transfer laws with special-interest exceptions, no matter how deserving the special interest groups may be. Don't let insolvent persons give away the creditors' money, say we at the NBC." *The Religious Liberty and Charitable Donation Protection Act of 1997: Hearing on H.R. 2604 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 105th Cong. (Feb. 12, 1998) (statement of Stephen H. Case on behalf of the National Bankruptcy Conference). For a post-mortem discussion of the political economy of the 1998 amendments, by the then-chair of the NBC's Committee on Legislation, see Kenneth N. Klee, *Tithing and Bankruptcy*, 75 AM. BANKR. L.J. 157, 157-62 (2001).

Fraudulent Conveyance Act ("UFCA"), is still in force, since 1938 has had a nonuniform provision for mandatory award of attorney's fees to a creditor who prevails in a fraudulent transfer action based on actual intent by the debtor to hinder, delay or defraud creditors, with the judgment for these fees running against the debtor and the transferee.[11] Texas, a UFTA state, in 2003 enacted a nonuniform provision stating simply that "In any proceeding under this chapter, the court may award costs and reasonable attorney's fees as are equitable and just."[12] Unlike the New York provision, the Texas provision is discretionary rather than mandatory; it is not limited to actions based on actual fraud; and it would seem to permit award in favor of a prevailing transferee, as well as a prevailing creditor. Moreover, a fee award to a creditor under the Texas provision would seem to run only against the transferee, and not also against the debtor.

The existence of these nonuniform provisions is a reason why choice of law may be important. A recent case analyzing choice of law for fraudulent transfer did so precisely in order to decide whether the Texas provision on attorney's fees applied to the case.[13]

The question also arises whether it would be desirable to amend the UFTA to provide for award of attorney's fees. The Study Committee does not recommend such an amendment at the present time. Unlike the original subjects proposed to be addressed by amendment (choice of law and evidentiary matters), an amendment providing for award of attorney's fees would not merely fill in a blank in the existing statutory scheme, but would reverse current law, which is the general "American rule" that each party bears its own attorney's fees.[14] Although there is much to be said in the abstract for a rule that would award a prevailing creditor its attorney's fees in at least some circumstances, such a change would be considerably more controversial than the originally-proposed amendments. At present nonuniform state activity on the subject does not amount to a critical mass sufficient to warrant such a change.

Furthermore, there is no clearly desirable model in existing statutory law. New York provides for award of fees only on a claim based on actual fraudulent intent by the debtor. The fee award is assessed against the transferee as well as the debtor, and realistically is likely to be borne by the transferee. It is illogical to make the transferee's liability for those fees dependent upon the mental state of a different person, the debtor. A more logical rule would not allow an award of attorney's fees against a good-faith transferee, but would allow (and perhaps even compel) such an award in favor of a prevailing creditor against a transferee who lacked good faith, regardless of the basis of the fraudulent transfer claim. The Texas provision does not so prescribe; instead, it is so vague as to be all things to all people. The Study Committee also questions the wisdom of the Texas provision insofar as it permits a court to award fees against an unsuccessful creditor.

C. Clarification of UFTA § 8(a). One of the members of the Study Committee who has litigated the meaning of UFTA § 8(a) suggested that it be clarified. The Study Committee agrees that the drafting committee, if appointed, should study this matter and that an addition to the

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11 N.Y. DEBT. & CRED. LAW § 276-a (McKinney 2001).

12 TEX. BUS. & COM. CODE ANN. § 24.013 (West 2009).

13 Feuerbacher v. Moser, No. 4:11–CV–272, 2012 WL 1070138 (E.D. Tex., March 29, 2012).

14 At least some cases have awarded attorneys' fees, and even punitive damages, in fraudulent transfer actions, based either upon UFTA § 7(a)(3)(iii) (which allows for grant of "any other relief the circumstances may require"), or non-UFTA quirks of state law. *See* PETER SPERO, ASSET PROTECTION ¶2.05 (1994 & Supp. 2012),

official comments, at least, is warranted. The mandate of the drafting committee should be broad enough to permit it to amend the statutory language on this point if it cannot adequately be dealt with by the comments.

