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A CRITICAL ANALYSIS OF THE NEW UNIFORM FRAUDULENT TRANSFER ACT

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I. INTRODUCTION

"The phases of fraud are manifold"1 and developing fraud rules which are both reasonably certain and sufficiently flexible presents a substantial challenge to the drafters of commercial law.

As to relief against frauds, no invariable rules can be established. Fraud is infinite; and were a Court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive.2

Lord Hardwicke's conclusion notwithstanding, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has endeavored to fix rules, some more "invariable" than others, intending to proscribe truly fraudulent transactions while not unduly impairing the free and dynamic flow of commerce.

In February of 1985 the American Bar Association (ABA) approved the new Uniform Fraudulent Transfer Act (UFTA), promulgated in August of 1984 by the NCCUSL.3 The new Act is the Commissioners' latest attempt to formulate the law governing the rights of defrauded

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2. Letter from Lord Hardwicke to Lord Kaims (June 30, 1759), quoted in 1 J. Story, Commentaries on Equity Jurisprudence, as Administered in England and America § 186, at 212 n.5 (1846).
3. Morris W. Macey chaired the UFTA drafting committee; Frank R. Kennedy served as Reporter for the project. Members of the American College of Real Estate Lawyers, the National Commercial Finance Association, and the ABA attended Committee meetings. In addition, the ABA sent delegates from its sections on Corporate, Banking, and Business Law, and on Real Property, Probate, and Trust Law. See Uniform Fraudulent Transfer Act, Prefatory Note, 7A U.L.A. 67-68 (West Supp. 1985) [hereinafter cited as U.F.T.A.].

The drafters renamed the new Act to emphasize that the UFTA applies to realty as well as...
creditors by regulating transactions which impair the capacity of a debtor to discharge its obligations and, therefore, operate to the prejudice of those with claims against the debtor. The Uniform Fraudulent Conveyance Act (UFCA),\(^4\) the Bankruptcy Reform Act of 1978,\(^5\) and, to some extent, the Uniform Commercial Code (UCC)\(^6\) currently regulate such transactions.

This article places the UFTA in historical context and compares the new Act to the prior law, describing the provisions of the new Act in some detail. Then, the article offers a critical evaluation of the UFTA and considers applying the new uniform law to problems of significant current interest to commercial transactors. The article concludes that the UFTA leaves unanswered problems of increasing concern to the commercial community and urges reconsideration of certain crucial assumptions of the new uniform Act. An appendix to this article reproduces the full text of the UFTA. For the reader unfamiliar with the contexts in which fraudulent commercial transfers may arise, this article provides a hypothetical fact pattern in the margin.\(^7\)

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\(^4\) Both the NCCUSL and the ABA approved the Uniform Fraudulent Conveyance Act in 1918. **UNIFORM FRAUDULENT CONVEYANCE ACT, Historical Note, 7A U.L.A. 161 (1978), superseded by U.F.T.A.** [hereinafter cited as U.F.C.A.]. The Commissioners promulgated the UFTA to replace this increasingly obsolescent earlier model act. **See generally U.F.T.A., Prefatory Note (discussing the UFCA's basic characteristics and the various influences leading to the promulgation of its successor, the UFTA). See also infra notes 8-78 and accompanying text for a full discussion of the historical influences on the UFTA.**


\(^6\) Article 6 of the UCC provides the law governing bulk transfers. **See U.C.C. §§ 6-101 to 6-111 (1978).**

\(^7\) DebtorCo, a small construction business, borrows money to purchase construction equipment. Sister Corp., a real estate company that has a substantial ownership interest in DebtorCo, loans the money to DebtorCo and takes a security interest in the equipment.

A year later, DebtorCo experiences financial difficulty. Although the company accountant can produce a balance sheet that demonstrates solvency, DebtorCo barely pays its bills and has not paid one large account debt for construction materials in over three months.

Pursuant to an agreement between DebtorCo and Sister Corp., DebtorCo stops making monthly payments on its loan from Sister Corp. Sister Corp. then declares that DebtorCo is in default under the terms of the loan agreement, and exercises its right to repossess and sell the collateral to satisfy the outstanding indebtedness. Sister Corp. buys the equipment at the foreclosure sale for approximately 60% of its market value, then leases the equipment back to DebtorCo under a long-term lease.

One month before DebtorCo is scheduled to distribute regular dividends to shareholders, a motorist is injured through the recklessness of a DebtorCo truck driver. DebtorCo proceeds with its scheduled distribution to shareholders. DebtorCo makes the payment according to state corporation
II. HISTORICAL OVERVIEW

A. The Statute of Elizabeth

The Uniform Fraudulent Transfer Act resulted from the evolution of the law of conveyances in fraud of creditors. While fraudulent dispositions of property were regulated under Roman law, Anglo-American rules in this area descend from England’s Statute of 13 Elizabeth, enacted in 1571. The original penalty under the Statute was forfeiture of the fraudulently conveyed property value—half to the government and half to the injured creditor. The English courts, however, construed the Statute as providing a private remedy and allowed judgment creditors to simply ignore a fraudulent transfer and to proceed directly against the property.

