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FOR DISCUSSION ONLY

AMENDMENTS TO THE UNIFORM FRAUDULENT TRANSFER ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

For February 1 - 2, 2013 Drafting Committee Meeting

With Reporter's Notes

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January 15, 2013

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AMENDMENTS TO THE UNIFORM FRAUDULENT TRANSFER ACT

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

* * *

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

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

(10) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

[Existing paragraph (10) and succeeding paragraphs to be renumbered]

Reporter’s Note

1. *“Organization,” paragraph (9).* In the UFTA as amended hereby, “organization” is used only in new Section 10, pertaining to choice of law, in which it appears in the definition of the debtor’s “location.” Because new Section 10 adopts the definition of “location” set forth in UCC § 9-307(b), this section uses the same definition of “organization” that applies to UCC § 9-307(b), which is set forth in UCC § 1-201(b)(25). The original UFTA also used the term “organization,” without definition, in the definition of “person” in original paragraph (9), but these amendments delete that usage.

2. *“Person,” paragraph (10).* The definition of “person” is the current standard definition prepared by the Uniform Law Commission, as set forth in the 2012 edition of its Drafting Rules. The current standard definition includes an option to delete the phrase “public corporation, government or governmental subdivision, agency, or instrumentality” and add a sentence stating that “person” does not include such entities. That option has is not exercised here because the definition of “person” in the original UFTA includes such entities.

The current standard definition differs from definition of “person” that applies for purposes of UCC § 9-307(b). That definition, at UCC § 1-102(b)(27), is as follows:

> (27) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

The differences between the current standard definition as included here, and the definition in UCC § 1-102(b)(27), seem to be merely stylistic.

The term "person" is used in the original UFTA in the following places: (i) the definitions of the basic terms "creditor" and "debtor" in Section 1, (ii) the definitions of the less central terms "affiliate" and "insider" in Section 1 (which are used only in connection with the "insider preference" rule of UFTA § 5(b)), (iii) Sections 3(a), 3(b) (defining "value"), and (iv) Sections 8(a), 8(b)(i) (pertaining to defenses and liabilities). In the UFTA as amended hereby, "person" is also used in the new definition of "organization."

SECTION 2. INSOLVENCY.

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

(b) A debtor who is generally not paying his [or her] debts as they become due is presumed to be insolvent.

(c) A partnership is insolvent under subsection (a) if the sum of the partnership's debts is greater than the aggregate of all of the partnership's assets, at a fair valuation, and the sum of the excess, not to exceed the partnership's debts for which the general partner is liable, of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

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

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

Reporter's Note

The Drafting Committee is authorized to prepare amendments that address "the consistency of the UFTA with ULC unincorporated business organization acts." That charge was inspired by a problem with the definition of insolvency of a partnership set forth in UFTA § 2(c).

The terms "general partner" and "partnership" are not defined in the UFTA. In Section 2(c) as originally written, "general partner" plainly was assumed to mean a person who,

by virtue of his status as partner, is liable for all of the obligations of the partnership. Modern partnership statutes, however, contemplate specialized forms of partnership under which a person may be denominated a "general partner" (or a "partner" of a partnership having only one class of partners), yet have materially limited liability for the obligations of the partnership. Examples include (i) Uniform Partnership Act (1997) § 306(c) (providing that a partner is not liable for any obligation of a partnership incurred while the partnership is a "limited liability partnership"), (ii) Uniform Limited Partnership Act (2001) § 404(c) (providing similarly as to a general partner of a "limited liability limited partnership"), and (iii) S.C. Code Ann. § 33-41-370 (1994) (providing that a partner in a "registered limited liability partnership" is not liable for obligations chargeable to the partnership arising from negligence, wrongful acts, or misconduct by another partner or an employee or agent of the partnership).

Even in the case of a simple general partnership or limited partnership, it need not be the case that a general partner is liable for all of the partnership's obligations. Under modern uniform statutes, a person who is a general partner is not generally liable for obligations incurred by the partnership before the person became a general partner. See Uniform Partnership Act (1997) § 306(a), (b); Uniform Limited Partnership Act (2001) § 404(a), (b).