Section 8(a) provides a complete defense to a transferee who receives a fraudulent transfer made by a debtor with actual intent to hinder, delay or defraud creditors, if the transferee "took in good faith and for a reasonably equivalent value." Courts have taken different positions on whether "reasonably equivalent value" given by the transferee counts for this purpose only if it is received by the debtor, or whether it counts regardless of who receives it, so long as the transferee is acting in good faith. Many courts that have touched upon § 8(a) have assumed without analysis that the defense applies only if the debtor receives the "reasonably equivalent value."[15] The very few courts that have actually analyzed the question have come to the opposite conclusion and held that debtor need not receive the "reasonably equivalent value."[16]

The terse Official Comment to § 8(a) says little more than that it is "an adaptation of the exception stated in § 9 of the Uniform Fraudulent Conveyance Act," as indeed it is.[17] Neither the comment nor former UFCA § 9 addresses the question just raised. Furthermore, there is no analogue to § 8(a) in Bankruptcy Code § 548. It is inexplicable why the UFTA and Bankruptcy Code § 548 differ on this point, given (i) the brevity of the interval between the enactment of the Bankruptcy Code in 1978 and the promulgation of the UFTA in 1984, (ii) the expressed purpose of the UFTA (as stated in its Prefatory Note) to revise state fraudulent transfer law in light of the new Bankruptcy Code, and (iii) the participation of the same individuals as key players in both

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[15] *See, e.g.,* Barclay v. Mackenzie (*In re* AFI Holding, Inc.), 525 F.3d 700, 707 (9th Cir. 2008) ("We find no reason, in statute or case law, to treat "reasonably equivalent value" differently for each of the Code's provisions. Both the prima facie case for constructively fraudulent transfers under § 3439.04(a)(2), and the affirmative defense to actually fraudulent transfers under § 3439.08 require the determination of whether 'reasonably equivalent value' was transferred from the transferee to the debtor."); SEC. v. Resource Dev. Int'l, LLC, 487 F.3d 295 (5th Cir. 2007) (holding that affirmative defense was not available because the debtor did not receive reasonably equivalent value); Wiand v. Waxenberg, No. 8:05-CV-1856-T-27TBM, 2009 WL 728546, at *16 (M.D. Fla. Mar. 19, 2009) ("The issue of whether a *debtor* received 'reasonably equivalent value' for an allegedly fraudulent transfer is an element of both constructive fraud provisions in the [Florida] UFTA and is also an element of the good faith defense.") (emphasis added); *In re* CRCGP, LLC, Adv. No. 07-03117, 2008 WL 4107490, at *10-11 (Bankr. S.D. Tex. Aug. 28, 2008) (conducting singular reasonably equivalent value analysis for purposes of both constructive fraudulent transfer claim and good faith defense to actual fraud claim under Texas UFTA); *In re* Hennings Feed & Crop Care, Inc., 365 B.R. 868, 887 (Bankr. C.D. Ill. 2007) ("This Court has already found that the transfers by [debtor] to [defendant transferee] were made without receiving reasonably equivalent value in exchange" as part of its good faith defense analysis with respect to the Trustee's actual fraud claim. "Accordingly, the Court need only focus on the other required proof to establish" the trustee's constructive fraud claim."); *In re* Unglaub, 332 B.R. 303, 319-21 (Bankr. N.D. Ill. 2005) (applying same reasonably equivalent value analysis for purposes of badge of fraud to actual intent claim, good faith defense to actual intent claim, and constructive fraud claim).

[16] *See* Quad City Bank v. Berstler *(In re* Chapman Lumber Co., Inc.*)*, Bankr. No. 05-00408, Adv. No. 06-09112, 2007 WL 2316528 (Bankr. N.D. Iowa Aug. 8, 2007) ("[T]he Court concludes that this value need not be received by [the] Debtor" under Iowa's adopted version of section 8(a) of the UFTA."); USA Capital Diversified Trust Deed Fund, LLC v. Stanley Fulton, Adv. No. 08-01132 (Bankr. D. Nev. Dec. 11, 2009), *aff'd,,* No. 2:09-CV-01940-RLH-LRL (D. Nev. 2010) (unreported).

[17] UFCA § 9 sets forth the remedies available to a creditor against whom a conveyance is fraudulent and whose claim has matured. It states that such a creditor "may, as against any person except a purchaser for fair consideration without knowledge at the time of the purchase," exercise the stated remedies. Strangely, no similar defense for a good faith purchaser for fair consideration is stated in UFCA § 10, which sets forth the remedies available to a creditor against whom a conveyance is fraudulent and whose claim has *not* matured.

projects.[18] The reporter for the UFTA, Frank Kennedy, wrote several articles devoted solely or partly to the UFTA, but none addresses this point.[19] Professor Kennedy was also Executive Director of the Commission on Bankruptcy Law of the United States that produced the first draft of what eventually became the Bankruptcy Code; that draft contained a provision quite similar to the eventual § 548, which likewise omitted the defense given by UFCA § 9/UFTA § 8(a), yet the explanatory notes provide no explanation.[20]

The divergence in the cases about the meaning of § 8(a) warrants elucidation in the comments, at least. The Study Committee considered the substance of that elucidation only preliminarily, as it became apparent that the question is not simple late in the Study Committee's deliberations, and it reached no conclusion. Set forth below, for the benefit of a future drafting committee, are summaries of the cases for the two different readings of § 8(a), each written by a proponent of that reading. It should be emphasized that these views are quite tentative, even on the part of the current proponents. Careful study of the types of transactions in which the issue has arisen, and in which it may arise, would be important to reaching a conclusion on this matter.

