

D R A F T
FOR DISCUSSION ONLY

UNIFORM FRAUDULENT TRANSFER ACT
(As Amended in 2014)

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

October 2013 Interim Draft

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*[Cleaned Version (October 25, 2013), blacklined against
Annual Meeting Draft (May 31, 2013) (similarly cleaned).
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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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October 25, 2013

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UNIFORM FRAUDULENT TRANSFER ACT (2014)**

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~~AMENDMENTS TO~~ UNIFORM FRAUDULENT TRANSFER ACT

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UNIFORM FRAUDULENT TRANSFER ACT

PREFATORY NOTE (1984)

1
2 The Uniform Fraudulent Conveyance Act was promulgated by the Conference of
3 Commissioners on Uniform State Laws in 1918. The Act has been adopted in 25 jurisdictions,
4 including the Virgin Islands. It has also been adopted in the sections of the Bankruptcy Act of
5 1938 and the Bankruptcy Reform Act of 1978 that deal with fraudulent transfers and obligations.
6

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

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

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

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

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

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

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

4 The Drafting Committee appointed by the Conference held its first meeting in January of
5 1983. A first reading of a draft of the revision of the Uniform Fraudulent Conveyance Act was
6 had at the Conference's meeting in Boca Raton, Florida, on July 27, 1983. The Committee held
7 four meetings in addition to a meeting held in connection with the Conference meeting in Boca
8 Raton. Meetings were also attended by the following representatives of interested organizations:
9

10 Robert Rosenberg, Esq., of the American Bar Association;

11
12 Richard Cherin, Esq., of the Commercial Financial Services Committee of the
13 Corporation, Banking and Business Law Section of the American Bar Association;

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

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

16
17 Ernest E. Specks, Esq., of the Real Property, Probate and Trust Law Section of
18 the American Bar Association.
19
20

21
22 The Committee determined to rename the Act the Uniform Fraudulent Transfer Act in
23 recognition of its applicability to transfers of personal property as well as real property,
24 "conveyance" having a connotation restricting it to a transfer of personal property. As noted in
25 | Comment (2) accompanying § 1 and Comment (409) accompanying § 4, however, this Act, like
26 the original Uniform Act, does not purport to cover the whole law of voidable transfers and
27 obligations. The limited scope of the original Act did not impair its effectiveness in achieving
28 uniformity in the areas covered. See McLaughlin, *Application of the Uniform Fraudulent*
29 *Conveyance Act*, 46 Harv.L.Rev. 404, 405 (1933).
30

31 The basic structure and approach of the Uniform Fraudulent Conveyance Act are
32 preserved in the Uniform Fraudulent Transfer Act. There are two sections in the new Act
33 delineating what transfers and obligations are fraudulent. Section 4(a) is an adaptation of three
34 sections of the U.F.C.A.; § 5(a) is an adaptation of another section of the U.F.C.A.; and § 5(b) is
35 new. One section of the U.F.C.A. (§ 8) is not carried forward into the new Act because deemed
36 to be redundant in part and in part susceptible of inequitable application. Both Acts declare a
37 transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors to
38 be fraudulent. Both Acts render a transfer made or obligation incurred without adequate
39 consideration to be constructively fraudulent—*i.e.*, without regard to the actual intent of the
40 parties—under one of the following conditions:
41

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

1 (2) the debtor intended to incur, or believed or reasonably should have believed
2 that he would incur, more debts than he would be able to pay; or
3

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

5 As under the original Uniform Fraudulent Conveyance Act a transfer or obligation that is
6 constructively fraudulent because insolvency concurs with or follows failure to receive adequate
7 consideration is voidable only by a creditor in existence at the time the transfer occurs or the
8 obligation is incurred. Either an existing or subsequent creditor may avoid a transfer or
9 obligation for inadequate consideration when accompanied by ~~the~~ condition specified in
10 § 4(a)(2)(i) or ~~the condition specified in~~ § 4(a)(2)(ii).
11

12 Reasonably equivalent value is required in order to constitute adequate consideration
13 under the revised Act. The revision follows the Bankruptcy Code in eliminating good faith on
14 the part of the transferee or obligee as an issue in the determination of whether adequate
15 consideration is given by a transferee or obligee. The new Act, like the Bankruptcy Code, allows
16 the transferee or obligee to show good faith in defense after a creditor establishes that a
17 fraudulent transfer has been made or a fraudulent obligation has been incurred. Thus a showing
18 by a defendant that a reasonable equivalent has been given in good faith for a transfer or
19 obligation is a complete defense although the debtor is shown to have intended to hinder, delay,
20 or defraud creditors.
21

22 A good-faith transferee or obligee who has given less than a reasonable equivalent is
23 nevertheless allowed a reduction in liability to the extent of the value given. The new Act, like
24 the Bankruptcy Code, eliminates the provision of the Uniform Fraudulent Conveyance Act that
25 enables a creditor to attack a security transfer on the ground that the value of the property
26 transferred is disproportionate to the debt secured. The premise of the new Act is that the value
27 of the interest transferred for security is measured by and thus corresponds exactly to the debt
28 secured. Foreclosure of a debtor's interest by a regularly conducted, noncollusive sale on default
29 under a mortgage or other security agreement may not be avoided under the Act as a transfer for
30 less than a reasonably equivalent value.
31

32 The definition of insolvency under the Act is adapted from the definition of the term in
33 the Bankruptcy Code. Insolvency is presumed from proof of a failure generally to pay debts as
34 they become due.
35

36 The new Act adds a new category of fraudulent transfer, namely, a preferential transfer
37 by an insolvent insider to a creditor who had reasonable cause to believe the debtor to be
38 insolvent. An insider is defined in much the same way as in the Bankruptcy Code and includes a
39 relative, also defined as in the Bankruptcy Code, a director or officer of a corporate debtor, a
40 partner, or a person in control of a debtor. This provision is available only to an existing
41 creditor. Its premise is that an insolvent debtor is obliged to pay debts to creditors not related to
42 him before paying those who are insiders.
43

44 The new Act omits any provision directed particularly at transfers or obligations of
45 insolvent partnership debtors. Under § 8 of the Uniform Fraudulent Conveyance Act any

1 transfer made or obligation incurred by an insolvent partnership to a partner is fraudulent without
2 regard to intent or adequacy of consideration. So categorical a condemnation of a partnership
3 transaction with a partner may unfairly prejudice the interests of a partner's separate creditors.
4 The new Act also omits as redundant a provision in the original Act that makes fraudulent a
5 transfer made or obligation incurred by an insolvent partnership for less than a fair consideration
6 to the partnership.

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

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

27
28 The new Act includes a new section specifying when a transfer is made or an obligation
29 is incurred. The section specifying the time when a transfer occurs is adapted from Section
30 548(d) of the Bankruptcy Code. Its premise is that if the law prescribes a mode for making the
31 transfer a matter of public record or notice, it is not deemed to be made for any purpose under the
32 Act until it has become such a matter of record or notice.

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

40
41 | **PREFATORY NOTE (2014) ~~Proposed~~**

42
43 In 2014 the Uniform Law Commission approved a set of amendments to the Uniform
44 | Fraudulent Transfer Act, which retitled it the Uniform Voidable Transactions Act. The
45 amendment project was instituted to address a small number of narrowly-defined issues, and was
46 not a comprehensive revision. The principal features of the amendments are listed below.

1 Further explanation of provisions added or revised by the amendments may be found in the
2 comments to those provisions.

3
4 *Choice of Law.* The amendments add a new §Section 10, which sets forth a choice of law
5 rule for ~~voidable transfers and obligations~~claims of the nature governed by the Act.

6 *Evidentiary Matters.* New §Sections 4(c), §-5(c), 8(g), and §-8(gh) add uniform rules
7 allocating the burden of proof and defining the standard of proof with respect to claims and
8 defenses under the Act. Language in the former comments to Section 2 defining the effect of the
9 presumption of insolvency created by Section 2(b) has been moved to the text of that provision,
10 the better to assure its uniform application.

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

27
28 *Defenses.* The amendments refine in relatively minor respects several provisions relating
29 to defenses available to a transferee or obligee, as follows:

30
31 (i) As originally written, Section 8(a) creates a complete defense to an action under
32 Section 4(a)(1) (which renders voidable a transfer made or obligation incurred with actual intent
33 to hinder, delay, or defraud any creditor of the debtor) if the transferee or obligee takes in good
34 faith and for a reasonably equivalent value. The amendments add to Section 8(a) the further
35 requirement that the reasonably equivalent value must be given the debtor.

36
37 (ii) To the extent that a transfer is avoidable under the Act, Section 8(b) creates a defense
38 for a subsequent transferee (that is, a transferee other than the first transferee or a person for
39 whose benefit the first transfer was made) that takes in good faith and for value, and for any
40 subsequent transferee from such a person. As originally written, this defense literally applied
41 only to an action for a money judgment. The amendments make clear that the defense also
42 applies to recovery of or from the transferred property or its proceeds, by levy or otherwise. This
43 clarification parallels Bankruptcy Code §§ 550(a), (b) (2014).

44
45 (iii) Section 8(e)(2) as originally written creates a defense to an action under Section

1 4(a)(2) or Section 5 to avoid a transfer if the transfer results from enforcement of a security
2 interest in compliance with Article 9 of the Uniform Commercial Code. The amendments
3 exclude from that defense acceptance of collateral in full or partial satisfaction of the obligations
4 it secures (a so-called “strict foreclosure”).

5
6 *Series Organizations.* A ~~definition of “series organization” has been added at § 1(15),~~
7 ~~and the definition of “person,” now at § 1(new Section 11), has been revised. Together those~~
8 ~~changes provide that~~ provides that each “protected series” of a “series organization” is to be
9 treated as a person for purposes of the Act, even if it is not treated as a legal entity for other
10 purposes. This change responds to the emergence of the “series organization” as a significant
11 form of business organization.

12
13 *Medium Neutrality.* In order to accommodate modern storage media, ~~the~~ references in
14 ~~original § 6the Act~~ to a “writing” have been replaced with “record,” and related ~~definitions~~
15 ~~added.~~ changes made.

16
17 *“Voidable.”* ~~The original Act inconsistently used different adjectives. As amended, the~~
18 Act consistently uses the word “voidable” to denote a transfer or obligation for which the Act
19 provides a remedy. ~~As originally written the Act sometimes inconsistently used “voidable”~~
20 ~~(see original § 2(d), §§ 8(a), (d), (e), (f)), and sometimes “fraudulent” (see original § 4(a),~~
21 ~~§§ 5(a), (b), § 9). The amendments resolve that inconsistency by consistently using “voidable”~~
22 ~~or deleting the adjective as unnecessary.”~~ No change in meaning is intended. ~~It should be noted~~
23 ~~that this Act, like the previous Uniform Fraudulent Conveyance Act, has never purported to be~~
24 ~~an exclusive law on the subject of voidable transfers and obligations. See Prefatory Note (1984),~~
25 ~~¶5; § 1, Comment (2); § 4, Comment (10).¶~~

26
27 *Official Comments.* Comments were added explaining the provisions added by the
28 amendments, and the original ~~Comments~~comments and Prefatory Note were supplemented and
29 otherwise refreshed.

30 ~~———— [If § 8(a) is revised, an appropriate reference will be added.]~~

31
32 ~~———— [If the title of the Act is changed, a reference will be added noting the fact and~~
33 ~~disavowing any intention to effect substantive change thereby.]~~

~~AMENDMENTS TO~~ UNIFORM FRAUDULENT TRANSFER ACT

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

2 (1) “Affiliate” means:

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

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

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

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

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

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

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

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

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

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

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

8 (4) "Creditor" means a person ~~who~~that has a claim.

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

10 (6) "Debtor" means a person ~~who~~that is liable on a claim.

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

13 (8) "Insider" includes:

14 (i) if the debtor is an individual,

15 (A) a relative of the debtor or of a general partner of the debtor;

16 (B) a partnership in which the debtor is a general partner;

17 (C) a general partner in a partnership described in clause (B); or

18 (D) a corporation of which the debtor is a director, officer, or person in
19 control;

20 (ii) if the debtor is a corporation,

21 (A) a director of the debtor;

22 (B) an officer of the debtor;

23 (C) a person in control of the debtor;

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

5 (iii) if the debtor is a partnership,
6 (A) a general partner in the debtor;
7 (B) a relative of a general partner in, a general partner of, or a person in
8 control of the debtor;
9 (C) another partnership in which the debtor is a general partner;
10 (D) a general partner in a partnership described in clause (C); or
11 (E) a person in control of the debtor;
12 (iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
13 (v) a managing agent of the debtor.

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

18 (10) "Organization" means a person other than an individual.

19 (11) "Person" means an individual, estate, business or nonprofit entity, public
20 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
21 entity. ~~If an organization is a series organization, the organization and each series of the~~
22 ~~organization is a separate person for purposes of this [Act], even if for other purposes a series is~~
23 ~~not an entity separate from the organization or other series.~~

1 (12) "Property" means anything that may be the subject of ownership.