As noted in Comment 3 to UFTA § 2, the definition of partnership insolvency in subsection (c) was derived from the definition of "insolvency" in § 101(29)(B) of the Bankruptcy Code (as constituted in 1984 when the UFTA was promulgated), which is now at § 101(32)(B). Like the UFTA, the Bankruptcy Code does not include definitions of "general partner" or "partnership."

The amendment to Section 2(c) attempts to make the definition of partnership insolvency work more sensibly as to a partnership having general partners that are not liable for some or all of the partnership's obligations. Such an amendment to the statutory text would create a mismatch with the definition in the Bankruptcy Code. However, the same problem exists in the definition in the Bankruptcy Code, which should likewise be amended. Coordination with the National Bankruptcy Conference or other appropriate bodies may be desirable.

An alternative approach would be to leave the statutory text untouched and add a comment stating that a person should be considered a "general partner" for the purpose of Section 2(c) only to the extent of partnership debts for which the person is liable.

SECTION 4. TRANSFERS FRAUDULENT AS TO PRESENT AND FUTURE CREDITORS.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

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

1 (2) without receiving a reasonably equivalent value in exchange for the transfer or
2 obligation, and the debtor:
3 (i) was engaged or was about to engage in a business or a transaction for
4 which the remaining assets of the debtor were unreasonably small in relation to the business or
5 transaction; or
6 (ii) intended to incur, or believed or reasonably should have believed that
7 he [or she] would incur, debts beyond his [or her] ability to pay as they became due.
8 (b) In determining actual intent under subsection (a)(1), consideration may be given,
9 among other factors, to whether:
10 (1) the transfer or obligation was to an insider;
11 (2) the debtor retained possession or control of the property transferred after the
12 transfer;
13 (3) the transfer or obligation was disclosed or concealed;
14 (4) before the transfer was made or obligation was incurred, the debtor had been
15 sued or threatened with suit;
16 (5) the transfer was of substantially all the debtor's assets;
17 (6) the debtor absconded;
18 (7) the debtor removed or concealed assets;
19 (8) the value of the consideration received by the debtor was reasonably
20 equivalent to the value of the asset transferred or the amount of the obligation incurred;
21 (9) the debtor was insolvent or became insolvent shortly after the transfer was
22 made or the obligation was incurred;
23 (10) the transfer occurred shortly before or shortly after a substantial debt was

incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

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

Reporter's Note

1. The Drafting Committee has the authority to amend the UFTA to address "presumptions and burdens of proof for fraudulent transfers." The Study Committee recommended that the Drafting Committee be given that authority because "[c]ourts in states that have enacted the UFTA have differed materially on such matters." However, the Study Committee did not make any recommendation as to whether such amendments should be adopted, nor did it make any recommendation as to the substance of such amendments if adopted.

The Drafting Committee may conclude that it is not necessary to amend the UFTA in respect of such evidentiary matters. Reported cases in which such evidentiary matters have been a significant issue have often involved a choice of law issue, in that two candidate jurisdictions have different case law on evidentiary matters. The addition of a choice of law rule to the UFTA may provide enough certainty about evidentiary matters to render unnecessary the addition of substantive provisions on the subject.

2. For discussion purposes, this draft includes amendments to UFTA §§ 4, 5 and 8 that take one plausible position on such evidentiary matters. The proposed amendments to UFTA §§ 4 and 5 (new §§ 4(c) and 5(c)) are intended principally to iron out two kinds of identified nonuniformities in the case law.

a. First, cases in some jurisdictions hold that the "intent to hinder, delay, or defraud any creditor of the debtor" required by UFTA § 4(a)(1) must be established by clear and convincing evidence. The proposed amendments direct that the ordinary preponderance of evidence standard be applied.

b. Second, cases in some jurisdictions apply nonstatutory presumptions that have the effect of shifting the burden of proof, both in actions based on constructive fraud under UFTA §§ 4(a)(2) or 5(a) and in actions based on actual fraud under UFTA § 4(a)(1).

As to constructive fraud, cases in some jurisdictions hold that if a debtor makes a transfer for less than reasonably equivalent value, then the transferee bears the burden of proving that the debtor was solvent at the time of the transfer. Some jurisdictions go even further and shift to the transferee the burden of proving that the debtor was solvent

at the time of the transfer or that the debtor received reasonably equivalent value in exchange, if the debtor merely owes a debt at the time of transfer (which is almost inevitably the case), Similarly, cases in some jurisdictions hold that if a debtor makes a transfer to a relative, then the relative bears the burden of proving that the debtor was solvent at the time of the transfer or that the debtor received reasonably equivalent value in exchange.