The Statute of Elizabeth required that a creditor prove actual, subjective intent to hinder, delay, or defraud to avoid a conveyance. The law and does not deplete its assets to the point where its liabilities would exceed assets. The distribution, however, substantially reduces the company’s cash assets at a time when the company is preparing to begin work on a major construction project.

With proof of an actual intent by DebtorCo and Sister Corp. to defraud creditors, any creditor may challenge the default and forfeiture scheme and the resulting foreclosure sale as fraudulent. In addition, creditors who held claims against DebtorCo at the time of the foreclosure sale may challenge those transactions under constructive fraud claims. Briefly, these constructive fraud claims may allege that DebtorCo received inadequate consideration to support the transaction and that DebtorCo (1) was rendered insolvent thereafter; (2) intended to incur debts beyond its ability to pay; or (3) was left with insufficient assets to carry out its business. Such claims also may allege that Sister Corp. was an “insider” of DebtorCo, transacted to satisfy an antecedent debt owed Sister Corp. by DebtorCo, and knew of DebtorCo’s financial difficulties. The Statute’s purpose was as follows:

avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions . . . which . . . are devised and contrived of male, fraud, covin, collusion or guile, to the end purpose and intent, to delay.
cause subjective intent to defraud was difficult to prove, courts focused on objective factors to establish the wrongful intent. Decisions under the Statute soon turned on "circumstances, so frequently attending sales, conveyances and transfers, intended to hinder, delay and defraud creditors, that they [were] known and denominated badges of fraud." The court in Twyne's Case cataloged several factors having particular probative force: (1) the debtor made a general transfer of all property; (2) the debtor retained possession and use of the property; (3) the transfer was clandestine; (4) the transfer was made "pending the writ"; (5) the parties created a trust to govern use of the property; or (6) the deed explicitly vouched for its own validity and the parties' honesty and good faith.

American jurisdictions enacted legislation similar to the Statute of Elizabeth or adopted the Statute as part of the common law. The American courts similarly adopted the English decisions that expanded the Statute through the use of objective indicia of fraud; later American decisions also increased the list of "badges." Although a strict construction of the Statute required proof of fraudulent intent, many courts permitted creditors to avoid a transfer on the basis of objective factors alone. The resulting decisions became increasingly difficult to rationalize. Ultimately, some of the objective indicia of fraud rose to the status of conclusive presumptions and once the courts found these objective criteria, evidence of the parties' intent was neither required nor relevant. For example, when an insolvent debtor transferred property for

hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs.

13 Eliz., ch. 5, § 1 (1571).

14. See, e.g., F. WAIT, FRAUDULENT CONVEYANCES AND CREDITORS' BILLS § 224 (3d ed. 1897) (discussing the need to rely on objective indicia to prove fraud in most circumstances). See also Cadogan v. Kennett, 2 Cowp. 432, 434, 98 Eng. Rep. 1171, 1172 (K.B. 1776) ("[t]hese statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud").

15. Thames & Co. v. Rembert's Adm'r, 63 Ala. 561, 567 (1878) (emphasis in original) (invalidating conveyance by insolvent debtor to relative, when debtor was pressed by a large suit and retained possession of some property supposedly conveyed).

16. 3 Coke 80b, 76 Eng. Rep. 809 (Star Chamber 1601) (setting aside preferential conveyance of debtor's farm and personal property).

17. See id. Later decisions expanded the badges of fraud to include virtually any circumstance suggesting fraud. See, e.g., M. BIGELOW, THE LAW OF FRAUDULENT CONVEYANCES 515-28 (K. Knowlton 2d ed. 1911) (defining and cataloging various minor badges of fraud). The number of badges may be "as infinite in number and form as are the resources and versatility of human artifice." Shealy & Finn v. Edwards, 75 Ala. 411, 417 (1883).

18. See M. BIGELOW, supra note 17, at 23-29 (discussing states' adoption or enactment of Statute); 1 G. GLENN, supra note 10, § 58.