2 (13) "Record" means information that is inscribed on a tangible medium or that is stored
3 in an electronic or other medium and is retrievable in perceivable form.

4 (14) "Relative" means an individual related by consanguinity within the third degree as
5 determined by the common law, a spouse, or an individual related to a spouse within the third
6 degree as so determined, and includes an individual in an adoptive relationship within the third
7 degree.

8 ~~(15) "Series organization" means an organization that, pursuant to the statute under
9 which the organization is organized, satisfies the following conditions;~~

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

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

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

20 ~~(16~~ (15) "Sign" means, with present intent to authenticate or adopt a record:

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

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

1 subjected to liability for a debt unless it is an obligation owed jointly by the debtor with his or
2 her cotenant by the entirety. See 2 American Law of Property 29 (1952); Craig, *An Analysis of*
3 *Estates by the Entirety in Bankruptcy*, 48 Am.Bankr.L.J. 255, 258 (1974). The definition in this
4 Act requires exclusion of interests in property held by tenants by the entirety that are not subject
5 to collection process by a creditor without a right to proceed against both tenants by the entirety
6 as joint debtors.

7
8 The reference to “generally exempt” property in § 1(2)(ii) recognizes that all exemptions
9 are subject to exceptions. Creditors having special rights against generally exempt property
10 typically include claimants for alimony, taxes, wages, the purchase price of the property, and
11 labor or materials that improve the property. See Uniform Exemptions Act § 10 (1979) and the
12 accompanying Comment. The fact that a particular creditor may reach generally exempt
13 property by resorting to judicial process does not warrant its inclusion as an asset in determining
14 whether the debtor is insolvent.

15
16 Since Because this Act is not an exclusive law on the subject of voidable transfers and
17 obligations (see Comment (409) to § 4 *infra*), it does not preclude the holder of a claim that may
18 be collected by process against property generally exempt as to other creditors from obtaining
19 relief from a transfer of such property that hinders, delays, or defrauds the holder of such a claim.
20 Likewise the holder of an unsecured claim enforceable against tenants by the entirety is not
21 precluded by the Act from pursuing a remedy against a transfer of property held by the entirety
22 that hinders, delays, or defrauds the holder of such a claim.

23
24 Nonbankruptcy law is the law of a state or federal law that is not part of the Bankruptcy
25 Code, Title 11 of the United States Code. The definition of an “asset” thus does not include
26 property that would be subject to administration for the benefit of creditors under the Bankruptcy
27 Code unless it is subject under other applicable law, state or federal, to process for the collection
28 of a creditor’s claim against a single debtor.

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

34
35 (4) The definition of “creditor” in combination with the definition of “claim” has
36 substantially the same effect as the definition of “creditor” under § 1 of the Uniform Fraudulent
37 Conveyance Act. As under that Act, the holder of an unliquidated tort claim or a contingent
38 claim may be a creditor protected by this Act.

39
40 (5) The definition of “debt” is derived from Bankruptcy Code § 101(11) (1984).

41
42 (6) The definition of “debtor” is new.

43
44 (7) The definition of “electronic” is the standard definition of that term used in acts
45 prepared by the Uniform Law Commission as of 2014.

1
2 (8) The definition of “insider” is derived from Bankruptcy Code § 101(28) (1984). In
3 this Act, as in the Bankruptcy Code, the definition states that the term “includes” certain listed
4 persons; it does not state that the term “means” the listed persons. Hence the definition is not
5 exclusive, and the statutory list is merely exemplary. See also Bankruptcy Code § 102(3) (1984).
6 Accordingly, a person may be an “insider” of a debtor that is an individual, corporation or
7 partnership even though the person is not designated as such by the statutory list. Thus, for
8 example, a trust may be found to be an “insider” of a beneficiary. Similarly, a court may find a
9 person living with an individual debtor for an extended time in the same household or as a
10 permanent companion to have the kind of close relationship intended to be covered by the term
11 “insider.” See also, e.g., *Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008 (5th
12 Cir.1992) (former spouse of debtor was an “insider” because of their continued personal
13 relationship, even though they had long ago divorced and remarried others). Likewise, a person
14 may be an “insider” of a debtor that is not an individual, corporation or partnership. See, e.g.,
15 *In re Longview Aluminum, L.L.C.*, 657 F.3d 507 (7th Cir. 2011) (holding an “insider” of a
16 limited liability company an individual on its Board of Managers and having a 12% membership
17 interest, when its organic documents vested management authority “in the Board of Managers
18 and the Members”).

19
20 The differences between the definition in this Act and that in the Bankruptcy Code are
21 slight. In this Act, the ~~The definition has been restricted in clauses (i)(C), (ii)(E), and (iii)(D) to~~
22 ~~make clear that a partner is not an insider of an individual, corporation, or partnership if any of~~
23 ~~these latter three persons is only a limited partner. The definition of “insider” in the Bankruptcy~~
24 ~~Code does not purport to make a limited partner an insider of the partners or of the partnership~~
25 ~~with which the limited partner is associated, but it is susceptible of a contrary interpretation and~~
26 ~~one which would extend unduly the scope of the defined relationship when the limited partner is~~
27 ~~not a person in control of the partnership. The definition of “insider” in this Act also differs~~
28 ~~from the definition in the Bankruptcy Code in omitting the reference in § 101(28)(D) to an~~
29 ~~elected official or relative of such an official as an insider of a municipality. As in the~~
30 ~~Bankruptcy Code (see § 102(3)), the word “includes” is not limiting, however. Thus, a court~~
31 ~~may find a person living with an individual for an extended time in the same household or as a~~
32 ~~permanent companion to have the kind of close relationship intended to be covered by the term~~
33 ~~“insider.” Likewise, a trust may be found to be an insider of a beneficiary.~~

34
35 (9) The definition of “lien” is derived from paragraphs (30), (31), (43), and (45) of
36 Bankruptcy Code § 101 (1984), which define “judicial lien,” “lien,” “security interest,” and
37 “statutory lien” respectively.

38
39 (10) The definition of “organization” is derived from Uniform Commercial Code
40 § 1-201(b)(25) (2014).

41
42 (11) ~~The first sentence of the~~ definition of “person” is the standard definition of that term
43 used in acts prepared by the Uniform Law Commission as of 2014. ~~As to the second sentence,~~
44 ~~which pertains to series organizations, see Comment (15) *infra* Section 11 may have the effect of~~
45 ~~rendering a “protected series” of a “series organization” a “person” for purposes of this Act, even~~
46 ~~though it may not otherwise qualify as such.~~

1
2 (12) The definition of “property” is derived from Uniform Probate Code § 1-201(33)
3 (1969). Property includes both real and personal property, whether tangible or intangible, and
4 any interest in property, whether legal or equitable.
5

6 (13) The definition of “record” is the standard definition of that term used in acts
7 prepared by the Uniform Law Commission as of 2014.
8

9 (14) The definition of “relative” is derived from Bankruptcy Code § 101(37) (1984) but
10 is explicit in its references to the spouse of a debtor in view of uncertainty as to whether the
11 common law determines degrees of relationship by affinity.
12

13 ~~——(15) The definition of “series organization” is adapted from Uniform Statutory Trust~~
14 ~~Entity Act §§ 401-402 (2009). This definition, together with the related language in the~~
15 ~~definition of “person,” accommodates developments in business organization statutes~~
16 ~~exemplified by the foregoing uniform law and by Del. Code Ann. tit. 6, § 18-215 (2012)~~
17 ~~(pertaining to Delaware limited liability companies). If the statute under which an organization~~
18 ~~is organized permits it to divide its assets and debts among “series” (however denominated),~~
19 ~~such that assets and debts of each “series” are separated in accordance with subparagraphs (ii)~~
20 ~~and (iii) of this definition, and if the organization does so, then the provisions of this Act should~~
21 ~~apply to each “series” as if it were a legal entity, regardless of whether it is considered to be a~~
22 ~~legal entity for other purposes. For purposes of this definition, the conditions referred to in~~
23 ~~subparagraphs (ii) and (iii) are satisfied if the statute under which the organization is organized~~
24 ~~so provides. It does not matter whether the separation of assets and debts described in~~
25 ~~subparagraphs (ii) and (iii) would be respected by another jurisdiction in which the organization~~
26 ~~does business, or would be given effect by the Bankruptcy Code in the bankruptcy of the~~
27 ~~organization. An organization may be a “series organization” having “series,” as those terms are~~
28 ~~used in this Act, even though the statute under which the organization is organized uses different~~
29 ~~terminology.~~
30

31 ~~(4615)~~ The definition of “sign” is the standard definition of that term used in acts
32 prepared by the Uniform Law Commission as of 2014.
33

34 ~~(4716)~~ The definition of “transfer” is derived principally from Bankruptcy Code
35 § 101(48) (1984). The definition of “conveyance” in § 1 of the Uniform Fraudulent Conveyance
36 Act was similarly comprehensive, and the references in this Act to “payment of money, release,
37 lease, and the creation of a lien or incumbrance” are derived from the Uniform Fraudulent
38 Conveyance Act. While the definition in the Uniform Fraudulent Conveyance Act did not
39 explicitly refer to an involuntary transfer, the decisions under that Act were generally consistent
40 with an interpretation that covered such a transfer. See, e.g., *Hearn 45 St. Corp. v. Jano*, 283
41 N.Y. 139, 27 N.E.2d 814, 128 A.L.R. 1285 (1940) (execution and foreclosure sales); *Lefkowitz v.*
42 *Finkelstein Trading Corp.*, 14 F.Supp. 898, 899 (S.D.N.Y. 1936) (execution sale); *Langan v.*
43 *First Trust & Deposit Co.*, 277 App.Div. 1090, 101 N.Y.S.2d 36 (4th Dept. 1950), *aff’d*, 302
44 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); *Catabene v. Wallner*, 16 N.J.Super.
45 597, 602, 85 A.2d 300, 302 (1951) (mortgage foreclosure).
46

1 U.C.C. § 1-201(b)(23) (2014), which defines “insolvency” to include “having generally ceased
2 to pay debts in the ordinary course of business other than as a result of bona fide dispute.” ~~The~~
3 ~~presumption imposes on the party against whom~~

4
5 Subsection (b) defines the effect of the presumption is directed to be (in paraphrase) that
6 the burden of proving that persuasion on the nonexistence issue of insolvency as defined in
7 § 2 (shifts to the defendant. That conforms to the default definition of the effect of a) is more
8 probable than its existence. See presumption in civil cases set forth in Uniform Rules of
9 Evidence (1974 Act), Rule 301(a). The 1974 Uniform) (later Rule 301 302(a) (1999 Act as
10 amended 2005)). It also conforms to the Final Draft of Federal Rule 301 as submitted to the
11 United States Supreme Court by the Advisory Committee on Federal Rules of Evidence in 1973.
12 “The so-called ‘bursting bubble’ theory, under which a presumption vanishes upon the
13 introduction of evidence which would support a finding of the nonexistence of the presumed
14 fact, even though not believed, is rejected as according presumptions too ‘slight and evanescent’
15 an effect.” Advisory Committee’s Note to Rule 301-, 56 F.R.D. 183, 208 (1973). See also 1 J.
16 Weinstein & M. Berger, Evidence ¶ 301 [01] (1982). It should be noted that the Federal Rule of
17 Evidence as finally enacted gave by default a different effect to presumptions in civil cases, in
18 effect adopting the “bursting bubble” definition. See Fed. R. Evid. 301 (1975) (carried forward
19 in the 2011 revision).