As to actual fraud, a strong minority of cases hold that a presumption of actual fraud under § 4(a)(1) is created when several of the statutory badges of fraud are present , which shifts the burden of persuasion to the transferee.

The intent of the proposed amendments is to abolish all such nonstatutory presumptions. It might be questioned whether the language used in this draft does that with sufficient clarity. A statement of the intended reach of these amendments in the comments may be sufficient. The amendments certainly should not abolish the statutory presumption contained in UFTA § 2(b).

The proposed amendment to UFTA § 8 relating to evidentiary matters (new Section 8(g)) is not inspired by identified nonuniformities in the case law, but merely rounds out the statute's treatment of burdens of proof in a way that seems reasonable.

SECTION 5. TRANSFERS FRAUDULENT AS TO PRESENT CREDITORS.

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

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

<u>(c) A party making a claim based on subsection (a) or (b) has the burden of proving by a preponderance of the evidence each element of the claim.</u>

Reporter's Note

As to Section 5(c), see the Reporter's Note to Section 4.

SECTION 8. DEFENSES, LIABILITY, AND PROTECTION OF TRANSFEREE.

(a) A transfer or obligation is not voidable under Section 4(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

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

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

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

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

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

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

(2) enforcement of any obligation incurred; or

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

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

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

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

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

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

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

(3) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

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

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

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

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

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

Comment

(1) Subsection (a) states the rule that applies when the transferee establishes a complete defense to the action for avoidance based on Section 4(a)(1). The subsection is an adaptation of the exception stated in § 9 of the Uniform Fraudulent Conveyance Act. ~~The~~ Pursuant to subsection (g), the person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. ~~*Chorost v. Grand Rapids Factory Showrooms, Inc.*, 77 F. Supp. 276, 280 (D.N.J. 1948), *aff'd*, 172 F.2d 327, 329 (3d Cir. 1949).~~ Subsection (a) implements the general principle of protecting a good faith purchaser for value, who the law protects in many other settings. An example is U.C.C. § 2-403(1), which awards good title to a good faith purchaser for value of a good from a person who had only "voidable title." Subsection (a) does not require the value given to be received by the debtor, just as U.C.C. § 2-403(1) does not require the value given to be received by the person whose interest is cut off by the rule. By contrast, a transfer made or obligation incurred by a debtor who is in a financial condition described in any of the three "constructive fraud" provisions set forth in Section 4(a)(2) or 5(a) is fraudulent under that provision unless the debtor receives reasonably equivalent in exchange for the transfer or obligation.

* * *

Reporter's Note

1. The Drafting Committee's mandate includes authority to clarify whether the defense in Section 8(a) applies if the "reasonably equivalent value" given by the transferee is not received by the debtor. The amendment to Comment 1 in this draft clarifies that the value need not be received by the debtor. The Study Committee was divided on that point, which came up late in the Study Committee's deliberations. If the Drafting Committee concludes that the value must be received by the debtor, a change to the statutory text would appear to be necessary.

2. See the Reporter's Note to Section 4 for notes on new Section 8(g), relating to evidentiary matters.

3. The Drafting Committee may wish to consider an issue relating to Section 8(e)(2) that is not addressed by this draft and that was not considered by the Study Committee. Section 8(e)(2) immunizes from constructive fraud attack "enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code." That broad language covers not only a foreclosure sale (which is redundantly immunized from constructive fraud attack by Section 3(b)), but also a strict foreclosure – that is, retention by the secured party of collateral in partial or complete satisfaction of the secured debt. When the UFTA was promulgated in 1984, strict foreclosure was addressed in UCC § 9-505; since 1998 strict foreclosure has been addressed by much expanded provisions at UCC §§ 9-620—9-622.