19. See F. WAIT, supra note 14, § 22.

20. See, e.g., Wilt v. Franklin, 1 Binn. 501, 516 (Pa. 1809) ("Although the Statute 13 Eliz. . . . is bottomed on the supposition of an immoral intention, yet it has been judged necessary to determine, that certain circumstances, which, in their nature, tend to deceive and injure creditors, shall be considered as sufficient evidence of fraud.") and cases cited in D. EPSTEIN, TEACHING MATERIALS ON DEBTOR-CREDITOR RELATIONS 244-46 (1973) and S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 354-55 (2d ed. 1975).


inadequate consideration, the courts presumed as a matter of law that such a conveyance was in fact motivated by an intent to defraud. 23

If the debtor is insolvent when he makes the gift, or the effect of it is to leave him insolvent, his intent appears as a conclusion of law drawn from these facts. His intent, in these circumstances, is to hinder, delay and defraud his creditors, because of the working principle that one is taken to have contemplated the necessary consequences of his acts. 24

As use of the badges of fraud increased, fraudulent transfer cases focused on the prejudicial effect of a particular conveyance on the debtor’s creditors, rather than on the actual intent of the debtor/transferor and the transferee. 25 In Rolfe v. Clarke, 26 a terminally ill debtor transferred real property to a friend in exchange for a promise to care for the debtor and her husband. The trial judge found no intent to defraud on the part of the debtor or her transferee and refused to avoid the transfer. The decision was reversed, however, on appeal. The appellate court noted that several of the traditional badges of fraud were present and that the complaining creditor had been adversely affected by the transfer. 27 The facts “showed an intention of the grantor which was fraudulent in law, although there was no actual intent to defraud her

(invalidating conveyance by debtor of majority of corporation’s assets to another corporation owned by debtor without inquiry into debtor’s intent); Briggs v. Sanford, 219 Mass. 572, 107 N.E. 436 (1914) (stating that common law under Statute of Elizabeth creates a presumption of fraud from conveyance by an insolvent for inadequate consideration).

23. See, e.g., Lloyd v. Fulton, 91 U.S. 479 (1875) (recognizing Georgia rule whereby objective factors may raise rebuttable presumption of fraud); Rudy v. Austin, 56 Ark. 73, 19 S.W. 111 (1892) (conveyance of real property to debtor’s 5-year-old son for no consideration presumed fraudulent as to creditors); Hanscome-James-Winship v. Ainger, 71 Cal. App. 735, 236 P. 325 (1925) (transfer from insolvent debtor to wife for love and attention created presumption of fraud); Briscoe v. Bronaugh, 1 Tex. 326 (1846) (invalidating transfer by debtor where consideration amounted to one-half the value of the property transferred).

24. G. Glenn, The Law of Fraudulent Conveyances § 270, at 362-63 (1931). A minority rule went even further, conclusively presuming any gifts given by a debtor to be fraudulent as a matter of law. See Haston v. Castner, 31 N.J. Eq. 697 (N.J. Ch. 1879) (allowing creditors to proceed against property conveyed to debtor’s son for no consideration); Read v. Livingston, 3 Johns. Ch. 481 (N.Y. Ch. 1818) (setting aside antenuptial conveyance of debtor’s property in trust for the benefit of the debtor’s wife and children). See also S. Riesenfeld, supra note 20, at 355.

25. See, e.g., Sims v. Gaines, 64 Ala. 392 (1879) (transfer of land later claimed to be only a mortgage held fraudulent as to existing creditors); Schaible v. Ardner, 98 Mich. 70, 56 N.W. 1105 (1893) (conveyance by debtor to son which left debtor with no assets to satisfy a pending tort claim presumptively was fraudulent as to creditors); Potter v. McDowell, 31 Mo. 62, 64 (1860) (setting aside conveyance when debtor was “in greatly embarrassed circumstances” with respect to creditors).

The question of fraudulent intent “is now generally considered to turn upon the consideration whether the debtor was at the time in a situation to make the [conveyance] in justice to his creditors, i.e., without delaying them in the enforcement of their rights.” M. Bigelow, supra note 17, at 78. See also F. Waite, supra note 14, § 9, at 19 (“Whenever the effect of a particular transaction is to hinder, delay, or defraud creditors, the law infers or supplies the intent, though there may be no direct evidence of a corrupt or dishonorable motive, but, on the contrary, an actual honest, but mistaken motive existed.”).


27. See id. at 411, 113 N.E. at 183 (noting the close relationship between debtor and transferee, intangible nature of consideration, and hardship caused to creditors).
creditors." 28 The ultimate test, then, became whether there had been an "unjust diminution of the estate of the debtor that otherwise would be available to the creditor." 29

Such judicial analyses undermined the operation of the Statute of Elizabeth. 30 Expansive constructions of the Statute created specious decisions and substantial confusion. 31 In addition, the procedural requirements for challenging a conveyance varied considerably among the jurisdictions. 32 Fundamental differences among the states as to the timing, scope, and effect of a judgment or lien against a debtor exacerbated the confusion. 33 Those issues, in turn, brought into question the proper length and starting point for applicable limitation periods. 34 Thus, the need for curative uniform legislation was manifest.

B. The Uniform Fraudulent Conveyance Act 35

The drafters of the UFCA attempted to respond to the ambiguities in fraudulent conveyance law by providing uniformity and predictabil-

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28. Id. at 411, 113 N.E. at 183-84.