20
21 The presumption is established in recognition of the difficulties typically imposed on a
22 creditor in proving insolvency in the bankruptcy sense, as provided in subsection (a). See
23 generally Levit, *The Archaic Concept of Balance-Sheet Insolvency*, 47 Am.Bankr.L.J. 215
24 (1973). Not only is the relevant information in the possession of a debtor who is apt to be
25 noncooperative-debtor, but the debtor’s records are more often than not apt to be incomplete and
26 inaccurate. As a practical matter, insolvency is most cogently evidenced by a general cessation
27 of payment of debts, as has long been recognized by the laws of other countries and is now
28 reflected in the Bankruptcy Code. See Honsberger, *Failure to Pay One’s Debts Generally as*
29 *They Become Due: The Experience of France and Canada*, 54 Am.Bankr.L.J. 153 (1980); J.
30 MacLachlan, *Bankruptcy* 13, 63-64, 436 (1956). In determining whether a debtor is paying its
31 debts generally as they become due, the court should look at more than the amount and due dates
32 of the indebtedness. The court should also take into account such factors as the number of the
33 debtor’s debts, the proportion of those debts not being paid, the duration of the nonpayment, and
34 the existence of bona fide disputes or other special circumstances alleged to constitute an
35 explanation for the stoppage of payments. The court’s determination may be affected by a
36 consideration of the debtor’s payment practices prior to the period of alleged nonpayment and
37 the payment practices of the trade or industry in which the debtor is engaged. The case law that
38 has developed under Bankruptcy Code § 303(h)(1) (1984) has not required a showing that a
39 debtor has failed or refused to pay a majority in number and amount of his or her debts in order
40 to prove general nonpayment of debts as they become due. See, e.g., *Hill v. Cargill, Inc. (In re*
41 *Hill)*, 8 B.R. 779, 3 C.B.C.2d 920 (Bankr. D.Minn. 1981) (nonpayment of three largest debts
42 held to constitute general nonpayment, although small debts were being paid); *In re All Media*
43 *Properties, Inc.*, 5 B.R. 126, 6 B.C.D. 586, 2 C.B.C.2d 449 (Bankr. S.D.Tex. 1980) (missing
44 significant number of payments or regularly missing payments significant in amount said to
45 constitute general nonpayment; missing payments on more than 50% of aggregate of claims said
46 not to be required to show general nonpayment; nonpayment for more than 30 days after billing

1 held to establish nonpayment of a debt when it is due); *In re Kreidler Import Corp.*, 4 B.R. 256,
2 6 B.C.D. 608, 2 C.B.C.2d 159 (Bankr. D.Md. 1980) (nonpayment of one debt constituting 97%
3 of debtor's total indebtedness held to constitute general nonpayment). A presumption of
4 insolvency does not arise from nonpayment of a debt as to which there is a genuine bona fide
5 dispute, even though the debt is a substantial part of the debtor's indebtedness. *Cf.* Bankruptcy
6 Code § 303(h)(1) (1984) ~~(as amended by § 426(b) of Public Law No. 98-882, the Bankruptcy~~
7 ~~Amendments and Federal Judgeship Act of 1984~~ in 1984) (making this point explicitly).
8

9 (3) Subsection (c) follows the approach of the definition of "insolvency" in Bankruptcy
10 Code § 101(29) (1984) by excluding from the computation of the value of the debtor's assets
11 any value that can be realized only by avoiding a transfer of an interest formerly held by the
12 debtor or by discovery or pursuit of property that has been concealed or removed with intent to
13 hinder, delay, or defraud creditors.
14

15 (4) Subsection (d) is new. It makes clear ~~the purpose not to render that~~ a person is not
16 rendered insolvent under this section by counting as a debt an obligation secured by property of
17 the debtor that is not counted as an asset. See also Comment (2) to § 1 and Comment (1) to § 2
18 *supra*.
19

20 SECTION 3. VALUE.

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

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

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

Official Comment

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

4(a)(2) (“reasonably equivalent value”);
4(b)(8) (“value ... reasonably equivalent”);
5(a) (“reasonably equivalent value”);
8(a) (“reasonably equivalent value”);
8(b)(~~21~~)(ii) and (d) (“value”);
8(f)(1) (“new value”); and
8(f)(3) (“present value”).

“Value” is also used in other senses in this Act, to which this section is not relevant. See, e.g., §§ 8(b)(1), 8(c) (“value” in the sense of the value of an asset voidably transferred).

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

(3) Section 3(a) does not indicate what is “reasonably equivalent value” for a transfer or obligation. Under this Act, as under Bankruptcy Code § 548(a)(2) (1984), a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a discrepancy between the value of the asset transferred and the debt secured, ~~since~~ because the amount of the debt is the measure of the value of the interest in the asset that is transferred. See, e.g., *Peoples-Pittsburgh Trust Co. v. Holy Family Polish Nat’l Catholic Church, Carnegie, Pa.*, 341 Pa. 390, 19 A.2d 360 (1941). If, however, a transfer purports to secure more than the debt actually incurred or to be incurred, it may be found to be for less than a reasonably equivalent value. See, e.g., *In re Peoria Braumeister Co.*, 138 F.2d 520, 523 (7th Cir. 1943) (chattel mortgage securing a \$3,000 note held to be voidable when the debt secured was only \$2,500); *Hartford Acc. & Indemnity Co. v. Jirasek*, 254 Mich. 131, 140, 235 N.W. 836, 839 (1931) (quitclaim deed given as mortgage held to be voidable to the extent the value of the property transferred exceeded the indebtedness secured). If the debt is a voidable obligation under this Act, a transfer to secure it as well as the obligation would be vulnerable to attack as voidable. A transfer to satisfy or secure an antecedent debt owed an insider is also subject to avoidance under the conditions specified in Section 5(b).

(4) Section 3(a) of the Uniform Fraudulent Conveyance Act has been thought not to recognize that an unperformed promise could constitute fair consideration. See McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 Harv.L.Rev. 404, 414 (1933).

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

21
22 (5) Subsection (b) rejects the rule of such cases as *Durrett v. Washington Nat. Ins. Co.*,
23 621 F.2d 201 (5th Cir. 1980) (nonjudicial foreclosure of a mortgage avoided as a voidable
24 transfer when the property of an insolvent mortgagor was sold for less than 70% of its fair
25 value); and *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547 (5th Cir. 1981), *cert. denied*,
26 454 U.S. 1164 (1982) (nonjudicial foreclosure held to be voidable transfer if made without fair
27 consideration). Subsection (b) adopts the view taken in *Lawyers Title Ins. Corp. v. Madrid (In re*
28 *Madrid)*, 21 B.R. 424 (B.A.P. 9th Cir. 1982), *aff'd on another ground*, 725 F.2d 1197 (9th Cir.
29 1984), that the price bid at a ~~publicly~~regularly conducted and noncollusive foreclosure sale
30 determines the fair value of the property sold. See also *BFP v. Resolution Trust Corp.*, 511 U.S.
31 531, 537 n.3 (1994) (similarly construing Bankruptcy Code § 548).~~—; opinion expressly limited~~
32 to foreclosure of real estate mortgages).

33
34 _____ Subsection (b) prescribes the effect of a sale meeting its requirements, whether the asset
35 sold is personal or real property. ~~The rule of this subsection applies~~Subsection (b) applies only
36 to a sale under a mortgage, deed of trust, or security agreement. Subsection (b) thus does not
37 apply to a sale foreclosing a nonconsensual lien, such as a tax lien. However, the subsection
38 does apply to a foreclosure by sale of the interest of a vendee under an installment land contract
39 in accordance with applicable law that requires or permits the foreclosure to be effected by a sale
40 in the same manner as the foreclosure of a mortgage. See G. Osborne, G. Nelson, & D.
41 Whitman, *Real Estate Finance Law* 83-84, 95-97 (1979).

42
43 If a lien given an insider for a present consideration is not perfected as against a
44 subsequent bona fide purchaser or is so perfected after a delay following an extension of credit
45 secured by the lien, foreclosure of the lien may result in a transfer for an antecedent debt that is
46 voidable under Section 5(b) *infra*. Subsection (b) does not apply to an action under Section

1 4(a)(1) to avoid a transfer or obligation because made or incurred with actual intent to hinder,
2 delay, or defraud any creditor.

3
4 (6) Subsection (c) is an adaptation of Bankruptcy Code § 547(c)(1) (1984). A transfer to
5 an insider for an antecedent debt may be voidable under § 5(b) *infra*.

6
7 **SECTION 4. TRANSFERS AND OBLIGATIONS VOIDABLE BYAS TO**
8 **PRESENT AND FUTURE CREDITORS.**

9 (a) A transfer made or obligation incurred by a debtor is voidable byas to a creditor,
10 whether the creditor's claim arose before or after the transfer was made or the obligation was
11 incurred, if the debtor made the transfer or incurred the obligation:

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

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

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

18 (ii) intended to incur, or believed or reasonably should have believed that
19 the debtor would incur, debts beyond the debtor's ability to pay as they became due.

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

22 (1) the transfer or obligation was to an insider;

23 (2) the debtor retained possession or control of the property transferred after the
24 transfer;

25 (3) the transfer or obligation was disclosed or concealed;

26 (4) before the transfer was made or obligation was incurred, the debtor had been

- 1 sued or threatened with suit;
- 2 (5) the transfer was of substantially all the debtor's assets;
- 3 (6) the debtor absconded;
- 4 (7) the debtor removed or concealed assets;
- 5 (8) the value of the consideration received by the debtor was reasonably
- 6 equivalent to the value of the asset transferred or the amount of the obligation incurred;
- 7 (9) the debtor was insolvent or became insolvent shortly after the transfer was
- 8 made or the obligation was incurred;
- 9 (10) the transfer occurred shortly before or shortly after a substantial debt was
- 10 incurred; and
- 11 (11) the debtor transferred the essential assets of the business to a lienor ~~whethat~~
- 12 transferred the assets to an insider of the debtor.
- 13 (c) A ~~party~~ creditor making a claim ~~based on~~ under subsection (a) has the burden of
- 14 proving the elements of the claim by a preponderance of the evidence.

15 Official Comment

16
17 (1) Section 4(a)(1) is derived from § 7 of the Uniform Fraudulent Conveyance Act,
18 which in turn was derived from the Statute of 13 Elizabeth, c. 5 (1571). Factors appropriate for
19 consideration in determining actual intent under paragraph (1) are specified in subsection (b).

20
21 (2) Section 4, unlike § 5, protects creditors of a debtor whose claims arise after as well as
22 before the debtor made or incurred the challenged transfer or obligation. Similarly, there is no
23 requirement in § 4(a)(1) that the intent referred to be directed at a creditor existing or identified
24 at the time of transfer or incurrence. For example, promptly after the invention in Pennsylvania
25 of the spendthrift trust, the assets and beneficial interest of which are immune from attachment
26 by the beneficiary's creditors, courts held that a debtor's establishment of a spendthrift trust for
27 his own benefit is a voidable transfer *per se* under the Statute of 13 Elizabeth. *Mackason's*
28 *Appeal*, 42 Pa. 330, 338-39 (1862); see also *Ghormley v. Smith*, 139 Pa. 584, 591-94 (1891);
29 *Patrick v. Smith*, 2 Pa. Super. 113, 119 (1896). Likewise, for centuries § 4(a)(1) and its
30 predecessors have been employed to invalidate nonpossessory property interests that are thought
31 to be potentially deceptive, without regard to whether the deception is directed at an existing or
32 identified creditor. See, e.g., *McGann v. Capital Sav. Bank & Trust Co.*, 89 A.2d 123, 183-84

1 (Vt. 1952) (seller’s retention of possession of goods after sale held voidable *per se* as to creditors
2 of the seller); *Superior Partners v. Prof’l Educ. Network, Inc.*, 485 N.E.2d 1218, 1221 (Ill. App.
3 Ct. 1985) (similar); *Clow v. Woods*, 5 Serg. & Rawle 275 (Pa. 1819) (holding, in the absence of a
4 public notice system, that a nonpossessory chattel mortgage is voidable *per se*).

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

13 (4) Unlike the Uniform Fraudulent Conveyance Act ~~as originally promulgated,~~ this Act
14 does not prescribe different tests ~~when for voidability of~~ a transfer ~~that~~ is made for the purpose of
15 security and ~~when it a transfer that~~ is intended to be absolute. The premise of this Act is that
16 when a transfer is for security only, the equity or value of the asset that exceeds the amount of
17 the debt secured remains available to unsecured creditors and thus cannot be regarded as the
18 subject of a voidable transfer merely because of the encumbrance resulting from an otherwise
19 valid security transfer. Disproportion between the value of the asset securing the debt and the
20 size of the debt secured does not, in the absence of circumstances indicating a purpose to hinder,
21 delay, or defraud creditors, constitute an impermissible hindrance to the enforcement of other
22 creditors’ rights against the debtor-transferor. *Cf. U.C.C. § 9-401 (2014)* U.C.C. § 9-401 (2014)
23 (providing that a debtor’s interest in collateral subject to a security interest is transferable
24 notwithstanding an agreement with the secured party prohibiting transfer, thereby rendering the
25 debtor’s equity in the collateral available to other creditors unless a special rule of Article 9 or
26 other law renders the debtor’s interest inalienable).

27
28 (5) Subparagraph (i) of § 4(a)(2) is an adaptation of § 5 of the Uniform Fraudulent
29 Conveyance Act but substitutes “unreasonably small [assets] in relation to the business or
30 transaction” for “unreasonably small capital.” The reference to “capital” in the Uniform
31 Fraudulent Conveyance Act is ambiguous in that it may refer to net worth or to the par value of
32 stock or to the consideration received for stock issued. The special meanings of “capital” in
33 corporation law have no relevance in the law of voidable transfers. The subparagraph focuses
34 attention on whether the amount of all the assets retained by the debtor was inadequate, *i.e.*,
35 unreasonably small, in light of the needs of the business or transaction in which the debtor was
36 engaged or about to engage.

