

UFTA governing law

From: Carl Bjerre [cbjerre@uoregon.edu]

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To: Kenneth Kettering; Edwin E. Smith [edwin.smith@bingham.com]

Dear Ken and Ed,

After the Boston floor discussion about mitigating possible abuses of a debtor-location rule, Ken expressed some hesitation about my suggested escape hatch which had been based on the debtor's intentions (see (c) below). Ken's point is well taken since looking the debtor's intentions in an open-ended way could create too much uncertainty in otherwise routine cases, and with that in mind I thought I'd refine my suggestion with a set of presumptions based on length of time before the transfer was made or the obligation was incurred (see (d) below).

The two-year conclusive presumption in (d)(3) borrows loosely from Bankruptcy Code section 522(b)(3)(A), which Andrea clued me into. I'd be perfectly content if the drafting committee would like to improve on the various lengths of time or other aspects of these presumptions, and more broadly I don't have any great allegiance to an intentions-based escape hatch at all, with or without presumptions. But having something in the text does seem advisable in this age of relatively mechanistic judging, and I'm offering the below just as quick ideas that might help the committee's thoughts. Many thanks to the two of you and the other members of the drafting committee.

Best regards,

Carl

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1 **SECTION 10. GOVERNING LAW.**

2 (a) *[Annual Meeting draft for determining location.]*

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

6 (c) If the debtor adopted the location specified in subsection (b) with the substantial
7 purpose of manipulating the results that would otherwise apply, the claim is governed by the
8 local law of [the jurisdiction having the most appropriate relationship to x, y, and z, giving due
9 weight etc. as specified in April draft] [the most recent preceding jurisdiction in which the debtor
10 was located for reasons not attributable to such substantial purpose].

11 (d) Whether the debtor adopted a location with the substantial purpose specified in
12 subsection (c) is a question of fact, except that

13 (1) the debtor is rebuttably presumed to have so acted if the debtor adopted the
14 location four months or less before the transfer was made or the obligation was incurred;

15 (2) the debtor is rebuttably presumed not to have so acted if the debtor adopted
16 the location more than four months but less than two years before the transfer was made or the
17 obligation was incurred; and

18 (3) the debtor is conclusively presumed not to have so acted if the debtor adopted
19 the location two years or more before the transfer was made or the obligation was incurred.