A case for interpreting § 8(a) to apply even if the value given does not go to the debtor. The internal logic of fraudulent transfer law focuses on the effect of a transaction on the debtor's estate, and that implies that only value that the debtor receives should count for purposes of § 8(a). However, the principle vindicated by § 8(a), under the "value need not go to the debtor" interpretation, is the more general principle that a good faith purchaser for value merits protection. The law in other settings protects a transferee of property who takes in good faith and gives value against an adverse claim even though the value goes to someone other than the claimant. Familiar examples include a person who gives value to a thief in exchange for stolen currency or a stolen bearer instrument.[21] The protection afforded by § 8(a) under this interpretation is quite similar to the protection afforded a good faith purchaser of a good by the "voidable title" rule codified in UCC § 2-403(1). A fraudster who receives an item in a fraud-induced sale has flawed title, for the defrauded seller has the right to recover the item by rescinding the sale. But if the fraudster disposes of the item to a purchaser who gives value and takes in good faith, § 2-403(1) awards the purchaser good title and thus immunity from any

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[18] Writing just before the UFTA was promulgated, Professor Jackson was similarly puzzled:

> Section 548 of the Bankruptcy Code borrows from fraudulent conveyance law, but tinkers with it in a fashion that is often inexplicable. *Compare* UNIF. FRAUDULENT CONVEYANCE ACT § 1 (1919) (definition of "conveyance") *with* Bankruptcy Code § 548(d) (definition of "transfer"). *Compare* UNIF. FRAUDULENT CONVEYANCE ACT § 9(1) (1919) (a wronged creditor cannot recover from a 'purchaser for fair consideration without knowledge of the fraud at the time of [the] purchase') *with* Bankruptcy Code § 548(c) (transferee 'that takes for value and in good faith has a lien on any interest transferred . . . to the extent that [he] gave value to the debtor').

Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 779 n.172 (1984).

[19] Indeed, almost the only mention of § 8(a) in Professor Kennedy's writings appears in a table comparing the provisions of the UFTA with those of the UFCA, which incorrectly states that § 8(a) has no counterpart in the UFCA. Frank R. Kennedy, *The Uniform Fraudulent Transfer Act*, 18 U.C.C. L.J. 195, 214 (1986).

[20] Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93d Cong., 1st Sess., pt. II, § 4-408 (1973).

[21] As to a stolen bearer instrument, see UCC § 3-306 and the related definitions of "holder in due course" and "holder." Currency is not governed by UCC Article 3 (see § 3-102(a)), but common law has applied the same rule to currency at least since *Miller v. Race*, 97 Eng. Rep. 398 (K.B. 1758). *See, e.g.,* City of Portland v. Berry, 739 P.2d 1041 (Or. App. 1987).

claim by the defrauded seller. In the same way, the title received by the transferee in a fraudulent transfer is ordinarily voidable, and § 8(a) can be viewed as similarly wiping away that flaw in title in the case of a good faith purchaser for value.

Furthermore, the structure and wording of the UFTA strongly suggest that its drafters intended that the value referred to in § 8(a) need not necessarily go to the debtor. Several key provisions of the UFTA state clearly that value counts for purposes of that provision only if it is received by the debtor.[22] It is implausible to suppose that the absence of such a limitation in § 8(a) was accidental. Moreover, if the § 8(a) defense were interpreted to apply only if the value given passes to the debtor, then § 8(a) would be an exceedingly narrow defense. Section 8(d) awards a good-faith transferee a lien in the transferred asset to the extent of the value given the debtor. Section 8(a) gives a good-faith transferee a complete defense if he has given "reasonably equivalent value" for the asset, and if that value counts only if it goes to the debtor, then all that § 8(a) adds to § 8(d) is protection to a good-faith transferee to the extent that the actual value of the asset he received exceeds the "reasonably equivalent value" he gave for it. If the difference between actual value and the "reasonably equivalent value" the debtor gave is significant, query how likely it is that the transferee could have acted in good faith.

A loose end left by this interpretation is that there is no obvious justification for limiting the § 8(a) defense, so interpreted, to actual fraud. The previous incarnation of this defense in UFCA § 9 applied to both actual fraud and constructive fraud, so the UFTA drafters' limitation of the § 8(a) defense to actual fraud was certainly deliberate.