37
38 (6) Subsection (b) is a nonexclusive catalogue of factors appropriate for consideration by
39 the court in determining whether the debtor had an actual intent to hinder, delay, or defraud one
40 or more creditors. Proof of the existence of any one or more of the factors enumerated in
41 subsection (b) may be relevant evidence as to the debtor’s actual intent but does not create a
42 presumption that the debtor has made a voidable transfer or incurred a voidable obligation. The
43 list of factors includes most of the so-called “badges of fraud” that have been recognized by the
44 courts in construing and applying the Statute of 13 Elizabeth and § 7 of the Uniform Fraudulent
45 Conveyance Act. Proof of the presence of certain badges in combination establishes voidability

1 conclusively—*i.e.*, without regard to the actual intent of the parties—when they concur as
2 provided in § 4(a)(2) or in § 5. The fact that a transfer has been made to a relative or to an
3 affiliated corporation has not been regarded as a badge of fraud sufficient to warrant avoidance
4 when unaccompanied by any other evidence of intent to hinder, delay, or defraud creditors. The
5 courts have uniformly recognized, however, that a transfer to a closely related person warrants
6 close scrutiny of the other circumstances, including the nature and extent of the consideration
7 exchanged. See 1 G. Glenn, *Fraudulent Conveyances and Preferences* § 307 (Rev. ed. 1940).
8 The second, third, fourth, and fifth factors listed are all adapted from the classic catalogue of
9 badges of fraud provided by Lord Coke in *Twyne’s Case*, 3 Coke 80b, 76 Eng.Rep. 809 (Star
10 Chamber 1601). Lord Coke also included the use of a trust and the recitation in the instrument
11 of transfer that it “was made honestly, truly, and bona fide,” but the use of the trust is voidable
12 only when accompanied by elements or badges specified in this Act, and recitals of “good faith”
13 can no longer be regarded as significant evidence of intent to hinder, delay, or defraud creditors.
14

15 (7) In considering the factors listed in § 4(b) a court should evaluate all the relevant
16 circumstances involving a challenged transfer or obligation. Thus the court may appropriately
17 take into account all indicia negating as well as those suggesting intent to hinder, delay, or
18 defraud creditors, as illustrated in the following reported cases:
19

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

36 (b) Whether the transferor retained possession or control of the property after the
37 transfer: *Harris v. Shaw*, 224 Ark. 150, 272 S.W.2d 53 (1954) (retention of property by
38 transferor said to be a badge of fraud and, together with other badges, to warrant avoidance
39 of transfer); *Stephens v. Reginstein*, 89 Ala. 561, 8 So. 68 (1890) (transferor’s retention of
40 control and management of property and business after transfer held material in determining
41 transfer to be voidable); *Allen v. Massey*, 84 U.S. (17 Wall.) 351 (1872) (joint possession of
42 furniture by transferor and transferee considered in holding transfer to be fraudulent);
43 *Warner v. Norton*, 61 U.S. (20 How.) 448 (1857) (surrender of possession by transferor
44 deemed to negate allegations of intent to hinder, delay, or defraud creditors).
45

46 (c) Whether the transfer or obligation was concealed or disclosed: *Walton v. First*

1 *National Bank*, 13 Colo. 265, 22 P. 440 (1889) (agreement between parties to conceal the
2 transfer from the public said to be one of the strongest badges of fraud); *Warner v. Norton*,
3 61 U.S. (20 How.) 448 (1857) (although secrecy said to be a circumstance from which,
4 when coupled with other badges, intent to hinder, delay, or defraud creditors may be
5 inferred, transfer was held not to be voidable when made in good faith and transferor
6 surrendered possession); *W.T. Raleigh Co. v. Barnett*, 253 Ala. 433, 44 So.2d 585 (1950)
7 (failure to record a deed in itself said not to evidence intent to hinder, delay, or defraud
8 creditors, and transfer held not to be voidable).
9

10 (d) Whether, before the transfer was made or obligation was incurred, a creditor sued or
11 threatened to sue the debtor: *Harris v. Shaw*, 224 Ark. 150, 272 S.W.2d 53 (1954) (transfer
12 held to be voidable when causally connected to pendency of litigation and accompanied by
13 other badges of fraud); *Pergrem v. Smith*, 255 S.W.2d 42 (Ky.App. 1953) (transfer in
14 anticipation of suit deemed to be a badge of fraud; transfer held voidable when accompanied
15 by insolvency of transferor who was related to transferee); *Bank of Sun Prairie v. Hovig*,
16 218 F.Supp. 769 (W.D.Ark. 1963) (although threat or pendency of litigation said to be an
17 indicator of intent to hinder, delay, or defraud creditors, transfer was held not to be voidable
18 when adequate consideration and good faith were shown).
19

20 (e) Whether the transfer was of substantially all the debtor's assets: *Walbrun v. Babbitt*,
21 83 U.S. (16 Wall.) 577 (1872) (sale by insolvent retail shop owner of all of his inventory in a
22 single transaction held to be voidable); *Cole v. Mercantile Trust Co.*, 133 N.Y. 164, 30 N.E.
23 847 (1892) (transfer of all property before plaintiff could obtain a judgment held to be
24 voidable); *Lumpkins v. McPhee*, 59 N.M. 442, 286 P.2d 299 (1955) (although transfer of all
25 assets said to indicate intent to hinder, delay, or defraud creditors, transfer held not to be
26 ~~voidability~~voidable because full consideration was paid and transferor surrendered
27 possession).
28

29 (f) Whether the debtor had absconded: *In re Thomas*, 199 F. 214 (N.D.N.Y. 1912)
30 (when debtor collected all of his money and property with the intent to abscond, intent to
31 hinder, delay, or defraud creditors was held to be shown).
32

33 (g) Whether the debtor had removed or concealed assets: *Bentley v. Young*, 210 F. 202
34 (S.D.N.Y. 1914), *aff'd*, 223 F. 536 (2d Cir. 1915) (debtor's removal of goods from store to
35 conceal their whereabouts and to sell them held to render sale voidable); *Cioli v.*
36 *Kenourgios*, 59 Cal.App. 690, 211 P. 838 (1922) (debtor's sale of all assets and shipment of
37 proceeds out of the country held to be voidable notwithstanding adequacy of consideration).
38

39 (h) Whether the value of the consideration received by the debtor was reasonably
40 equivalent to the value of the asset transferred or the amount of the obligation incurred:
41 *Toomay v. Graham*, 151 S.W.2d 119 (Mo.App. 1941) (although mere inadequacy of
42 consideration said not to be a badge of fraud, transfer held to be voidable when accompanied
43 by badges of fraud); *Texas Sand Co. v. Shield*, 381 S.W.2d 48 (Tex. 1964) (inadequate
44 consideration said to be an indicator of intent to hinder, delay, or defraud creditors, and
45 transfer held to be voidable because of inadequate consideration, pendency of suit, family
46 relationship of transferee, and fact that all nonexempt property was transferred); *Weigel v.*

1 Wood, 355 Mo. 11, 194 S.W.2d 40 (1946) (although inadequate consideration said to be a
2 badge of fraud, transfer held not to be voidable when inadequacy not gross and not
3 accompanied by any other badge; fact that transfer was from father to son held not sufficient
4 to establish intent to hinder, delay, or defraud creditors).
5

6 (i) Whether the debtor was insolvent or became insolvent shortly after the transfer was
7 made or obligation was incurred: *Harris v. Shaw*, 224 Ark. 150, 272 S.W.2d 53 (1954)
8 (insolvency of transferor said to be a badge of fraud and transfer held voidable when
9 accompanied by other badges of fraud); *Bank of Sun Prairie v. Hovig*, 218 F.Supp. 769
10 (W.D. Ark. 1963) (although the insolvency of the debtor said to be a badge of fraud, transfer
11 held not voidable when debtor was shown to be solvent, adequate consideration was paid,
12 and good faith was shown, despite the pendency of suit); *Wareheim v. Bayliss*, 149 Md. 103,
13 131 A. 27 (1925) (although insolvency of debtor acknowledged to be an indicator of intent
14 to hinder, delay, or defraud creditors, transfer held not to be voidable when adequate
15 consideration was paid and whether debtor was insolvent in fact was doubtful).
16

17 (j) Whether the transfer occurred shortly before or shortly after a substantial debt was
18 incurred: *Commerce Bank of Lebanon v. Halladale A Corp.*, 618 S.W.2d 288, 292
19 (Mo.App. 1981) (when transferors incurred substantial debts near in time to the transfer,
20 transfer was held to be voidable due to inadequate consideration, close family relationship,
21 the debtor's retention of possession, and the fact that almost all the debtor's property was
22 transferred).
23

24 ~~(8) The effect~~ (k) Whether the debtor transferred the essential assets of the two transfers
25 described in business to a lienor who transferred the assets to an insider of the debtor: The
26 evil addressed by § 4(b)(11), if not avoided, may be to permit a debtor- is collusive and a
27 lienor to deprive the debtor's unsecured abusive use of a lienor's superior position to
28 eliminate junior creditors of access to the debtor's assets for the purpose of collecting their
29 claims while the debtor, the debtor's affiliate or insider, and the lienor arrange for the
30 beneficial use or disposition of the assets in accordance with their interests leaving equity
31 holders unaffected. The kind of disposition sought to be reached ~~here~~ is exemplified by that
32 found in *Northern Pacific Co. v. Boyd*, 228 U.S. 482, 502-05 (1913), the leading case in
33 establishing the absolute priority doctrine in reorganization law. There the Court held that a
34 reorganization whereby the secured creditors and the management-owners retained their
35 economic interests in a railroad through a foreclosure that cut off claims of unsecured
36 creditors against its assets was in effect a voidable disposition ~~(id. at 502-05)~~. ~~See Frank,~~
37 ~~*Some Realistic Reflections on Some Aspects of Corporate Reorganization*, 19 Va.L.Rev.~~
38 ~~541, 693 (1933).~~ ~~See Bruce A. Markell, *Owners, Auctions and Absolute Priority in*~~
39 ~~*Bankruptcy Reorganizations*, 44 Stan.L.Rev. 69, 74-83 (1991).~~ For cases in which an
40 analogous injury to unsecured creditors was inflicted by a lienor and a debtor, see *Voest-*
41 *Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206 (3d Cir. 1990) (lender
42 foreclosed on assets of steel company at 5:00 p.m. on a Friday, then transferred the assets to
43 an affiliate of the debtor; lender made a loan to the affiliate to enable it to purchase at the
44 foreclosure sale on almost the same terms as the old loan; new business opened Monday
45 morning); *Jackson v. Star Sprinkler Corp. of Florida*, 575 F.2d 1223, 1231-34 (8th Cir.
46 1978); *Heath v. Helmick*, 173 F.2d 157, 161-62 (9th Cir. 1949); *Toner v. Nuss*, 234 F.Supp.

1 457, 461-62 (E.D.Pa. 1964); and see *In re Spotless Tavern Co., Inc.*, 4 F.Supp. 752, 753, 755
2 (D.Md. 1933).

3
4 (98) The phrase “hinder, delay, or defraud” in § 4(a)(1), carried forward from the
5 primordial Statute of 13 Elizabeth, is potentially applicable to any transaction that unacceptably
6 contravenes norms of creditors’ rights. Section 4(a)(1) is sometimes said to require “actual
7 fraud,” by contrast to § 4(a)(2) and §-5(a), which are said to require “constructive fraud.” That
8 shorthand is highly misleading. Fraud is not a necessary element of a claim under any of those
9 provisions. By its terms, §-4(a)(1) applies to a transaction that “hinders” or “delays” a creditor,
10 even if it does not “defraud” ~~him~~the creditor. See, e.g., *Shapiro v. Wilgus*, 287 U.S. 348, 354
11 (1932); *Means v. Dowd*, 128 U.S. 273, 280-83, 288 (1888); *Consove v. Cohen (In re Roco*
12 *Corp.)*, 701 F.2d 978, 984 (1st Cir. 1983); *Empire Lighting Fixture Co. v. Practical Lighting*
13 *Fixture Co.*, 20 F.2d 295, 297 (2d Cir. 1927); *Lippe v. Bairnco Corp.*, 249 F. Supp. 2d 357, 374
14 (S.D.N.Y. 2003). “Hinder, delay, or defraud” is best considered as a single term of art
15 describing a transaction that unacceptably contravenes norms of creditors’ rights. Such a
16 transaction need not bear any resemblance to common-law fraud. Thus, the Supreme Court held
17 a given transfer voidable because made with intent to “hinder, delay, or defraud” creditors, but
18 emphasized: “We have no thought in so holding to impute to [the debtor] a willingness to
19 participate in conduct known to be fraudulent.... [He] acted in the genuine belief that what [he]
20 planned was fair and lawful. Genuine the belief was, but mistaken it was also. Conduct and
21 purpose have a quality imprinted on them by the law.” *Shapiro v. Wilgus*. 287 U.S. 348, 357
22 (1932).

23
24 Diminution of the assets available to the debtor’s creditors is not necessarily required to
25 “hinder, delay, or defraud” creditors. For example, the age-old legal skepticism of
26 nonpossessory property interests, which stems from their potential for deception, has often
27 resulted in their avoidance under § 4(a)(1) or its predecessors. See Comments (2) and (7(b)). A
28 transaction may “hinder, delay, or defraud” creditors even though it neither reduces the assets
29 available to the debtor’s creditors nor involves any potential deception. See, e.g., *Shapiro v.*
30 *Wilgus*, 287 U.S. 348 (1932) (holding voidable a solvent individual debtor’s conveyance of his
31 assets to a wholly-owned corporation for the purpose of instituting a receivership proceeding not
32 available to an individual).