29. 1 G. GLENN, supra note 10, § 195, at 348. Decisions turned on "whether as a result of the debtor's operations on the title to his property, the creditor loses by reason of finding less to seize and apply to his claim." Id.

30. M. BIGELOW, supra note 17, at 515-27. See D. EPSTEIN, supra note 20, at 243-44.

31. See, e.g., F. WAIT, supra note 14, at 440-41 (criticizing courts' tendencies to injure honest debtors and purchasers, caused by poorly defined rules regarding the weight properly accorded to different badges of fraud).

32. The Statute of Elizabeth's provisions led to a general requirement of a judgment and an unsatisfied return as a condition precedent to a fraudulent conveyance action. See, e.g., Bond v. Warren County State Bank, 201 Iowa 1175, 207 N.W. 233 (1926); Jackson v. Holbrook, 36 Minn. 494, 32 N.W. 852 (1887); Hart v. A.L. Clarke & Co., 194 N.Y. 403, 87 N.E. 808 (1909). Because the possibilities of precluding a jury trial on the creditor's underlying claim and of tying up the property of an alleged debtor existed, courts were reluctant to allow simultaneous actions in equity and at law. See, e.g., Cates v. Allen, 149 U.S. 451, 459 (1893); Scott v. Neely, 140 U.S. 106, 109 (1891); Adler Goldman Comm'n Co. v. Williams, 211 F. 530, 533 (W.D. Ark. 1914). As debtor-creditor law became more sympathetic to the interests of creditors, courts developed various exceptions to the judgment requirement and allowed a creditor to proceed directly against a conveyance without first obtaining judgment against the debtor. See, e.g., First Nat'l Bank v. Eastman, 144 Cal. 487, 77 P. 1043 (1904) (judgment would be impossible or useless); Crary v. Kurtz, 132 Iowa 105, 105 N.W. 590 (1906) (debtor had died); American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783 (1929) (delay in obtaining judgment would unduly prejudice creditors' rights). Some jurisdictions adopted substantive rules allowing a creditor to set aside a fraudulent conveyance before obtaining a legal remedy. See, e.g., ALA. CODE § 6-6-182 (1975); MISS. CODE ANN. § 11-5-75 (1972); W. VA. CODE § 40-1-14 (1982). See also Note, Creditors' Rights—Attempt to Reach Debtors' Equitable Assets—Requirement of Prior Judgment and Execution at Law, 34 COLUM. L. REV. 1140, 1141 (1934).

33. For example, some jurisdictions held that a judgment lien could attach to fraudulently conveyed realty. See, e.g., McGee v. Allen, 7 Cal. 2d 468, 60 P.2d 1026 (1936); Jackson v. Holbrook, 36 Minn. 494, 32 N.W. 852 (1887); Hillyer v. Le Roy, 179 N.Y. 369, 72 N.E. 237 (1904). Other states did not allow a judgment lien creditor to attach fraudulently conveyed realty. See, e.g., Union Nat'l Bank v. Lane, 177 Ill. 171, 52 N.E. 361 (1898); Joyce v. Perry, 111 Iowa 567, 82 N.W. 941 (1900); Preston-Parton Milling Co. v. Dexter Horton & Co., 22 Wash. 236, 60 P. 412 (1900). See 1 G. GLENN, supra note 10, § 121.

34. See S. RIESENFELD, supra note 20, at 357 (limitations period could run from date of sale, judgment, execution of writ, or return on execution).

35. See supra note 4.
They focused on the uncertainties attending increasingly sophisticated, and often interstate, commercial transactions. Specifically, the drafters responded to the three primary areas under the existing legislation and common law that confused courts and commentators: courts unevenly applied the insolvency concept; courts inconsistently specified the proper parties and procedural steps necessary to challenge a conveyance; and courts extended fraudulent conveyance law to transfers carried out without actual fraudulent intent.

Professor William Draper Lewis drafted the UFCA, at the request of the NCCUSL's Committee on Commercial Law. Drafts were presented to the Conference for criticism and revision before the finished product was approved in 1918. The ABA approved the Act in 1919. The legal community generally received the UFCA well. Commentators praised the Act and recommended its adoption to the states. Within six years of its promulgation, fourteen jurisdictions had enacted the UFCA. The Bankruptcy Code also incorporated the Act as a supplementary remedy for bankruptcy trustees seeking to recover the debtor's fraudulently transferred property. To date, however, only twenty-six jurisdictions have adopted the Act. Only four states have

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36. See generally U.F.C.A. Commissioners' Prefatory Notes (1918) ("There are few legal subjects where there is a greater lack of exact definition and clear understanding of boundaries.").