It is questionable whether immunization of strict foreclosure from constructive fraud attack is appropriate. Comment 5 to UFTA § 8 recognizes the problem but suggests that that the interests of the debtor's unsecured creditors can be adequately policed by two features asserted to exist in then-current Article 9. The first is an asserted requirement that "the creditor must

proceed in good faith (U.C.C. § 9-103)." In fact UCC § 9-103 (1984) contained no such requirement, though a general duty of good faith did exist in UCC § 1-203 (1984) (now UCC § 1-304 (2001)), and the comments to the current version of Article 9 acknowledge the applicability of that general duty of good faith to strict foreclosure. See UCC § 9-620 cmt. 11 (1998). The second is an asserted requirement that the strict foreclosure be done in in a "commercially reasonable manner." Comment 5 to UFTA § 8 acknowledges, however, that UCC § 9-505 (1984) states no such requirement; Comment 5 merely asserts that such a requirement is "implicit." The much-expanded strict foreclosure rules in the current version of Article 9 provide no basis for asserting a requirement of "commercial reasonableness." Concepts of "good faith" or "commercial reasonableness," even if applicable, are a doubtful basis for vindicating the interests of the debtor's unsecured creditors. The strict foreclosure rules of Article 9 are not concerned with protecting the debtor's unsecured creditors; they are concerned with protecting the debtor (and to some extent junior lienholders, if such exist). It is by no means clear that those rules, however buttressed by "good faith" or "commercial reasonableness," constrain a strict foreclosure to which the debtor is wholly agreeable.

California and Pennsylvania, at least, made nonuniform changes to their enactments of Section 8(e) that delete the immunization of strict foreclosure. Amendment of the official text of the UFTA on this point would require an addition to the Drafting Committee's mandate. If Section 8(e) is revised to delete the immunization of strict foreclosure, it may be unnecessary to retain both such a revised Section 8(e) and Section 3(b), as the latter already immunizes foreclosure sales from constructive fraud attack. Pennsylvania chose to retain both provisions, but California deleted Section 3(b) and folded its substance into Section 8(e).

[Version A (only for consideration by the Drafting Committee)]

SECTION 10. GOVERNING LAW.

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

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

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

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

(b) A claim in the nature of a claim based on Section 4(a)(2) or 5 is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the

obligation is incurred.

(c) The following rules determine the law that governs a claim in the nature of a claim based on Section 4(a)(1):

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

(A) a claim in the nature of a claim based on Section 4(a)(2) or 5 is made with respect to the same transfer or obligation; or

(B) the circumstances on which the claim is based would support a claim based on Section 4(a)(2) or 5, whether or not such a claim is made.

(2) If paragraph (1) does not apply [and a statute of this state prescribes the law that governs the claim, the claim is governed by that law] [and the claim is that retention of possession of goods by a seller is fraudulent, the claim is governed by the local law of the jurisdiction in which the goods are situated].

(3) If neither paragraph (1) nor paragraph (2) applies, the claim is governed by the local law of the jurisdiction having the most appropriate relationship to the transaction, the debtor, the transferee or obligee, and [the plaintiff creditor] [the debtor's creditors].

Reporter's Note

1. The choice of law rule proposed to be added to the UFTA is drafted as a new Section 10, with existing Section 10 and succeeding sections renumbered. This draft presents for discussion purposes three versions of Section 10, as Versions A, B and C. It is anticipated that the final text will settle on a single version. All three versions implement the recommendation of the Study Committee in its report dated January 9, 2010. (A similar recommendation is given with further detail in Kettering, 19 Am. Bankr. Inst. L. Rev. 319 (2011).) Specifically, the Study Committee recommended that for a claim based on "constructive fraud" under UFTA §§ 4(a)(2) or 5(a), choice of law should be based on the location of the debtor (in the sense defined in subsection (a) of Versions A, B and C) at the time of the challenged transfer or obligation. The Study Committee was more tentative about claims based on "actual fraud" under UFTA §4(a)(1). Hence Versions A, B and C each set forth the same rule for choice of law for claims based on constructive fraud, but set forth alternative approaches to choice of law for claims based on

actual fraud.