33
34 A transaction that does not place an asset entirely beyond the reach of creditors may
35 nevertheless “hinder, delay, or defraud” creditors if it makes the asset more difficult for creditors
36 to reach. Simple exchange by a debtor of an asset for a less liquid asset, or disposition of liquid
37 assets while retaining illiquid assets, may be voidable for that reason. See, e.g., *Empire Lighting*
38 *Fixture Co. v. Practical Lighting Fixture Co.*, 20 F.2d 295, 297 (2d Cir. 1927) (L. Hand, J.)
39 (credit sale by a corporation to an affiliate of its plant, leaving the seller solvent with ample
40 accounts receivable, held ~~avoidable~~voidable because made for the purpose of hindering creditors
41 of the seller, due to the comparative difficulty of creditors realizing on accounts receivable under
42 then-current collection practice). Overcollateralization of a debt for the purpose of making the
43 debtor’s equity in the collateral more difficult for creditors to reach is similarly voidable. See
44 Comment (4) *supra*. Likewise, it is voidable for a debtor intentionally to hinder creditors by
45 transferring assets to a wholly-owned corporation or other organization, as may be the case if the
46 equity interest in the organization is more difficult to realize upon than the assets (either because

1 the equity interest is less liquid, or because the applicable procedural rules are more demanding).
2 See, e.g., *Addison v. Tessier*, 335 P.2d 554, 557 (N.M. 1959); *First Nat'l Bank v. F. C. Trebein*
3 | *Co.*, 52 N.E. 834, 837-38 (Ohio 1898); Anno., 85 A.L.R. 133 (1933).

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

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

1 Thus, for example, suppose that entrepreneurs organize a business as a limited liability
2 company, contributing assets to capitalize it, in the ordinary situation in which none of the
3 owners has particular reason to anticipate personal liability or financial distress and no other
4 unusual facts are present. Assume that the LLC statute has the creditor-thwarting feature of
5 precluding execution upon equity interests in the LLC and providing only for charging orders
6 against such interests. Notwithstanding that feature, the owners’ transfers of assets to capitalize
7 the LLC is not voidable under § 4(a)(1) as in force in the same state. The legislature in that state,
8 having created the LLC vehicle having that feature, must have expected it to be used in such
9 ordinary circumstances. By contrast, if owners of an existing business were to reorganize it as an
10 LLC under such a statute when the clouds of personal liability or financial distress have gathered
11 over some of them, and with the intention of gaining the benefit of that creditor-thwarting
12 feature, that should voidable under § 4(a)(1), at least absent a clear indication that the legislature
13 truly intended the LLC form, with its creditor-thwarting feature, to be available even in such
14 circumstances.

15
16 Because the laws of different jurisdictions differ in their tolerance of particular creditor-
17 thwarting devices, choice of law considerations may be important in interpreting § 4(a)(1) as in
18 force in a given jurisdiction. For example, recall that, as noted in Comment (2) *supra*, the
19 language of § 4(a)(1) historically has been interpreted to render voidable *per se* a transfer to a
20 self-settled spendthrift trust. Suppose that jurisdiction X, in which this Act is in force, also has in
21 force a statute permitting an individual to establish a self-settled spendthrift trust and transfer
22 assets thereto, subject to stated conditions. If an individual Debtor whose principal residence is
23 in X establishes such a trust and transfers assets thereto, then under § 10 of this Act the voidable
24 transfer law of X applies to that transfer. That transfer cannot be considered voidable *per se*
25 under § 4(a)(1) as in force in X, for the legislature of X, having authorized the establishment of
26 such trusts, must have expected them to be used. (Other facts might still render the transfer
27 voidable under X’s enactment of § 4(a)(1), even though it is not voidable *per se*.) By contrast, if
28 Debtor’s principal residence is in jurisdiction Y, which also has enacted this Act but has no
29 legislation validating such trusts, and if Debtor establishes such a trust under the law of X and
30 transfers assets to it, then the result would be different. Under § 10 of this Act, the voidable
31 transfer law of Y would apply to the transfer. The transfer would be voidable *per se* under
32 § 4(a)(1) as in force in Y, as there is no reason to deviate from the established interpretation of
33 that provision in Y.

34
35 (409) This Act is not an exclusive law on the subject of voidable transfers and
36 obligations. See § 1, Comment (2). Nothing in this Act is intended to affect the application of
37 Uniform Commercial Code ~~§§ 2-402(2), 9-205, or 9-310~~ (2014). Section 2-402(2) recognizes
38 the generally prevailing rule that retention of possession of goods by a seller may be voidable,
39 but limits the application of the rule by negating any imputation of voidability from “retention of
40 possession in good faith and current course of trade by a merchant-seller for a commercially
41 reasonable time after a sale or identification.” (Indeed, independently of § 2-402(2), retention of
42 possession of goods in good faith and current course of trade by a merchant-seller for a
43 commercially reasonable time after a sale or identification should not in itself be considered to
44 “hinder, delay, or defraud” any creditor of the merchant-seller under § 4(a)(1) in any case.)
45 ~~Section 9-205 explicitly negates any imputation of voidability from the grant of liberty by a~~
46 ~~secured creditor to a debtor to use, commingle, or dispose of personal property collateral or to~~

1 account for its proceeds. The section recognizes that it does not relax prevailing requirements
2 for delivery of possession by a pledgor. Moreover, the section does not mitigate the requirement
3 of § 9-310 that a nonpossessory security interest in personal property generally must be
4 accompanied by a notice filing in order to be perfected (and a security interest that is not
5 perfected generally will not prevail against a competing interest in the property under the rules of
6 Article 9 of the Uniform Commercial Code). Finally Similarly, like the Uniform Fraudulent
7 Conveyance Act, this Act does not preempt statutes governing bulk transfers (including Article 6
8 of the Uniform Commercial Code, to the extent it remains in force). Compliance with the cited
9 provisions of the Uniform Commercial Code does not, however, insulate a transfer or obligation
10 from being voidable under this Act. Thus a sale by an insolvent debtor for less than a reasonably
11 equivalent value would be voidable under this Act notwithstanding compliance with the Uniform
12 Commercial Code. 6 of the Uniform Commercial Code in jurisdictions where it remains in
13 force).
14

15 In the same way, this Act operates independently of rules in an organic statute applicable
16 to a business organization that limit distributions by the organization to its equity owners.
17 Compliance with those rules does not insulate such a distribution from being voidable under this
18 Act. It is conceivable that such an organic statute might contain a provision preempting the
19 application of this Act law to such distributions. Cf. Model Business Corporation Act § 152
20 (optional provision added in 1979 preempting the application of “any other statutes of this state
21 with respect to the legality of distributions;” deleted 1984). ~~Such a preemptive provision of~~
22 ~~course must be respected if applicable, but choice of law considerations may render the provision~~
23 ~~inapplicable. For example, suppose that the business corporation statute of state X includes such~~
24 ~~a preemptive provision, and a distribution made by a corporation organized under that statute is~~
25 ~~challenged as being excessive. Regardless of the forum in which the action is brought, a claim~~
26 ~~based on business corporation law ordinarily would be expected to be governed by the law of~~
27 ~~state X, as that claim relates to the internal affairs of the corporation. However, a claim based on~~
28 ~~avoidance law might well be governed by the law of a jurisdiction other than state X (regardless~~
29 ~~of whether § 10 of this Act is in force in the forum). In that event state X’s preemptive provision~~
30 ~~would not apply to bar the avoidance claim.~~ Such a preemptive statute of course must be
31 respected if applicable, but choice of law considerations may well render it inapplicable. See,
32 *e.g., Faulkner v. Kornman (In re The Heritage Organization, L.L.C.)*, 413 B.R. 438, 462-63
33 (Bankr. N.D. Tex. 2009). 2009) (action under the Texas enactment of this Act challenging a
34 distribution by a Delaware limited liability company to its members; held, a provision of the
35 Delaware LLC statute imposing a three-year statute of repose on an action under “any applicable
36 law” to recover a distribution by a Delaware LLC did not apply, because choice of law rules
37 directed application of the voidable transfer law of Texas).
38

39 ~~(11)~~ (10) Subsection (c) was added in 2014. Sections 2(b), 4(c), 5(c), 8(g), and 8(h)
40 together provide uniform rules on burdens and standards of proof relating to the operation of this
41 Act.
42

43 Pursuant to subsection (c), proof of intent to “hinder, delay, or defraud” a creditor under
44 § 4(a)(1) is sufficient if made by a preponderance of the evidence. That is the standard of proof
45 ordinarily applied in civil actions. Subsection (c) thus rejects cases that have imposed an
46 extraordinary standard, typically “clear and convincing evidence,” by analogy to the standard

1 commonly applied to proof of common-law fraud. That analogy is misguided. By its terms,
2 § 4(a)(1) applies to a transaction that “hinders” or “delays” a creditor even if it does not
3 “defraud,” and a transaction ~~that contravenes~~ to which § 4(a)(1) applies need not bear any
4 resemblance to common-law fraud. See Comment (98) *supra*. Furthermore, the extraordinary
5 standard of proof commonly applied to common-law fraud originated in cases that were thought
6 to involve a special danger that claims might be fabricated. In the earliest such cases, a court of
7 equity was asked to grant relief on claims that were unenforceable at law for failure to comply
8 with the Statute of Frauds, the Statute of Wills, or the parol evidence rule. In time, extraordinary
9 proof also came to be required in actions seeking to set aside or alter the terms of written
10 instruments. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 388-89 (1983) and sources
11 cited therein. Those reasons for extraordinary proof do not apply to claims under § 4(a)(1).

12
13 For similar reasons, a procedural rule that imposes extraordinary pleading requirements
14 on a claim of “fraud,” without further gloss, should not be applied to a claim ~~based on~~ under
15 § 4(a)(1). The elements of a claim ~~based on~~ under § 4(a)(1) are very different from the elements
16 of a claim of common-law fraud. Furthermore, the reasons for such extraordinary pleading
17 requirements do not apply to a claim under § 4(a)(1). Unlike common-law fraud, a claim under
18 § 4(a)(1) is not unusually susceptible to abusive use in a “strike suit,” nor is it apt to be of use to
19 a plaintiff seeking to discover unknown wrongs. Likewise, a claim under § 4(a)(1) is unlikely to
20 cause significant harm to the defendant’s reputation, for the defendant is the transferee or
21 obligee, and the elements of the claim do not require the defendant to have committed even an
22 arguable wrong. ~~Likewise, a claim under § 4(a)(1) is not unusually susceptible to abusive use in~~
23 ~~a “strike suit,” nor is it apt to be of use to a plaintiff seeking to discover unknown wrongs.~~ See
24 *Janvey v. Alguire*, 846 F.Supp.2d 662, 675-77 (N.D. Tex. 2011); *Carter-Jones Lumber Co. v.*
25 *Benune*, 725 N.E.2d 330, 331-33 (Ohio App. 1999). Cf. Federal Rules of Civil Procedure,
26 Appendix, Form 21 (2010) (illustrative form of complaint for a claim ~~based on~~ under § 4(a)(1) or
27 similar law, which Rule 84 declares sufficient to comply with federal pleading rules).

28
29 (~~4211~~) Subsection (c) allocates to the party making a claim under § 4 the burden of
30 persuasion as to the elements of the claim. Courts should not apply nonstatutory presumptions
31 that reverse that allocation, and should be wary of nonstatutory presumptions that would dilute it.
32 The command of § ~~4213~~—that this Act is to be applied so as to effectuate its purpose of making
33 uniform the law among states enacting it—applies with particular cogency to nonstatutory
34 presumptions, for given the elasticity of key terms of this Act (*e.g.*, “hinder, delay, or defraud”) and
35 the potential difficulty of proving others (*e.g.*, the financial condition tests in § 4(a)(2) and
36 § 5), employment of divergent nonstatutory presumptions by enacting jurisdictions may render
37 the law nonuniform as a practical matter. It is not the purpose of subsection (c) to forbid
38 employment of any and all nonstatutory presumptions. Indeed, in some instances a rule of
39 avoidance law applied with a judicially-crafted presumption has won such favor as to be codified
40 ~~in~~ as a separate statutory creation, such as the bulk sales laws, the absolute priority rule applicable
41 to reorganizations under Bankruptcy Code § 1129(b)(2)(B)(ii) (2014), and the so-called
42 “constructive fraud” provisions of § 4(a)(2) and § 5(a) of this Act itself. However, subsection (c)
43 and § ~~4213~~ mean, at the least, that a nonstatutory presumption is suspect if it would alter the
44 statutorily-allocated burden of persuasion, would upset the policy of uniformity, or is an
45 unwarranted carrying-forward of obsolescent principles. ~~Examples~~ An example of a nonstatutory
46 ~~presumptions~~ presumption that should be rejected for those reasons ~~are~~ is a presumption that the

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

14
15 (3) Subsection (b) does not extend as far as § 8(a) of the Uniform Fraudulent
16 Conveyance Act and Bankruptcy Code § 548(b) (1984) in rendering voidable a transfer or
17 obligation incurred by an insolvent partnership to a partner, who is an insider of the partnership.
18 The transfer to the partner is not vulnerable to avoidance under § 5(b) unless the transfer was for
19 an antecedent debt and the partner had reasonable cause to believe that the partnership was
20 insolvent. The cited provisions of the Uniform Fraudulent Conveyance Act and the Bankruptcy
21 Act make any transfer by an insolvent partnership to a partner voidable. Avoidance of the
22 partnership transfer without reference to the partner's state of mind and the nature of the
23 consideration exchanged would be unduly harsh treatment of the creditors of the partner and
24 unduly favorable to the creditors of the partnership.