37. See U.F.C.A. Commissioners' Prefatory Comments (1918).

38. See infra notes 119-25 and accompanying text.


40. William Draper Lewis was a Professor at the University of Pennsylvania School of Law at the time the UFCA was drafted. Samuel Williston was a member of the committee that requested Lewis's assistance. One commentator asserts that Williston principally drafted the UFCA. D. Epstein, supra note 20, at 247.

41. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 254 (1916).


43. See id.

44. See, e.g., Radin, Fraudulent Conveyances in California and the Uniform Fraudulent Conveyance Act, 27 CALIF. L. REV. 1, 12 (1938) (UFCA offers "clarity and breadth of view" to state law); Current Legislation, 20 COLUM. L. REV. 339, 339 (1920) (UFCA "should commend itself to the legislatures of the States which have yet to consider it"); Rose & Hunsinger, Transfers in Fraud of Creditors, Ohio Law and the Uniform Act, 9 OHIO ST. L.J. 571, 611 (1948) (citing "important improvements" offered by the Act); Comment, The Law of Fraudulent Conveyances in North Carolina: An Analysis and Comparison with the Uniform Fraudulent Conveyances Act, 50 N.C.L. REV. 873, 901-02 (1972) (UFCA would offer clear, simple provisions as replacement for confusing state statutes); Note, Remedies of a Creditor for Setting Aside a Fraudulent Conveyance with Recommendations for Changes, 6 S.C.L.Q. 80, 85 (1953) (UFCA is "highly desirable" because it provides "a positive course" which the creditor may follow).

45. See sources cited id.

46. See U.F.C.A. Historical Note (listing UFCA jurisdictions). The early UFCA jurisdictions "included the commercially most important states of the Union." Radin, supra note 44, at 12.

47. See generally 4 COLLIER ON BANKRUPTCY §§ 548.01 - .11 (L. King 15th ed. 1985) (comparing bankruptcy provisions to UFCA).

enacted the UFCA since 1960, and only one state has adopted the Act in the past fifteen years.

At the time of its promulgation the UFCA offered a new conceptual approach and terminology. Although it has provided a restatement of the Statute of Elizabeth's actual fraudulent intent rule, the Act has focused primarily on the forms of constructive fraud that the parties could prove with objective indicia. Transactions unsupported by adequate consideration and certain partnership transactions are fraudulent.

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49. Idaho, Nebraska, Ohio, and Oklahoma are the four states. See id.

50. See supra note 48.


52. “Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.” U.F.C.A. § 7.

53. See McLaughlin, supra note 39, at 407; Radin, supra note 44, at 7-8; Current Legislation, supra note 44, at 339.

54. § 4: Conveyances by Insolvent. Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

§ 5: Conveyances by Persons in Business. Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to others persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

§ 6: Conveyances by a Person About to Incur Debts. Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

U.F.C.A. §§ 4-6.

55. Conveyance of Partnership Property. Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred,

(a) To a partner, whether with or without a promise by him to pay partnership debts, or

(b) To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

Id. § 8.
under the UFCA irrespective of the parties’ actual intentions. The drafters retained the complete protection which the Statute of Elizabeth gave to good faith purchasers for value and defined certain crucial concepts and key terms such as “insolvency,” “fair consideration,” “debt,” and “creditor.”

In practice, however, the UFCA has not always achieved the drafters’ goal to “clearly define what heretofore has been indefinite.” Many courts in UFCA states still struggle to properly apply the badges of fraud. Courts continue to resolve claims based on actual fraudulent intent by using the traditional badges rather than proof of subjective intent. Indeed, some UFCA decisions draw no significant distinction between actual and constructive fraud. Courts often resolve creditors’

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56. See id. § 9 (giving defrauded creditors a right of recovery against any party “except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase”).

57. Insolvency.
   (1) A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.
   (2) In determining whether a partnership is insolvent there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription.

Id. § 2.

58. Fair Consideration. Fair consideration is given for property, or obligation,
   (a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or
   (b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

Id. § 3.

59. “‘Debt’ includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.” Id. § 1.

60. “‘Creditor’ is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.” Id.

61. Id., Commissioners’ Prefatory Note. See also McLaughlin, supra note 39, at 452 (concluding that states’ use of the UFCA was inadequate, with frequent failure to apply the Act in the appellate courts).