A case for interpreting § 8(a) to count only value received by the debtor. Section 8 contains three different "good faith" defenses.[23] Section 8(a) prevents an actually fraudulent transfer from being voidable in the first instance, whereas §§ 8(b)(2) and 8(d) limit recovery against a good faith transferee. Another distinction is that § 8(a) is limited to actually fraudulent transfers, whereas the limitations on recovery set forth in §§ 8(b)(2) and 8(d) apply to both actual and constructively fraudulent transfers. In light of this broader statutory framework, the drafters must have intended for § 8(a) to be limited only to "initial transferees" of actually fraudulent transfers.[24]

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[22] For example, the most familiar provision of the UFTA in which the term "reasonably equivalent value" is used is the definition of a constructively fraudulent transfer, and that provision is clear that value counts only if it is received by the debtor. See UFTA § 4(a) ("[A transfer is fraudulent as to a creditor] if *the debtor* made the transfer …(2) *without receiving* a reasonably equivalent value *in exchange* for the transfer….") (emphasis added). Likewise UFTA § 8(d) ("Notwithstanding voidability of a transfer…, a good-faith transferee … is entitled, to the extent of value *given the debtor* for the transfer….to [a lien on the transferred property]") (emphasis added). The language of UFTA § 8(a) is very different: "A transfer… is not voidable…against a person who took in good faith and for a reasonably equivalent value.")

[23] The three good faith defenses provided by UFTA § 8 are as follows: (1) Section 8(a), available to a recipient of an "actual intent" transfer "who took in good faith and for a reasonably equivalent value" and against any subsequent transferee of that person;

(2) Section 8(b)(2), available to a good faith subsequent transferee "who took for value" and against any subsequent transferee of that person (akin to § 550(b) of the Bankruptcy Code); and

(3) Section 8(d), a lien or partial set-off available to a good faith transferee "to the extent of the value given the debtor" (akin to § 548(c)).

[24] In particular, if § 8(a) were meant to apply to subsequent transfers, then it would be partly redundant with § 8(d), which protects all good faith subsequent transferees "who took for value." (The provisions would not be

This focus of § 8(a) on prima facie avoidability of actual fraudulent transfers from a debtor to an initial transferee demonstrates why "reasonably equivalent value" must be given to the debtor in order for § 8(a) to apply. First, the absence of the word "debtor" in the text of § 8(a) is due to the fact that the "transferor" and the "debtor" are one and the same. Just as a good faith subsequent transferee who "takes for value" under § 8(b)(2) must provide value to his or her transferor, an initial transferee seeking to rely upon § 8(a) must provide reasonable equivalent value to his or her transferor, *i.e.* the debtor. Second, the exclusive focus of § 8(a) on initial transferees of actual fraudulent transfers reveals that the drafters must have meant for reasonably equivalent value to be provided to the debtor in order to avoid several troubling results including (1) creating a preferred class of transferees,[25] (2) facilitating fraud,[26] and (3) allowing the dissipation of debtor assets without any corresponding value.[27] Presumably, the drafters would not have crafted a special defense available only to initial transferees of actual fraudulent transfers that would result in such potentially inconsistent and inequitable consequences.

Finally, inclusion of § 8(a) into the UFTA—assuming it requires reasonably equivalent value to the debtor—creates a neat stratification of initial transferees in which all initial transferees are treated identically except in situations where collusion is most likely. Specifically:

- *Category 1: Where the debtor did not receive reasonably equivalent value, and the transferee acted in good faith.* Within this category, all initial transferees of fraudulent transfers—*i.e.* where the other statutory elements are met—are strictly liable because the transfer is avoidable, but have a set-off defense under § 8(d) to the extent that the transferee gave value to the debtor.
- *Category 2: Where the debtor received reasonably equivalent value, and the transferee acted in good faith.* Within this category, all initial transferees are completely immune from liability because the transfer would not be avoidable.
- *Category 3: Where the debtor did not receive reasonably equivalent value, and the transferee did not act in good faith.* Within this category, all initial transferees of fraudulent transfers are strictly liable because the transfer would be avoidable (assuming that actual intent or the constructive fraud elements related to the debtor's financial condition were satisfied).
- *Category 4: Where the debtor received reasonably equivalent value, and the transferee did not act in good faith.* Within this category, only actually fraudulent transfers would be avoidable, and thus only initial transferees of

completely redundant, because § 8(a) provides a complete defense to the transferee, while § 8(d) only reduces the transferee's liability to the extent of the value given.)