25
26 (4) Subsection (c) was added in 2014. Sections 2(b), 4(c), 5(c), 8(g), and 8(h) together
27 provide uniform rules on burdens and standards of proof relating to the operation of this Act.
28 The principles stated in Comment (~~4211~~) to § 4 apply to subsection (c) ~~of this section.~~

29 30 SECTION 6. WHEN TRANSFER IS MADE OR OBLIGATION IS INCURRED.

31 For the purposes of this [Act]:

32 (1) a transfer is made:

33 (i) with respect to an asset that is real property other than a fixture, but including
34 the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is
35 so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable
36 law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to
37 the interest of the transferee; and

38 (ii) with respect to an asset that is not real property or that is a fixture, when the

1 transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien
2 otherwise than under this [Act] that is superior to the interest of the transferee;

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

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

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

10 (5) an obligation is incurred:

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

12 (ii) ~~if evidenced by a record~~otherwise, when the record evidencing the obligation,
13 signed by the obligor, is delivered to or for the benefit of the obligee.

14 Official Comment

15
16 (1) One of the uncertainties in the law governing the avoidance of transfers and
17 obligations of the nature governed by this Act is the difficulty of determining when the cause of
18 action arises. Section 6 clarifies ~~this~~that point in time. For transfers of real estate,
19 ~~subparagraph~~paragraph (1)(i) fixes the time as the date of perfection against a good-faith
20 purchaser from the transferor. For transfers of fixtures and assets constituting personalty,
21 ~~subparagraph~~paragraph (1)(ii) fixes the time as the date of perfection against a judicial lien
22 creditor not asserting rights under this Act. Perfection under paragraph (1) typically is effected
23 by notice-filing, recordation, or delivery of unequivocal possession. See U.C.C. §§ 9-310, 9-313
24 (2014) (security interest in personal property generally is perfected by notice-filing or delivery of
25 possession to transferee); 4 American Law of Property §§ 17.10-17.12 (1952) (recordation of
26 transfer or delivery of possession to grantee required for perfection against bona fide purchaser
27 from grantor). The provision for postponing the time a transfer is made until its perfection is an
28 adaptation of Bankruptcy Code § 548(d)(1) (1984). When no steps are taken to perfect a transfer
29 that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be
30 perfected immediately before the filing of an action to avoid it; without such a provision to cover
31 that eventuality, an unperfected transfer would arguably be immune to attack. Some transfers—
32 *e.g.*, an assignment of a bank account, or execution of a marital or premarital agreement for the
33 disposition of property owned by the parties to the agreement—may not be amenable to

1 perfection as against a bona fide purchaser or judicial lien creditor. When a transfer is not
2 | perfectible as provided in paragraph (1), paragraph (3) provides that the transfer occurs for the
3 purpose of this Act when the transferor effectively parts with an interest in the asset as provided
4 | in § 1(1716) *supra*.

5
6 (2) Paragraph (4) requires the transferor to have rights in the asset transferred before the
7 transfer is made for the purpose of this section. This provision makes clear that its purpose may
8 not be circumvented by notice-filing or recordation of a document evidencing an interest in an
9 asset to be acquired in the future. *Cf.* Bankruptcy Code § 547(e) (1984); U.C.C. § 9-203(b)(2)
10 (2014).

11
12 (3) Paragraph (5) is new. It is intended to resolve uncertainty arising from *Rubin v.*
13 *Manufacturers Hanover Trust Co.*, 661 F.2d 979, 989-91, 997 (2d Cir. 1981), insofar as that case
14 holds that an obligation of guaranty may be deemed to be incurred when advances covered by
15 the guaranty are made rather than when the guaranty first became effective between the parties.
16 Compare Rosenberg, *Intercorporate Guaranties and the Law of Fraudulent Conveyances:*
17 *Lender Beware*, 125 U.Pa.L.Rev. 235, 256-57 (1976).

18 An obligation may be avoided under this Act if it is incurred under the circumstances
19 specified in § 4(a) or § 5(a). The debtor may receive reasonably equivalent value in exchange
20 for an obligation incurred even though the benefit to the debtor is indirect. See *Rubin v.*
21 *Manufacturers Hanover Trust Co.*, 661 F.2d at 991-92; *Williams v. Twin City Co.*, 251 F.2d 678,
22 681 (9th Cir. 1958); Rosenberg, *supra* at 243-46.

23
24 | Under paragraph (5), if an oral obligation is effective between the parties it is incurred
25 when it so becomes effective, and later confirmation of the oral obligation by a record does not
26 reset the time of incurrence to that later time.

27 |

28 SECTION 7. REMEDIES OF CREDITORS.

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

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

33 [(2) an attachment or other provisional remedy against the asset transferred or
34 other property of the transferee in accordance with the procedure prescribed by [];]

35 (3) subject to applicable principles of equity and in accordance with applicable
36 rules of civil procedure,

1 (i) an injunction against further disposition by the debtor or a transferee, or
2 both, of the asset transferred or of other property;

3 (ii) appointment of a receiver to take charge of the asset transferred or of
4 other property of the transferee; or

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

6 (b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the
7 court so orders, may levy execution on the asset transferred or its proceeds.

8 Official Comment

9
10 (1) This section is derived from §§ 9 and 10 of the Uniform Fraudulent Conveyance Act.
11 Section 9 of that Act specified the remedies of creditors whose claims have matured, and § 10
12 enumerated the remedies available to creditors whose claims have not matured. A creditor
13 holding an unmatured claim may be denied the right to receive payment from the proceeds of a
14 sale on execution until his claim has matured, but the proceeds may be deposited in court or in an
15 interest-bearing account pending the maturity of the creditor's claim. The remedies specified in
16 this section are not exclusive.

17 (2) The availability of an attachment or other provisional remedy has been restricted by
18 amendments of statutes and rules of procedure to reflect views of the Supreme Court expressed
19 in *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969), and its progeny. This
20 judicial development and the procedural changes that followed in its wake do not preclude resort
21 to attachment by a creditor in seeking avoidance of a transfer or obligation. See, e.g., *Britton v.*
22 *Howard Sav. Bank*, 727 F.2d 315, 317-20 (3d Cir. 1984); *Computer Sciences Corp. v. Sci-Tek*
23 *Inc.*, 367 A.2d 658, 661 (Del. Super. 1976); *Great Lakes Carbon Corp. v. Fontana*, 54 A.D.2d
24 548, 387 N.Y.S.2d 115 (1st Dep't 1976). Section 7(a)(2) continues the authorization for the use
25 of attachment contained in § 9(b) of the Uniform Fraudulent Conveyance Act, or of a similar
26 provisional remedy, when the state's procedure provides therefor, subject to the constraints
27 imposed by the due process clauses of the United States and state constitutions.

28
29 (3) Subsections (a) and (b) of § 10 of the Uniform Fraudulent Conveyance Act
30 authorized the court, in an action on a voidable transfer or obligation, to restrain the defendant
31 from disposing of his property, to appoint a receiver to take charge of his property, or to make
32 any order the circumstances may require. Section 10, however, applied only to a creditor whose
33 claim was unmatured. There is no reason to restrict the availability of these remedies to such a
34 creditor, and the courts have not so restricted them. See, e.g., *Lipskey v. Voloshen*, 155 Md. 139,
35 143-45, 141 Atl. 402, 404-05 (1928) (judgment creditor granted injunction against disposition of
36 property by transferee, but appointment of receiver denied for lack of sufficient showing of need
37 for such relief); *Matthews v. Schusheim*, 36 Misc.2d 918, 922-23, 235 N.Y.S.2d 973, 976-77,
38 991-92 (Sup.Ct. 1962) (injunction and appointment of receiver granted to holder of claims for

1 fraud, breach of contract, and alimony arrearages; whether creditor’s claim was mature said to be
2 immaterial); *Oliphant v. Moore*, 155 Tenn. 359, 362-63, 293 S.W. 541, 542 (1927) (tort creditor
3 granted injunction restraining alleged tortfeasor’s disposition of property).
4

5 (4) As under the Uniform Fraudulent Conveyance Act, a creditor is not required to
6 obtain a judgment against the debtor-transferor or to have a matured claim in order to proceed
7 under subsection (a). See §§ 1(3) and 1(4) *supra*; *American Surety Co. v. Conner*, 251 N.Y. 1,
8 166 N.E. 783, 65 A.L.R. 244 (1929); 1 G. Glenn, *Fraudulent Conveyances and Preferences* 129
9 (Rev. ed. 1940).
10

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

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

31 (7) If a transfer or obligation contravenes voidable under § 4 or § 5, the basic remedy
32 provided by this Act is its avoidance under subsection (a)(1). “Avoidance” is a term of art in this
33 Act, for it does not mean that the transfer or obligation is simply rendered void. It has long been
34 established that a transfer avoidable avoided by a creditor under this Act or its predecessors is
35 nevertheless valid as between the debtor and the transferee. For example, in the case of a
36 transfer of property worth \$100 by Debtor to Transferee, held voidable in a suit by Creditor-1
37 who is owed \$80 by Debtor, “avoidance” of the transfer should leave the \$20 surplus with
38 Transferee. Debtor is not entitled to recover the surplus. Nor is Debtor’s Creditor-2 entitled to
39 the windfall, at Transferee’s expense, of being able to pursue the surplus by reason of Creditor-
40 -1’s action (though of course Creditor-2 may be entitled to bring his own avoidance action to
41 pursue the surplus). The foregoing principle is embedded in the language of subsection (a)(1),
42 which prescribes “avoidance” only “to the extent necessary to satisfy the creditor’s claim.”
43 Section 9(a) of the Uniform Fraudulent Conveyance Act was similarly limited. See, e.g., *Becker*
44 *v. Becker*, 416 A.2d 156, 162 (Vt. 1980); *De Martini v. De Martini*, 52 N.E.2d 138, 141 (Ill.
45 1943); *Markward v. Murrah*, 156 S.W.2d 971, 974 (Tex. 1941); *Society Milion Athena, Inc. v.*
46 *National Bank of Greece*, 22 N.E.2d 374, 377 (N.Y. 1939); *National Radiator Corp. v. Parad*, 8

1 N.E.2d 794, 796-97 (Mass. 1937); *Doty v. Wheeler*, 182 A. 468, 471 (Conn. 1936); *Brownell*
2 *Realty, Inc. v. Kelly*, 303 N.W.2d 871, 875 (Mich. Ct. App. 1981); *Patterson v. Missler*, 48
3 Cal.Rptr, 215, 222-24 (Cal. Dist. Ct. App. 1965); 1 G. Glenn, *Fraudulent Conveyances and*
4 *Preferences* § 114, at 225 (Rev. ed. 1940). ~~Transferee's~~The transferee's mental state is irrelevant
5 to the foregoing, but a good-faith ~~Transferee~~transferee may also be afforded protection by § 8.
6

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

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

20 **SECTION 8. DEFENSES, LIABILITY, AND PROTECTION OF TRANSFEREE**
21 **OR OBLIGEE.**

22 (a) A transfer or obligation is not voidable under Section 4(a)(1) against a person
23 ~~whothat~~ took in good faith and for a reasonably equivalent value ~~given the debtor~~ or against
24 any subsequent transferee or obligee.

25 (b) ~~Except as otherwise provided in this section, to~~To the extent a transfer is
26 ~~voidable~~avoidable in an action by a creditor under Section 7(a)(1), the following provisions
27 apply:

28 (1) Except as otherwise provided in this section, the creditor may recover
29 judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount
30 necessary to satisfy the creditor’s claim, whichever is less. The judgment may be entered
31 against:

32 ~~(1)~~ (i) the first transferee of the asset or the person for whose benefit the

1 transfer was made; or

2 | ~~(2)~~ (ii) any subsequent transferee other than a good-faith transferee ~~whothat~~
3 took for value or from any subsequent transferee.