62. Commentaries that encouraged the use of badges of fraud, excluded by the UFCA in intentional fraud cases, even after adoption of the UFCA illustrated the confusion over the proper role of these badges. See, e.g., Note, Creditors’ Rights—Remedies Available to Tort Creditor Without Judgment in Michigan and Under the Uniform Fraudulent Conveyances Act, 48 Mich. L. Rev. 711, 712-13 (1950); Note, Fraudulent Conveyances—Uniform Fraudulent Conveyance Act—Presumptions of Intent—Limitations of Actions—Necessity for Prior Judgment—Rights of Insurance Beneficiaries, 23 Minn. L. Rev. 616, 618-20 (1938). The decisions of courts applying the UFCA also demonstrate a reluctance to forego using objective indicia to prove fraudulent subjective intent by preserving the badges of fraud. See Bentley v. Caille, 289 Mich. 74, 286 N.W. 163 (1939); Thompson v. Schiek, 171 Minn. 284, 213 N.W. 911 (1927); Conway v. Raphel, 101 N.J. Eq. 495, 138 A. 691 (1927), aff’d, 102 N.J. Eq. 531, 141 A. 804 (1928).

63. See Westminster Savings Bank v. Sauble, 183 Md. 628, 39 A.2d 862 (1944); Paxton v. Paxton, 80 Utah 540, 15 P.2d 1051 (1932); In re Reed’s Estate, 566 P.2d 587 (Wyo. 1977).

64. See, e.g., In re D.H. Overmyer Telecasting Co., 23 Bankr. 823 (Bankr. N.D. Ohio 1982) (presuming actual fraudulent intent from debtor’s insolvency); Bryan v. Wilson, 171 Md. 421, 189 A. 220 (1937) (inferring intentional fraud from glaring disparity between value of debtor’s property and consideration received); Sparkman & McLean Co. v. Derber, 4 Wash. App. 341, 481 P.2d 585
claims alleging alternative types of fraud with a summary conclusion that the evidence demonstrates the fraud alleged. When conveyances are set aside the decisions often do not indicate clearly whether the conveyance was actually or constructively fraudulent. Because only present creditors may challenge constructively fraudulent transfers by an insolvent debtor, this distinction is significant.

Despite the efforts of the drafters, considerable uncertainty also has persisted concerning who is a creditor, the party with standing to challenge a conveyance, and what procedural steps must be taken before bringing a claim under the UFCA. Because it abolishes the judgment requirement and tends to blur the line between actions in equity and actions at law, the UFCA also has raised state constitutional issues in New Jersey.

Recently counsel for unsecured creditors have convinced courts to construe the UFCA as providing a basis for objection when a secured party forecloses on a debtor's encumbered property and then sells the property at the foreclosure sale for less than the market value. The leading case is *Durrett v. Washington National Insurance Co.*, in which the United States Court of Appeals for the Fifth Circuit invalidated a foreclosure sale as a fraudulent conveyance because the property was sold for only 57.7% of its market value. Later cases have described the "Durrett rule"...
"Durrett rule" as providing that unsecured creditors may avoid a foreclosure sale for less than seventy percent of the property value as a fraudulent transfer of the debtor's property. But the Ninth Circuit, in *In re Madrid,* has refused to follow the Durrett rule. The *Madrid* court presumed that the price obtained in a regularly conducted, noncollusive foreclosure sale is adequate. These conflicting interpretations of the UFCA have sparked debate regarding the balance between the interests of unsecured creditors and the need for certainty in secured credit transactions.

Finally, several questions have restricted the usefulness of the UFCA. For example, the effect of the Act on prior statutory and case law is unclear. Similarly debatable is the proper interpretation of "fair consideration" and "good faith." Also, developments in other areas of debtor-creditor law have confused courts applying UFCA provisions: the fraudulent conveyance provisions of the Bankruptcy Reform Act of 1978 have created conflicts between the federal law and the UFCA, as have changes in the UCC concerning perfection of secured transactions. The committee which is revising the Model Corporation Act (MCA) recently has requested a review of the UFCA to determine whether that Act is consistent with the MCA's treatment of dividend distributions. The UFTA represents the NCCUSL's response to these issues.

III. THE UNIFORM FRAUDULENT TRANSFER ACT

The new uniform Act follows substantially the structure and organization of the UFCA. This article treats the provisions of the two acts in three sections for purposes of exposition and comparison. First, this article considers the provisions that describe the forms of fraudulent trans-
fers. The article then reviews the remedies provided to defrauded creditors by the UFTA and UFCA. Finally, the article considers the rights and liabilities of fraudulent transferees under both acts.

A. Transactions in Fraud of Creditors

1. Intent to Hinder, Delay, or Defraud

The new Act continues the UFCA rule proscribing transactions executed with an actual, subjective intent to hinder, delay, or defraud creditors.79 The UFTA, however, acknowledges the usefulness of objective criteria by listing a number of appropriate factors that courts may consider in assessing the debtor's and its transferee's subjective intent.80 The factors correspond closely to the common law badges of fraud which courts applied under the UFCA to create a presumption of fraudulent intent.81 In the UFTA these factors are mere relevant evidence, however, and not presumptions.82 The UFTA comments encourage courts to consider any circumstantial evidence that negates the existence of fraud.83