[25] Good faith initial transferees of actually fraudulent transfers who provide zero value to the debtors could totally escape liability, whereas good faith transferees of constructively fraudulent transfers who provide some but less than reasonably equivalent value would only get a set-off (under § 8(d));

[26] In cases where a malfeasant insider diverted corporate funds to pay an obligation owed by the insider to a third-party, creditors would have no recourse to avoid the transfers as actually fraudulent unless the third-party did not act in good faith.

[27] So long as the initial transferee provided reasonably equivalent value to someone, creditors would be powerless to avoid an actually fraudulent transfer even if the debtor did not receive one penny of value.

> actually fraudulent transfers could be held liable. The distinction in this category makes perfect sense, however, in order to prevent collusion between a debtor with actual fraudulent intent and a bad-faith transferee.

This equal treatment of initial transferees is more likely to have been the intended consequence of the inclusion of § 8(a) in the UFTA.

D. "Avoidance" of a Fraudulent Obligation. Another subject on which amendment to the comments appears to be warranted relates to the remedy that applies in the event that a debtor incurs an obligation that is held to be fraudulent under UFTA.

Fraudulent *transfer* law is, for obvious reasons, ordinarily thought of as applying to *transfers* of property. But the UFTA, like the earlier UFCA, also applies to incurrence of obligations. The basic remedial provision of the UFTA applies equally to a transfer of property and the incurrence of an obligation: namely, the plaintiff creditor "may obtain … (1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim." UFTA § 7(a)(1). It is obvious that the avoidance remedy provided by § 7(a)(1) was written with property transfers primarily in mind. It makes perfect sense as to transfers. It makes little sense as applied to an obligation. "Avoidance" of an obligation, under the ordinary meaning of that word, would mean annulment of the obligation. Annulment would, however, be contrary to an axiom of fraudulent transfer law in the primordial setting of property transfers, which is that, even if a transfer is fraudulent as to the debtor's creditors, it is effective as between the debtor and transferee. Furthermore, § 7(a)(1) provides for "avoidance" of a fraudulent obligation only "to the extent necessary to satisfy the [plaintiff] creditor's claim." Yet annulment of the fraudulent obligation, whether in part or in whole, will never "satisfy the [plaintiff] creditor's claim," for it gives no value to the plaintiff creditor.

At least some courts have subordinated the fraudulent obligation as the remedy.[28] Commentators (including Frank Kennedy, reporter for the UFTA) have approved this resolution in at least some factual settings, though not necessarily in all.[29] It is possible to justify the subordination remedy textually by relying on § 7(a)(3)(iii), which provides that the plaintiff creditor "may obtain…any other relief the circumstances may require." However, that meshes uneasily with § 7(a)(1), which seems to permit annulment (or at least some remedy other than subordination). Accordingly, it would be desirable to add to the comments guidance on the remedies applicable to a fraudulent obligation. At least one state, Pennsylvania, added such a comment to the legislative history that accompanied its enactment of the UFTA.[30] The Pennsylvania comment, quoted as follows, would be a good starting point for an amendment to the official comments:

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[28] *See, e.g., In re* Crowthers McCall Pattern, Inc., 120 B.R. 279, 288 (Bankr. S.D.N.Y. 1990).

[29] *See* Gerald K. Smith & Frank R. Kennedy, *Fraudulent Transfers and Obligations: Issues of Current Interest*, 43 S.C. L. REV. 709, 714-20 (1992). Professor Carlson has expressed similar dissatisfaction with the remedies provided by the UFTA and its predecessor for fraudulent obligations, though he prefers to address it by a much more sweeping reconstruction of the remedial structure of fraudulent transfer law as to both asset transfers and obligations. *See* David Gray Carlson, *The Logical Structure of Fraudulent Transfers and Equitable Subordination*, 48 WM. & MARY L. REV. 157 (2003).

[30] Furthermore, one state, Utah, has added "equitable subordination" to § 10 of its version of the UFTA as one of the "principles of law and equity" that supplement the UFTA. UTAH CODE ANN. § 25-6-11 (2012).

> Particularly if a transaction avoided under subsection (a)(1) is an obligation rather than a transfer, equitable principles should govern what specific remedy or remedies properly constitute "avoidance" in a particular case. Such remedies should be fashioned in light of the long-established principle that a transaction fraudulent under this chapter and its predecessors, even if avoidable by creditors, remains enforceable as between the parties to the transaction. *See, e.g.,* Smith v. Arrell*,* 388 Pa. 117, 130 A.2d 167 (1957). Accordingly, even if an obligation is subject to avoidance under this chapter, it may be inappropriate simply to void or cancel the obligation, because such an obligation should still rank ahead of equity interests in the debtor. In many cases the most appropriate remedy will be equitable subordination of the obligation. *See, e.g., In re* Crowthers McCall Pattern, Inc., 120 Bankr. 279, 288 (Bankr. S.D.N.Y. 1990).[31]

E. Conformity to Bankruptcy Code § 548. One outside academic suggested that the Study Committee consider the advisability of amending the UFTA to conform more closely in its details to the Bankruptcy Code's integral fraudulent transfer provision, § 548. The commenter did not single out any particular nonconformity as being objectionable, but simply stated that "there seem to be some differences between [the two statutes] that are not based on different policy considerations and do no more than create litigation issues."