4 | (2) Recovery pursuant to Section 7(a)(1) or 7(b) of or from the asset transferred or
5 its proceeds, by levy or otherwise, is available only against a person referred to in subsection
6 (b)(1)(i) or (b)(1)(ii).

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

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

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

14 (2) enforcement of any obligation incurred; or

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

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

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

20 (2) enforcement of a security interest in compliance with Article 9 of the Uniform
21 Commercial Code, other than acceptance of collateral in full or partial satisfaction of the
22 obligations it secures.

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

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

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

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

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

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

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

13 (3) The transferee has the burden of proving good faith and value under
14 subsection (b)(~~2~~-1)(ii).

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

17 ———(~~5~~)(h) Proof of matters referred to in this section is sufficient if established by a
18 preponderance of the evidence.

19 Official Comment

20
21 —(1) Subsection (a) ~~states the rule that applies when the transferee establishes sets~~
22 ~~forth~~ a complete defense to ~~thean~~ action for avoidance ~~based on Section under §~~ 4(a)(1). The
23 subsection is an adaptation of the exception stated in § 9 of the Uniform Fraudulent Conveyance
24 Act. Pursuant to subsection (g), the person who invokes this defense carries the burden of
25 establishing good faith and the reasonable equivalence of the consideration exchanged.
26

27 (2) Subsection (b) is derived from Bankruptcy Code ~~§§§~~ 550(a), (b) (1984). The value
28 of the asset transferred is limited to the value of the levyable interest of the transferor, exclusive

1 of any interest encumbered by a valid lien. See § 1(2) *supra*.

2
3 | The requirement of Bankruptcy Code § 550(b)(1) (1984) that a transferee be “without
4 knowledge of the voidability of the transfer” in order to be protected has been omitted as
5 inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with
6 the good faith that is required of a protected transferee. Knowledge of the voidability of a
7 transfer would seem to involve a legal conclusion. Determination of the voidability of the
8 transfer ought not to require the court to inquire into the legal sophistication of the transferee.

9
10 (3) Subsection (c) is new. The measure of the recovery of a creditor against a transferee
11 is usually limited to the value of the asset transferred at the time of the transfer. See, e.g., *United*
12 *States v. Fernon*, 640 F.2d 609, 611 (5th Cir. 1981); *Hamilton Nat’l Bank of Boston v. Halstead*,
13 134 N.Y. 520, 31 N.E. 900 (1892); cf. *Buffum v. Peter Barceloux Co.*, 289 U.S. 227 (1932)
14 (transferee’s objection to trial court’s award of highest value of asset between the date of the
15 transfer and the date of the decree of avoidance rejected because an award measured by value as
16 of time of the transfer plus interest from that date would have been larger). The premise of
17 § 8(c) is that changes in value of the asset transferred that occur after the transfer should
18 ordinarily not affect the amount of the creditor’s recovery. Circumstances may require a
19 departure from that measure of the recovery, however, as the cases decided under the Uniform
20 Fraudulent Conveyance Act and other laws derived from the Statute of 13 Elizabeth illustrate.
21 Thus, if the value of the asset at the time of levy and sale to enforce the judgment of the creditor
22 has been enhanced by improvements of the asset transferred or discharge of liens on the
23 | property, a good-faith transferee should be reimbursed for the outlay for such a purpose to the
24 extent the sale proceeds were increased thereby. See Bankruptcy Code § 550(d) (1984); *Janson*
25 *v. Schier*, 375 A.2d 1159, 1160 (N.H. 1977); Anno., 8 A.L.R. 527 (1920). If the value of the
26 asset has been diminished by severance and disposition of timber or minerals or fixtures, the
27 transferee should be liable for the amount of the resulting reduction. See *Damazo v. Wahby*, 269
28 Md. 252, 257, 305 A.2d 138, 142 (1973). If the transferee has collected rents, harvested crops,
29 or derived other income from the use or occupancy of the asset after the transfer, the liability of
30 the transferee should be limited in any event to the net income after deduction of the expense
31 incurred in earning the income. Anno., 60 A.L.R.2d 593 (1958). On the other hand, adjustment
32 for the equities does not warrant an award to the creditor of consequential damages alleged to
33 accrue from mismanagement of the asset after the transfer.

34
35 (4) Subsection (d) is an adaptation of Bankruptcy Code § 548(c) (1984). An insider who
36 receives property or an obligation from an insolvent debtor as security for or in satisfaction of an
37 | antecedent debt of the transferor or obligor is not a good-faith transferee or obligee if the insider
38 has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or
39 the obligation was incurred. If a foreclosure sale does not qualify for the benefit of § 3(b) or
40 § 8(e)(2) because it was not conducted in accordance with the requirements of applicable law,
41 the buyer, if in good faith, will still be entitled to the benefit of subsection (d) to the extent of the
42 value paid by the buyer in the sale.

43
44 (5) Subsection (e)(1) rejects the rule adopted in *Darby v. Atkinson (In re Farris)*, 415
45 F.Supp. 33, 39-41 (W.D.Okla. 1976), that termination of a lease on default in accordance with its
46 terms and applicable law may constitute a voidable transfer.

1
2 _____ Subsection (e)(2) protects a transferee who acquires a debtor’s interest in an asset as a
3 result of the enforcement ~~of~~by a secured ~~creditor’s party (who may but need not be the transferee)~~
4 ~~of~~ rights pursuant to and in compliance with the provisions of Part 6 of Article 9 of the Uniform
5 Commercial Code. *Cf. Calaiaro v. Pittsburgh Nat’l Bank (In re Ewing)*, 33 B.R. 288, 9
6 C.B.C.2d 526, CCH B.L.R. ¶ 69,460 (Bankr. W.D.Pa. 1983) (sale of pledged stock held subject
7 to avoidance ~~in~~under § 548 of the Bankruptcy Code), *rev’d*, 36 B.R. 476 (W.D.Pa. 1984)
8 (transfer held not voidable because deemed to have occurred more than one year before
9 bankruptcy petition filed). ~~Although a secured creditor may enforce rights in collateral without a~~
10 ~~sale under U.C.C. §§ 9-607-9-608 (2014) or U.C.C. §§ 9-620-9-622 (2014), the creditor must~~
11 ~~proceed in good faith. See U.C.C. § 1-304 (2014). An enforcement of rights in collateral that is~~
12 ~~purportedly based on §§ 9-607-9-608 or §§ 9-620-9-622 but that is not made in good faith is not~~
13 ~~protected by subsection (e)(2). The global requirement of Article 9 that the secured party enforce~~
14 ~~its rights in good faith, and its further requirement that certain remedies be conducted in a~~
15 ~~commercially reasonable manner, provide substantial protection to the other creditors of the~~
16 ~~debtor. See U.C.C. §§ 1-304, 9-607(b), 9-610(b) (2014). The exemption afforded by subsection~~
17 ~~(e)(2) does not extend to acceptance of collateral in full or partial satisfaction of the obligations it~~
18 ~~secures. That remedy, contemplated by U.C.C. §§ 9-620-9-622 (2014), is sometimes referred to~~
19 ~~as “strict foreclosure.” An exemption for strict foreclosure is inappropriate because compliance~~
20 ~~with the rules of Article 9 relating to strict foreclosure may not sufficiently protect the interests~~
21 ~~of the debtor’s other creditors if the debtor does not act to protect equity the debtor may have in~~
22 ~~the asset.~~

23
24 (6) Subsection (f) provides additional defenses against the avoidance of a preferential
25 transfer to an insider under § 5(b).

26 Paragraph (1) is adapted from Bankruptcy Code § 547(c)(4) (1984), which permits a
27 preferred creditor to set off the amount of new value subsequently advanced against the recovery
28 of a voidable preference by a trustee in bankruptcy to the debtor without security. The new value
29 may consist not only of money, goods, or services delivered on unsecured credit but also of the
30 release of a valid lien. See, e.g., *In re Ira Haupt & Co.*, 424 F.2d 722, 724 (2d Cir. 1970);
31 *Baranow v. Gibraltar Factors Corp. (In re Hygrade Envelope Co.)*, 393 F.2d 60, 65-67 (2d Cir.),
32 *cert. denied*, 393 U.S. 837 (1968); *In re John Morrow & Co.*, 134 F. 686, 688 (S.D.Ohio 1901).
33 It does not include an obligation substituted for a prior obligation. If the insider receiving the
34 preference thereafter extends new credit to the debtor but also takes security from the debtor, the
35 injury to the other creditors resulting from the preference remains undiminished by the new
36 credit. On the other hand, if a lien taken to secure the new credit is itself voidable by a judicial
37 lien creditor of the debtor, the new value received by the debtor may appropriately be treated as
38 unsecured and applied to reduce the liability of the insider for the preferential transfer.

39
40 Paragraph (2) is derived from Bankruptcy Code § 547(c)(2) (1984), which excepts certain
41 payments made in the ordinary course of business or financial affairs from avoidance by the
42 trustee in bankruptcy as preferential transfers. Whether a transfer was in the “ordinary course”
43 requires a consideration of the pattern of payments or secured transactions engaged in by the
44 debtor and the insider prior to the transfer challenged under § 5(b). See Tait & Williams,
45 *Bankruptcy Preference Laws: The Scope of Section 547(c)(2)*, 99 Banking L.J. 55, 63-66 (1982).

1 The defense provided by paragraph (2) is available, irrespective of whether the debtor or the
2 insider or both are engaged in business, but the prior conduct or practice of both the debtor and
3 the insider-transferee is relevant.
4

5 Paragraph (3) is new and reflects a policy judgment that an insider who has previously
6 extended credit to a debtor should not be deterred from extending further credit to the debtor in a
7 good-faith effort to save the debtor from a forced liquidation in bankruptcy or otherwise. A
8 similar rationale has sustained the taking of security from an insolvent debtor for an advance to
9 enable the debtor to stave off bankruptcy and extricate itself from financial stringency.
10 *Blackman v. Bechtel*, 80 F.2d 505, 508-09 (8th Cir. 1935); *Olive v. Tyler (In re Chelan Land*
11 *Co.)*, 257 F. 497, 5 A.L.R. 561 (9th Cir. 1919); *In re Robin Bros. Bakeries, Inc.*, 22 F.Supp. 662,
12 663-64 (N.D.Ill. 1937); see *Dean v. Davis*, 242 U.S. 438, 444 (1917). The amount of the present
13 value given, the size of the antecedent debt secured, and the likelihood of success for the
14 rehabilitative effort are relevant considerations in determining whether the transfer was in good
15 faith.
16

17 (7) ~~Subsection~~Subsections (g) is new. Together with § 4(e) and § (h) were added in
18 2014. Sections 2(b), 4(c), 5(c), it provides 8(g), and 8(h) together provide uniform rules on
19 burdens and standards of proof relating to the operation of this Act. The principles stated in
20 Comment (1211) to § 4 apply to subsections (g) and (h).
21

22 (8) The provisions of § 8 are integral elements of the rights created by this Act.
23 Accordingly, they should apply if this Act is invoked in a bankruptcy proceeding pursuant to
24 Bankruptcy Code § 544(b) (2014). That follows from the fundamental principle that property
25 rights in bankruptcy should be the same as outside bankruptcy, unless a federal interest compels
26 a different result. See *Butner v. United States*, 440 U.S. 48, 55 (1979). Section 8(b) limits
27 damages under this Act to the amount of the plaintiff creditor's claim, and that limitation is
28 overridden in bankruptcy by the rule of *Moore v. Bay*, 284 U.S. 4 (1931), which Congress
29 unmistakably maintained when it enacted the Bankruptcy Code. In the absence of a clear
30 override by the Bankruptcy Code or ~~clear conflict with its principles~~other federal law, however,
31 other aspects of § 8 should apply if this Act is invoked in bankruptcy. See, e.g., *Decker v.*
32 *Tramiel (In re JTS Corp.)*, 617 F.3d 1102, 1110-16 (9th Cir. 2010) (holding that § 8(d) applies to
33 a claim brought under this Act in a bankruptcy proceeding pursuant to Bankruptcy Code
34 § 544(b)).
35

36 SECTION 9. EXTINGUISHMENT OF [CLAIM FOR RELIEF] [CAUSE OF

37 ACTION]. A [claim for relief] [cause of action] with respect to a transfer or obligation under
38 this [Act] is extinguished unless action is brought:

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

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

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

5 Official Comment

6
7 (1) This section is new. Its purpose is to make clear that lapse of the statutory periods
8 prescribed by the section bars the right and not merely the remedy. The section rejects the rule
9 applied in *United States v. Gleneagles Inv. Co.*, 565 F.Supp. 556, 583 (M.D.Pa. 1983) (state
10 statute of limitations held not to apply to action by United States based on Uniform Fraudulent
11 Conveyance Act). Another consequence of barring the right and not merely the remedy is that,
12 under *Restatement (Second) of Conflict of Laws* § 143 (1971), if an action is brought in
13 jurisdiction A and the action is determined to be governed by this Act as enacted in
14 jurisdiction B, the action cannot be maintained if it is time-barred in jurisdiction B. The 1988
15 revision of §§ 142 and 143 of the *Restatement (Second) of Conflict of Laws*, which eliminated
16 the right/remedy distinction, should not be applied to this Act. Because a voidable transfer or
17 obligation may injure all of a debtor’s many creditors, there is need for a uniform and predictable
18 cutoff time.