The new Act maintains the UFCA distinction between creditors whose claims have matured at the time a suspect transaction occurs (present creditors) and those whose claims arise after the transaction but before the fraudulent transfer action begins (future creditors).84 Both present and future creditors may challenge transfers intended to hinder, delay, or defraud.85 The new Act follows the Statute of Elizabeth and UFCA rationale that actual, fraudulent intent represents a higher degree of culpability and justifies a larger class of potential plaintiffs.86

2. Sufficiency of Consideration Received by Debtor

Both the UFTA and UFCA deem certain transactions fraudulent solely because objective factors indicate that the rights of unsecured cred-

79. See id. § 4(a)(1). UFCA section 7 provides: “Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.” U.F.C.A. § 7.
81. See supra text accompanying notes 13-29.
82. See U.F.T.A. § 4 comment 5.
83. See id. at comment 6.
84. The major organizational change of the UFTA reflects this distinction: the types of fraud actionable under the Act are divided into those challengeable by present and future creditors and those that present creditors may attack alone. Compare U.F.C.A. §§ 4-8 (providing individually which particular creditors may challenge the various types of fraudulent transactions) with U.F.T.A. §§ 4, 5.

Stronger evidence of fraud is required in a case brought by a subsequent creditor because ordinarily a person is free to dispose of his property as he sees fit if he is not indebted at the time. Therefore a subsequent creditor must prove actual fraud in the conveyance rather than mere constructive fraud which is usually held to be sufficient in the case of an existing creditor. Coleman v. Alderman, 357 Mo. 758, 760, 210 S.W.2d 994, 995 (1948).
itors have been prejudiced. The acts consider these constructively fraudulent transfers sufficiently harmful to unsecured creditors to justify avoidance of a transaction, regardless of the actual intent of the debtor and its transferee. A creditor challenging a transaction as constructively fraudulent must show that the transfer was made or the obligation incurred for insufficient consideration. The UFCA's "fair consideration" definition has involved a two-part test that appraises the value received by the debtor as well as the good faith of the transferee. In early UFCA cases, courts looked almost entirely to the value given to the debtor and rarely considered the intentions of the parties. More recently, courts deciding cases under the Act have focused on the transferee's good faith and ignored the sufficiency of the consideration received. As a result, courts have avoided preferential transfers which normally are avoidable only in a bankruptcy proceeding.

The UFTA drafters have removed the issue of the transferee's good faith from the constructive fraud calculus, focusing instead on the debtor's receipt of reasonably equivalent value. Transferees may prove their good faith as a defense to the avoidance action. The new Act fails to define reasonably equivalent value, but instead adopts the Bankruptcy Code's general approach to the concept. Decisions construing the bankruptcy definition of value do not offer certainty or predictability, however, as courts have concluded that the fact finder must have considerable discretion.

87. Compare U.F.C.A. §§ 4-6 (requiring proof of less than "fair consideration") with U.F.T.A. §§ 4(a)(2), 5 (requiring proof of less than "reasonably equivalent value").
88. See U.F.C.A. § 3. "Fair consideration is given for property, or obligation, (a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied . . . ." Id.
90. See, e.g., Spear v. Spear, 101 Misc. 2d 341, 421 N.Y.S.2d 277 (Sup. Ct. 1979) (invalidating bona fide confession of judgment to debtor's girlfriend, when she apparently knew that transaction would hinder other creditors); Sparkman & McLean Co. v. Derber, 4 Wash. App. 341, 481 P.2d 585 (1971) (invalidating mortgage to secure a genuine debt to debtor's attorney, when attorney knew debtor was near financial collapse).
91. Comment, supra note 51, at 502-03. Certain preferential transfers may be invalid under section 547 of the Bankruptcy Code. See 11 U.S.C. § 547 (1982), amended in 11 U.S.C.A. § 547 (West Supp. 1985); Johnson-Baillie Shoe Co. v. Bardsley, Elmer & Nichols, 237 F. 763, 767 (8th Cir. 1916) (debtor has right to pay one creditor in preference to others until commencement of bankruptcy proceedings); Canright v. General Fin. Corp., 35 F. Supp. 841, 843-44 (E.D. Ill. 1940), aff'd, 123 F.2d 98 (7th Cir. 1941) (preference is not an evil act in itself, but one prohibited by Bankruptcy Act); Abeken v. United States, 26 F. Supp. 170, 172 (E.D. Mo. 1939) ("Aside from the Bankruptcy Act, a creditor may be preferred by a debtor.").
93. See id. § 8(a).
95. 4 COLIER, supra note 47, ¶ 548.09, at 548-100 ("courts have not been too exacting in
safe harbor but indicates that courts will consider the circumstances attending the particular transaction, the type of value exchanged, and the equitable posture of the parties to the transfer.96