2. The definition of the debtor's "location" in subsection (a) of Versions A, B and C is identical to the baseline definition of that term in the 1998 version of UCC Article 9, UCC § 9-307(b). Under Article 9, the law of the debtor's location generally governs (i) the priority of a security interest in intangible property, and (ii) perfection of a nonpossessory security interest in any property. See UCC § 9-301(1). The UFTA definition does not include any of the exceptions to the baseline rule set forth in UCC § 9-307. Those exceptions include the following: (i) UCC § 9-307(c), which provides that the location of a domestic corporation or other "registered organization" is its jurisdiction of organization, and (ii) UCC § 9-307(b), which provides in effect that if the baseline rule would locate a foreign debtor in a jurisdiction that lacks an Article 9-style filing system, then that debtor is instead located in the District of Columbia. Those exceptions are not included in the UFTA definition because their purpose (or at least their primary purpose) relates to the functioning of Article 9's perfection rules. That purpose has no analogue in the operation of the UFTA.

UCC § 9-307(b) locates an individual at the individual's "principal residence." The UFTA definition shows as alternatives "principal residence" and "domicile," both of which were suggested by the Study Committee as meriting consideration. "Principal residence" may be easier to prove than "domicile," but may also be more amenable to temporary manipulation by the debtor.

3. Versions A, B and C apply to insider preference claims (UFTA § 5(b)) the same choice of law rule as for constructive fraud claims (UFTA §§ 4(a)(2) and 5(a)). The Drafting Committee may wish to consider whether there is reason to apply a different choice of law rule for insider preferences. (Note that at least Arizona, California, Indiana and Pennsylvania declined to enact the provisions of the UFTA relating to insider preference.)

4. As with the choice of law rules prescribed by Article 9 pertaining to the priority of a security interest as against competing claims to property, set forth in UCC §§ 9-301—9-307, Versions A, B and C do not include any "escape clause" that would permit a court to ignore the prescribed rule on the basis of public policy.

5. The reason for tabling alternative approaches to choice of law for an action based on "actual fraud" under UFTA § 4(a)(1), in Versions A, B and C, derives from the following considerations. The "constructive fraud" rules of UFTA §§ 4(a)(2) and 5(a), and the "insider preference" rule of UFTA § 5(b), historically are merely special cases of the primordial "actual fraud" rule of UFTA § 4(a)(1). It remains the case that any claim based on constructive fraud or insider preference can be pleaded in the alternative as a claim based on actual fraud. (Indeed, the badges of fraud in UFTA § 4(b) include several that preserve that parallelism.) It would make no sense to apply different choice of law rules to an actual fraud claim and a constructive fraud claim that are essentially duplicative. On the other hand, it would be inappropriate to apply the "debtor location" choice of law rule to *all* actual fraud claims. The primordial rule of actual fraud has been applied in a vast range of settings, many of which are not comparable to the settings to which constructive fraud or insider preference apply, in that the objectionable feature of the transaction is not a reduction in the debtor's net worth, and has no necessary connection

with the debtor's financial condition at the time of transfer. Illustrations include the following:

(a) Certain transfers that have a potential for deceiving persons who deal with the debtor. Examples include (i) the "vendor-in-possession" doctrine that prevails in many states, which provides that a seller's retention of possession of a good after selling it is or may be fraudulent as against purchasers from and creditors of the seller, and (ii) the historical antipathy of courts toward secret liens.

(b) Certain transfers that distort the norms of debtor-creditor law in an undesirable way. Example include (i) a transfer made for the purpose of manipulating the applicability of different bodies of insolvency law (as in *Shapiro v. Wilgus*, 287 U.S. 348 (1932), and as in the case of a transfer of property by a distressed debtor not eligible for relief under chapter 11 of the Bankruptcy Code to an entity that is eligible, which is sometimes called "new debtor syndrome"), (ii) disposition of property of one type in exchange for property of a less liquid type, for the purpose of making creditors' recovery more difficult, and (iii) gross overcollateralization, which likewise complicates recovery by unsecured creditors who may seek to realize on the debtor's equity in such collateral.

(c) Certain transfers that are not objectionable in isolation but that facilitate a later transaction (to which the transferee need not be party) that is unduly prejudicial to creditors. Examples include (i) bulk sales, and (ii) secured loans the proceeds of which are used to make a preferential payment (as in *Dean v. Davis*, 242 U.S. 438 (1917)).