19
20 (2) Statutes of limitations applicable to the avoidance of transfers and obligations vary
21 widely from state to state and are frequently subject to uncertainties in their application. See
22 Hesson, *The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in*
23 *Actions Against Directors by Creditors of Corporations*, 32 Cornell L.Q. 222 (1946); Annos., 76
24 A.L.R. 864 (1932), 128 A.L.R. 1289 (1940), 133 A.L.R. 1311 (1941), 14 A.L.R.2d 598 (1950),
25 and 100 A.L.R.2d 1094 (1965). Together with § 6, this section should mitigate the uncertainty
26 and diversity that have characterized the decisions applying statutes of limitations to actions to
27 avoid transfers and obligations. The periods prescribed apply, whether the action under this Act
28 is brought by a creditor or by a purchaser at a sale on execution levied pursuant to § 7(b) and
29 whether the action is brought against the original transferee or subsequent transferee. The
30 prescription of statutory periods of limitation does not preclude the barring of an avoidance
31 action for laches. See § ~~4112~~ and the accompanying Comment *infra*.

32
33 (3) Subsection (a) provides that the four-year period ordinarily applicable to a claim
34 under § 4(a)(1) is extended to “one year after the transfer or obligation was or could reasonably
35 have been discovered by the claimant.” Antecedents to that “discovery rule” have long existed
36 in common law and in other statutes, and courts may take different approaches to filling out the
37 meaning of subsection (a) by reference to such precedents. Thus, subsection (a) literally starts
38 the one-year period when the “transfer” was or could reasonably have been discovered by the
39 claimant, but cases applying subsection (a) have held that the period starts only when the transfer
40 and its wrongful nature were or could reasonably have been discovered. See, e.g., *Freitag v.*
41 *McGhie*, 947 P.2d 1186 (Wash. 1997); *State Farm Mut. Auto. Ins. Co. v. Cordua*, 834 F.Supp.2d
42 301, 306-08 (E.D. Pa. 2011). A recurring situation to which that distinction may be relevant is

1 Spouse X's transfer of assets beyond the reach of creditors, made in anticipation of divorcing
2 Spouse Y after the four-year period has elapsed and made for the purpose of thwarting
3 Spouse Y's economic interests in the divorce. Spouse Y may well know of the transfer long
4 before Spouse Y learns its wrongful purpose. Of course, even if the period specified in
5 subsection (a) is held to have lapsed in a given case, law other than this Act might allow the
6 transferred assets to be considered in making a division of assets in the ensuing divorce case.
7

8 **SECTION 10. GOVERNING LAW.**

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

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

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

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

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

18 **Official Comment**

19
20 (1) Section 10, added in 2014, codifies a simple and predictable choice of law rule for
21 claims of the nature governed by the Act. It provides that a claim in the nature of a claim under
22 the Act is governed by the local law of the jurisdiction in which the debtor is "located" at the
23 time the challenged transfer is made or the challenged obligation is incurred. Section 6 defines
24 the time at which a transfer is made or obligation is incurred for purposes of the Act, including
25 this section.

26
27 Basing choice of law on the location of the debtor is analogous to the rule set forth in
28 U.C.C. § 9-301 (2014), which provides that the priority of a security interest in intangible
29 property is generally governed by the law of the jurisdiction in which the debtor is located. The
30 analogy is apt, because the substantive rules of this Act are a species of priority rule, in that they
31 determine the circumstances in which a debtor's creditors, rather than the debtor's transferee,
32 have superior rights in property transferred by the debtor. In keeping with that analogy, the
33 definition of the debtor's "location" in subsection (a) is identical to the baseline definition of that
34 term in U.C.C. § 9-307(b) (2014). Subsection (a) does not include any of the exceptions to the
35 baseline definition that are set forth in Article 9 of the Uniform Commercial Code, such as
36 U.C.C. § 9-307(e) (2014) (providing that the location of a domestic corporation or other

1 “registered organization” is its jurisdiction of organization), and U.C.C. § 9-307(c) (2014)
2 (providing in effect that if the baseline definition would locate a debtor in a jurisdiction that lacks
3 an Article 9-style filing system, then the debtor is instead located in the District of Columbia).
4 Those exceptions are not included in subsection (a) because their primary purpose relates to the
5 operation of Article 9’s perfection rules, which have no analogue in this Act.

6
7 (2) As used in subsection (a), the terms “chief executive office,” “place of business,” and
8 “principal residence” are to be evaluated on the basis of authentic and sustained activity, not on
9 the basis of manipulations employed to establish a location artificially (e.g., by such means as
10 establishing a notional “chief executive office” by use of straw-man officers or directors in a
11 jurisdiction in which creditors’ rights are substantially debased, or establishing a notional
12 “principal residence” for a short term in such a jurisdiction for the purpose of making an asset
13 transfer while there). Notwithstanding the adaptation of subsection (a) from U.C.C. § 9-307(b)
14 (2014), the foregoing terms need not necessarily have the same meanings in both statutes.
15 Debtors are likely to have greater incentive and ability to employ “asset tourism” for the purpose
16 of seeking to evade the substantive rules of this Act than for the purpose of seeking to
17 manipulate the perfection and priority rules of secured transactions law. Interpretation and
18 application of this Act should so recognize.

19
20 (3) “Location” under this Act has no relation to the concept of “center of main interests”
21 (“COMI”), as that term is used in Chapter 15 of the Bankruptcy Code. Chapter 15, which
22 applies to transnational insolvency proceedings, requires United States courts to defer in various
23 ways to a foreign proceeding in the jurisdiction of the debtor’s COMI. Those consequences are
24 quite different from the consequences of “location” under this Act. Furthermore, if the debtor is
25 an organization, the debtor’s jurisdiction of organization has no bearing on the debtor’s
26 “location” under subsection (a), by contrast to the presumption in Bankruptcy Code § 1516(c)
27 (2014) that the jurisdiction in which the debtor has its registered office (i.e., its jurisdiction of
28 organization) is its COMI.

29 30 **SECTION -11. APPLICATION TO SERIES ORGANIZATIONS.**

31 (a) In this section, “series organization” means an organization that, pursuant to the
32 statute under which the organization is organized, satisfies the following conditions:

33 (1) the organic record of the organization provides for creation by the
34 organization of one or more protected series (however denominated) with respect to specified
35 property of the organization, and provides for records to be maintained for each protected series
36 that identify the property of the protected series;

37 (2) debt incurred or existing with respect to the activities or property of a
38 particular protected series is enforceable against the property of the protected series only, and not

1 against the property of the organization or of other protected series thereof; and
2 (3) debt incurred or existing with respect to the activities or property of the
3 organization is enforceable against the property of the organization only, and not against the
4 property of any protected series thereof.

5 (b) A series organization and each protected series of the series organization is a separate
6 person for purposes of this [Act], even if for other purposes a protected series is not an entity
7 separate from the series organization or other protected series thereof.

8 Official Comment

9
10 This section, added in 2014, accommodates developments in business organization
11 statutes exemplified by the Uniform Trust Entity Act §§ 401-404 (2009) and Del. Code Ann.
12 tit. 6, § 18-215 (2012) (pertaining to Delaware limited liability companies). The definition of
13 “series organization” in subsection (a) is adapted from §§ 401-402 of the Uniform Trust Entity
14 Act. If the statute under which an organization is organized permits it to divide its assets and
15 debts among “protected series” (however denominated), such that assets and debts of each
16 “protected series” are separated in accordance with subsections (a)(2) and (a)(3), and if the
17 organization does so, then the provisions of this Act apply to each “protected series” as if it were
18 a legal entity, regardless of whether it is considered to be a legal entity for other purposes. The
19 conditions referred to in subsections (a)(2) and (a)(3) are satisfied if the statute under which the
20 organization is organized so provides. It does not matter whether the separation of assets and
21 debts described in subsections (a)(2) and (a)(3) would be respected by another jurisdiction in
22 which the organization does business, or would be given effect by the Bankruptcy Code in the
23 bankruptcy of the organization. An organization may be a “series organization” having
24 “protected series,” as those terms are used in this section, even though the statute under which
25 the organization is organized uses different terminology. This section uses the term “protected
26 series,” which is not used in either the Uniform Trust Entity Act or the Delaware provisions cited
27 above, to emphasize that the application of this section does not depend upon the terminology
28 used by the applicable statute.

29
30 **SECTION 412. SUPPLEMENTARY PROVISIONS.** Unless displaced by the
31 provisions of this [Act], the principles of law and equity, including the law merchant and the law
32 relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion,
33 mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

1 **Official Comment**

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

12 **SECTION 1213. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**

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

15 **SECTION 1314. SHORT TITLE.** This [Act], which was formerly cited as the
16 Uniform Fraudulent Transfer Act, may be cited as the Uniform ~~Fraudulent Transfer~~Voidable
17 Transactions Act.

18 **Official Comment**

19
20 (1) The 2014 amendments change the short title of the Act from “Uniform Fraudulent
21 Transfer Act” to “Uniform Voidable Transactions Act.” The change of title is not intended to
22 effect any change in the meaning of the Act. The retitling is not motivated by the substantive
23 revisions made by the 2014 amendments, which are relatively minor. Rather, the word
24 “Fraudulent” in the original title, though sanctioned by historical usage, was a misleading
25 description of the Act as it was originally written. Fraud is not, and never has been, a necessary
26 element of a claim under the Act. The misleading intimation to the contrary in the original title
27 of the Act led to confusion in the courts. See, e.g., § 4, Comment (10). The misleading
28 insistence on “fraud” in the original title also contributed to the evolution of widely-used
29 shorthand terminology that further tends to distort understanding of the provisions of the Act.
30 Thus, several theories of recovery under the Act that have nothing whatever to do with fraud (or
31 with intent of any sort) came to be widely known by the oxymoronic and confusing shorthand
32 tag “constructive fraud.” See §§ 4(a)(2), 5(a). Likewise, the primordial theory of recovery under
33 the Act, set forth in § 4(a)(1), came to be widely known by the shorthand tag “actual fraud.”
34 That shorthand is misleading, because that provision does not in fact require proof of fraudulent
35 intent. See § 4, Comment (8).

36
37 In addition, the word “Transfer” in the original title of the Act was underinclusive,
38 because the Act applies to incurrence of obligations as well as to transfers of property.
39

1 (2) The Act, like the earlier Uniform Fraudulent Conveyance Act, has never purported to
2 be an exclusive law on the subject of voidable transfers and obligations. See Prefatory Note
3 (1984), ¶5; § 1, Comment (2), ¶6; § 4, Comment (9), ¶1. It remains the case that the Act is not
4 the exclusive law on the subject of voidable transfers and obligations.

5
6 (3) The retitling of the Act should not be construed to affect references to the Act in
7 other statutes or international instruments that use the former terminology. See, e.g., Convention
8 on International Interests in Mobile Equipment, art. 30(a)(3), opened for signature Nov. 16,
9 2001, S. Treaty Doc. No. 108-10 (referring to “any rules of law applicable in insolvency
10 proceedings relating to the avoidance of a transaction as a ... transfer in fraud of creditors”).

11 (4) The 2014 amendments also make a correction to the text of the Act that is consonant
12 with the change of the Act’s title. As originally written, the Act inconsistently used different
13 words to denote a transfer or obligation for which the Act provides a remedy: sometimes
14 “voidable” (see original § 2(d), §§ 8(a), (d), (e), (f)), and sometimes “fraudulent” (see original
15 § 4(a), §§ 5(a), (b), § 9). The amendments resolve that inconsistency by using “voidable”
16 consistently or deleting the word as unnecessary. No change in meaning is intended.

17
18 **SECTION 1415. REPEAL.** The following acts and all other acts and parts of acts

19 inconsistent herewith are hereby repealed:

20 **Official Comment**

21
22 If enacted by this State, the Uniform Fraudulent Conveyance Act should be listed among
23 the statutes repealed.

24 ~~*Legislative Note on transition to be added, if appropriate.*~~ **Legislative Note (2014):** *The*
25 *legislation enacting the 2014 amendments in a jurisdiction in which the Act is already in force*
26 *should provide as follows: (i) the amendments apply to a transfer made or obligation incurred*
27 *on or after the effective date of the enacting legislation, (ii) the amendments do not apply to a*
28 *transfer made or obligation incurred before the effective date of the enacting legislation, (iii) the*
29 *amendments do not apply to a right of action that has accrued before the effective date of the*
30 *enacting legislation, and (iv) for the foregoing purposes a transfer is made and an obligation is*
31 *incurred at the time provided in § 6 of the Act. In addition, the enacting legislation should revise*
32 *any reference to the Act by its former title in other permanent legislation of the enacting*
33 *jurisdiction.*