It is quite true that there are differences of detail between the UFTA and Bankruptcy Code § 548 as to which there is no obvious policy justification. However, most of those differences existed in § 548 as originally enacted in 1978 and the UFTA as promulgated a mere six years later, in 1984. As previously noted,[32] these differences are puzzling, given (i) the brevity of the interval between the two statutes, (ii) the fact that one of the primary reasons for drafting the UFTA, as stated in its Prefatory Note, was to conform state fraudulent transfer law to that set forth in the new Bankruptcy Code, and (iii) the fact that key players (including the reporter) in the UFTA drafting process were also key players in the drafting of the Bankruptcy Code. Given that background, the Study Committee does not feel that it would be advisable at this late date to conform differences between the two that the original drafters chose to maintain, merely for conformity's sake—*i.e.*, in the absence of a substantial need.

The differences between the UFTA and the original enactment of Bankruptcy Code § 548 include some that are quite substantial, such as the reachback period (generally four years under UFTA § 9, but only one year under Bankruptcy Code § 548 as originally enacted, extended generally to two years in the 2005 amendments). Other differences are less weighty but by no means insignificant. An illustration is the point discussed in part IV.C above: namely, UFTA § 8(a) provides a complete defense to a good-faith transferee who gives reasonably equivalent value that has no analogue in § 548. Another such difference arguably amounts to special interest legislation, to wit: § 548(d)(2) since its inception has provided immunity from constructive fraud attack for certain capital markets transactions (originally only margin payments received by commodity brokers and forward contract merchants, but vastly extended by successive amendments to include a panoply of other capital markets transactions). The UFTA has never provided any comparable immunity.

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31 12 PA. CONS. STAT. ANN. § 5107, Committee Comment 7 (West 2012).

32 *See supra* text at note 18.

Because the Study Committee does not consider it desirable to revisit the decisions on conformity with § 548 made by the drafters of the UFTA without substantial need, and no such need is apparent, the Study Committee focused upon nonconformities between § 548 and the UFTA that arise from amendments to the Bankruptcy Code after the UFTA was promulgated in 1984.[33] Those amendments are discussed below. The Study Committee does not believe that any of these post-1984 amendments to § 548 warrants a conforming amendment to the UFTA.

1. Several post-1984 amendments to § 548 expanded the exemption from constructive fraud attack for capital markets transactions set forth in § 548(d)(2). Because (i) the exemption existed in the original 1978 version of § 548, (ii) the drafters of the UFTA did not include such an exemption, and (iii) there has been no objection to the omission of such an exemption by participants in those markets, the Study Committee does not believe that an amendment to parallel the Bankruptcy Code on this subject is warranted.[34]

2. The 1998 amendments added exceptions to Bankruptcy Code §§ 548 and 544 pertaining to charitable contributions. These are discussed in part IV.A above.

3. The 2005 amendments altered Bankruptcy Code § 548 in several ways.

a. Those amendments extended the reachback period for most fraudulent transfers from one year to two. (§ 548(a)(1), (b)). They also further expanded the immunity from constructive fraud attack given to various capital market transactions by § 548(d)(2). Neither of these amendments warrants conforming change to the UFTA because they relate to matters on which the UFTA has differed from § 548 from its inception.

b. The 2005 amendments added a provision applicable to a transfer to a self-settled trust, with a 10 year reachback period. (§ 548(e)). That provision provides for avoidance of any transfer by a debtor who is beneficiary of a "self-settled trust or similar device," made with "the actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted." The Study Committee does not recommend a parallel amendment to the UFTA. Such an amendment is unlikely to be enacted by states that have enacted legislation validating self-settled trusts.[35] Such an amendment should be unnecessary in states that have not enacted such legislation, because traditional principles would

[33] Post-1978 amendments to Bankruptcy Code § 548 are conveniently summarized, in chronological order, in 5 COLLIER ON BANKRUPTCY ¶548.12 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012).

[34] Bankruptcy Code § 546(e) through (j) protect prepetition transfers of property made in connection with any of several broadly-defined classes of capital markets transactions from avoidance in a bankruptcy proceeding, on the basis of state fraudulent transfer law or Bankruptcy Code § 548, with the sole exception of actual fraud under Bankruptcy Code § 548(a)(1). This probably explains the lack of objection by participants in those markets to the absence of an exception in the UFTA parallel to the exceptions set forth in § 548(d). The § 548(d) exceptions appear to be belt-and-suspenders protection for such transactions, given § 546(e) through (j).