In at least some of these settings it would seem that choice of law should not be determined by the location of the debtor (in any sense). A clear example is UCC § 2-402(2), which assumes that the law governing application of the "vendor in possession" doctrine to a sale of goods is that of the jurisdiction in which the goods are situated. There may be other statutory provisions that, like UCC § 2-402(2), are based on an assumption about choice of law that differs from the location of the debtor (or indeed explicitly prescribes such a different choice of law rule).

Version A addresses choice of law for a claim based on actual fraud in subsection (c), as follows:

Paragraph (c)(1). For a claim of actual fraud that is essentially redundant of a claim of constructive fraud or insider preference, paragraph (c)(1) applies the same "debtor's location" rule that applies to a claim of the latter sort.

Paragraph (c)(2). For other claims of actual fraud, paragraph (c)(2) defers to the choice of law rule prescribed by other statutory law of the state, to the extent such other statutory law exists. Two versions of paragraph (c)(2) are presented: a narrow version directed solely at fraudulent retention of possession of goods by a seller as referred to in UCC § 2-402(2), and a broader version that also defers to other statutory provisions that prescribe a governing law, if such other statutory provisions exist. (It might be questioned whether the wording of the broader version is sufficiently precise to capture UCC § 2-402(2). UCC § 2-402(2) arguably does not "prescribe" a choice of law rule based on situs, but rather assumes the existence of such a rule. This draft assumes that if

the broader language is used this point would be clarified in the comments.)

Paragraph (c)(3). If neither paragraph (c)(1) nor (c)(2) applies, paragraph (c)(3) applies a "most appropriate relationship" rule. That is a paraphrase of the choice of law rule applied to torts under *Restatement (Second) of Choice of Law* § 145(1), which is the rule applied by most courts today to choice of law for fraudulent transfer. *Restatement (Second)* § 145(1) contains cross-references to lengthy glosses, consisting of lists of factors that may be appropriate for consideration in determining which jurisdiction has the "most appropriate relationship" (or, in the vernacular of the *Restatement (Second)*, "most significant relationship"). Those glosses are omitted here.

[Version B (only for consideration by the Drafting Committee)]

SECTION 10. GOVERNING LAW.

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

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

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

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

(b) Except as otherwise provided in subsection (c), a claim in the nature of a claim based on Section 4 or 5 is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.

(c) A claim that retention of possession of goods by a seller is fraudulent is governed by the local law of the jurisdiction in which the goods are situated.

Reporter's Note

Version B of Section 10 prescribes a more definitive choice of law rule than does Version A for a claim based on actual fraud that is not effectively redundant of a claim in constructive fraud or insider preference. Version B applies the "debtor's location" rule to all claims based on actual fraud, subject only to enumerated exceptions. The only exception enumerated in this draft is subsection (c), which implements the choice of law rule assumed in

UCC § 2-402(2) for "vendor in possession" situations. If this approach is pursued, consideration must be given to the following points:

(i) To what extent is the "debtor's location" rule substantively appropriate for the whole universe of actual fraud claims?

(ii) What should be done about other statutory provisions, in addition to UCC § 2-402(2), that expressly state or implicitly assume a choice of law rule for certain actual fraud claims that differs from the "debtor's location" rule?

[Version C (only for consideration by the Drafting Committee)]

SECTION 10. GOVERNING LAW.

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

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

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

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

(b) A claim in the nature of a claim based on Section 4(a)(2) or 5 is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred. .

(c) A claim in the nature of a claim based on Section 4(a)(1) is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred if:

(1) a claim in the nature of a claim based on Section 4(a)(2) or 5 is made with respect to the same transfer or obligation; or

(2) the circumstances on which the claim is based would support a claim based on

Section 4(a)(2) or 5, whether or not such a claim is made.

Reporter's Note

Version C prescribes no choice of law rule for a claim of actual fraud that is not effectively redundant of a claim in constructive fraud or insider preference. Version C thus leaves that point to common law and any other statutory law that may exist, as under the present UFTA.

SECTION ~~10~~ 11. SUPPLEMENTARY PROVISIONS. Unless displaced by the provisions of this [Act], the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

SECTION ~~11~~ 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

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

SECTION ~~13~~ 14. REPEAL. The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed:

[SECTION 15. TRANSITION.] *[To be addressed in a later draft]*