[35] According to Richard Nenno, as of April 2012 effective statutes authorizing self-settled trusts existed in Alaska, Delaware, Nevada, New Hampshire, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming. Similar statutes also existed in Colorado, Hawaii, Missouri, and Oklahoma, but according to Nenno those statutes "are flawed and/or not fully developed." Richard W. Nenno, *Planning and Defending Domestic Asset-Protection Trusts, in* AMERICAN LAW INST. & AMERICAN BAR ASS'N, PLANNING TECHNIQUES FOR LARGE ESTATES, text at n.18 (2012).

declare transfers to a self-settled trust to be fraudulent *per se*.[36] Hence enactment of such a provision by a state that adheres to traditional principles would represent a weakening of its position, insofar as such a provision would tend to validate a transfer made to such a trust absent a specific showing of actual intent to defraud (though the extension of the reachback period to 10 years would have an offsetting effect).

c. Finally, the 2005 amendments added a new provision to Bankruptcy Code § 548 that is aimed at transfer of property or incurrence of an obligation by a debtor to an insider under an employment contract. (§ 548(a)(2)(B)(ii)(IV)). Although this provision is in form an amendment to the constructive fraud rule, it differs radically from the traditional constructive fraud rule in that it renders voidable a transfer of property or incurrence of an obligation without regard to the debtor's financial condition at the time of the transfer or incurrence. Specifically, this provision allows the trustee in bankruptcy to avoid a transfer of property or an obligation incurred by a debtor-employer if (i) the debtor received less than reasonably equivalent value in exchange, and (ii) the debtor "made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business."

As an example, if a solvent company grants a golden parachute to its CEO in 2010, the company may later challenge that grant (or payments made pursuant to that grant) in a bankruptcy filed before 2012, so long as the debtor can show that (i) it did not receive reasonably equivalent value in exchange, and (ii) the grant was not in the ordinary course of business of the debtor.

Putting aside the question of the substantive merit of this provision, the Study Committee does not recommend a parallel amendment to the UFTA because it is highly unlikely to be enacted. Such an amendment to the UFTA would have practical effect (i) if the debtor-employer were not subject to a proceeding under the Bankruptcy Code, or (ii) in bankruptcy, if the reachback period for an action under such a provision of the UFTA were set at the four year period ordinarily applicable to constructive fraud actions, rather than the two-year period that applies under Bankruptcy Code § 548. One may question how likely it is that a creditor would bring such an avoidance action absent bankruptcy of the debtor. The threat of such an action, however, would be an extraordinary bludgeon in the hands of a creditor. A proposed amendment to the UFTA of this nature would, in the view of the Study Committee, be certain to draw strong opposition, and would not have substantial countervailing support.

F. Other Suggested Amendments. Professor David Carlson, who has written several articles on fraudulent transfer law, submitted a list of revisions to the UFTA for the consideration of the Study Committee.[37] The Study Committee concluded that these suggestions do not

[36] *See* Kenneth C. Kettering, *Codifying a Choice of Law Rule for Fraudulent Transfer: A Memorandum to the Uniform Law Commission*, 19 AM. BANKR. INST. L. REV. 319, 327-30 (2011). On the other hand, an appellate court in Illinois, which does not have legislation validating self-settled trusts, recently reversed a trial court's holding that transfer to a self-settled trust is *per se* fraudulent. An appeal to the Illinois Supreme Court is pending. Rush U. Med. Ctr. v. Sessions, 956 N.E.2d 490 (Ill. App. Ct. 2011), *appeal allowed*, 962 N.E.2d 489 (Ill. 2011).

[37] See, in particular, Carlson, *supra* note 29, for an article by Professor Carlson directly attuned to the drafting of the UFTA. Mention should also be made of Paul M. Shupack, *Confusion in Policy and Language in the Uniform Fraudulent Transfer Act,* 9 CARDOZO L. REV. 811 (1987), which likewise contains suggestions that would have been

warrant revision of the statutory text of the UFTA, though some of them may warrant revision of comments. This is by no means a judgment that the suggestions lack merit. To the contrary, they would have merited serious consideration in connection with the original drafting of the UFTA. Rather, the Study Committee's judgment is a pragmatic one. The generally successful functioning of the UFTA, long continued, means that its terms should not be altered absent a substantial need, and the suggestions did not, in the Study Committee's opinion, reach that high threshold. By contrast, a lower standard applies to the two subjects originally proposed to be addressed by the Study Committee, namely choice of law and evidentiary matters, because provisions on those two subjects would not alter the UFTA's current terms, but rather would address issues that the UFTA does not presently address.

An example is Professor Carlson's suggestion that the language of the UFTA be recast to clarify whether a transfer of property or incurrence of an obligation that is condemned by the statute should be treated as no transfer or incurrence at all (as is suggested by the term "avoidance"), or should instead be treated (correctly, in Carlson's view) as a transfer or incurrence that is valid as between the debtor and the transferee/obligee and that the law assigns for security to the creditor having the fraudulent transfer right. Carlson acknowledges that this recasting would have a practical effect only in "certain admittedly marginal cases."[38] As discussed in part IV.D, with respect to fraudulent obligations, at least, it appears possible for a sensible court to navigate to a sensible result in such cases by invoking the "other appropriate remedies" provision of the UFTA, though it would be helpful to provide encouragement in the form of a comment.

A second example is Professor Carlson's dislike of UFTA § 8(b), which provides a creditor with an *in personam* claim against the transferee of a fraudulent transfer. That was a distinct change from the UFCA, which gave the creditor only *in rem* rights to the transferred property (except perhaps insofar as the "other appropriate remedies" language applicable under the UFCA in certain circumstances might have been stretched to provide an *in personam* remedy). Putting aside the theoretical merits of repeal of this feature of the UFTA, such repeal would be futile absent amendment of the Bankruptcy Code. That is because the Bankruptcy Code provides for an *in personam* claim against the transferee in a fraudulent transfer action brought in a bankruptcy proceeding, whether brought under state fraudulent transfer law or Bankruptcy Code § 548, if "the court so orders." Bankruptcy Code § 550(a).

V. Concluding Observations. For the foregoing reasons, the Study Committee is of the view that the decision whether to commence a drafting project should rest on the merits of addressing the two subjects described in its original report. Such a narrowly-focused project should be relatively fast and inexpensive.

The opinions of the Study Committee's members and observers as to the merits of that limited project have not changed since the original report. All consider that the object is desirable and should be fairly easy to implement. The Study Committee estimates that there is a reasonable likelihood of enactment, especially if the uniform law is cast in the form of an

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well taken in connection with the original drafting of the UFTA but that do not reach the high threshold for amendment at the present date.

[38] Carlson, *supra* note 29, at 157.

amendment to the UFTA. On the other hand, as noted in the original report, while the view of a substantial preponderance of members and observers was that the benefit of such a project warrants its cost, that opinion was not unanimous. Moreover, all participants acknowledge that the choice of law issue does not arise with sufficient frequency to make statutory resolution a matter of urgency. Still, in the brief period since the Study Committee's original report was submitted in January, at least three reported cases (one by the U.S. Court of Appeals for the Fifth Circuit) have been decided that required resolution of the choice of law issue.[39]

Respectfully submitted.

EES

Enclosure: Report of the Committee on Choice of Law for Fraudulent Transfer (January 9, 2012)

[39] MC Asset Recovery LLC v. Commerzbank A.G. (*In re* Mirant Corp.), 675 F.3d 530 (5th Cir. 2012) (reserving judgment on whether choice of law in this bankruptcy proceeding was governed by federal rules or the rules of the forum state (Texas), as both were held to apply the "most significant relationship" analysis of the *Restatement (Second) of Conflict of Laws*; holding that New York's fraudulent transfer law (which was the UFCA), applied to a fraudulent transfer attack on an intercorporate guaranty, rather than Georgia's then-nonuniform law (under which the guaranty would not be susceptible to fraudulent transfer attack at all));

Feuerbacher v. Moser, No. 4:11–CV–272, 2012 WL 1070138 (E.D. Tex., March 29, 2012) (reserving judgment on whether choice of law in this bankruptcy proceeding was governed by federal rules or the rules of the forum state (Texas), as both were held to apply the "most significant relationship" analysis of the *Restatement (Second) of Conflict of Laws*; holding that the fraudulent transfer law of Texas, rather than Colorado, applied to an interspousal conveyance of Colorado real estate made in anticipation of the transferor's bankruptcy filing; both states had enacted the UFTA but Texas had a nonuniform provision providing for award of attorney's fees against the transferee, which therefore applied);

Allstate Ins. Co. v. Countrywide Fin. Corp., No. 2:11–CV–05236–MRP, 2012 WL 335730 (C.D. Cal., Feb. 2, 2012) (applying New York choice of law rules (after transfer of venue from New York to California); holding that fraudulent transfer law of Illinois, rather than New York, applied to claims brought by purchasers of residential mortgage-backed securities against bank that acquired the issuer of the securities, which allegedly misrepresented the quality of the securities).