The prior uniform law has distinguished between transactions in which the debtor transfers outright ownership, a sale, and those transactions that create a security interest in the debtor’s property.97 In a sales transaction the UFCA has required that the debtor receive a “fair equivalent.”98 In secured transactions, however, the old Act focused on the difference between the value of the debtor’s encumbered property and the amount received by the debtor.99 When the amount of the loan to the debtor was “not disproportionately small,” a court would enforce the obligation incurred.100 Despite this more relaxed standard, courts often have invalidated secured transactions under the UFCA.101 The comments to the new Act recognize that those decisions have ignored the fact that a lender’s interest in secured property may not exceed the amount of the debt, leaving the remainder of the debtor’s property, the equity, available to unsecured creditors.102 The UFTA does not continue the double standard, but recognizes that the amount of the secured debt is the measure of the debtor’s obligation.103 Although the delay caused when a secured creditor satisfies a claim against a debtor’s property may prejudice unsecured creditors, the UFTA follows Article 9 of the UCC104 and subordinates the interests of unsecured creditors to those of secured creditors in this situation. The new Act, however, leaves open the possibility

96. 4 COLLIER, supra note 47, ¶ 548.09.
97. Compare U.F.C.A. § 3(a): “Fair consideration is given for property, or obligation, (a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied . . . .” with § 3(b): “When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.”
98. See id. § 3(a). See also Willoughby v. King, 21 Ariz. App. 589, 522 P.2d 54 (1974) (examining financial factors for fair equivalence); Utah Assets Corp. v. Dooley Bros. Ass’n, 91 Utah 577, 70 P.2d 738 (1952) (defining fair equivalence not as a fixed, precise measure but in light of value of property at time of conveyance); Farmers’ Exchange Bank v. Oneida Motor Truck Co., 202 Wis. 266, 232 N.W. 536 (1930) (explaining that fair equivalence may constitute cash or a hardship or obligation undertaken by the debtor’s purchaser).
99. See U.F.C.A. § 3(b).
100. See, e.g., Zellerbach Paper Co. v. Valley Nat’l Bank, 13 Ariz. App. 431, 477 P.2d 550 (1970) (finding difference between $11,000 antecedent debt and mortgaged property worth $25,000 was disproportionately small); Trust Co. of Orange v. Garfinkel, 107 N.J. Eq. 20, 151 A. 858 (1930) (deciding debt of $15,000 was fair consideration for stock worth little more, if anything); Wirtz v. Jensen (In re Rasmussen’s Estate), 238 Wis. 334, 298 N.W. 172 (1941) (voiding security transaction as lacking fair consideration when property mortgaged was worth several times the amount of antecedent debt).
101. See supra note 100.
103. See id. § 3 comment 3, § 4 comment 3.
that the size of the difference between the amount of the debt and the value of the collateral may indicate an intent to hinder, delay, or defraud.\textsuperscript{105}

Courts construing the UFCA have concluded that an executory promise is not within the Act's definition of fair consideration.\textsuperscript{106} Courts have rejected some promises to discharge the debtor's obligations or to support the debtor for life as inadequate value.\textsuperscript{107} Other UFCA decisions, however, have reached the opposite result.\textsuperscript{108} The new Act strikes a balance: executory promises made in the ordinary course of business may serve as consideration sufficient to allow a transfer.\textsuperscript{109} Therefore, a professional builder's promise to make repairs, a farmer's promise to continue working on a parent's farm for the remainder of the parent's life, or an assumption of debts may support transfers of the debtor's property under the new Act. The UFTA's expressed policy is to assess value from the viewpoint of the particular debtor's unsecured creditors and to focus upon the overall diminution of the debtor's estate.\textsuperscript{110}

The drafters of the UFTA respond to the Durrett issue—whether a court may invalidate a foreclosure sale of secured collateral because the sale realized an inadequate price\textsuperscript{111}—in the definition of value. The new Act conclusively presumes that the value received is sufficient when the parties transfer property "pursuant to a regularly conducted, noncollusive foreclosure sale or execution of power of sale."\textsuperscript{112} The basis for this provision is the rationale that a foreclosure sale provides the most accurate means to establish the collateral's fair value.\textsuperscript{113} Neither the new Act nor the comments elaborate on what constitutes a regularly conducted, noncollusive sale.\textsuperscript{114}

\begin{thebibliography}{100}
\bibitem{105}See U.F.T.A. § 3 comment 2.
\bibitem{107}See, e.g., Sandler v. Parliapiano, 236 A.D. 70, 258 N.Y.S. 88 (1932) (promise of future support held insufficient); Cooper v. Cooper, 22 Tenn. App. 473, 124 S.W.2d 264 (1938) (promise to pay criminal judgment, support for life, and pay for funeral expenses held insufficient).
\bibitem{109}See U.F.T.A. § 3(a).
\bibitem{110}See id. § 3 comment 2.
\bibitem{111}See supra notes 70-75 and accompanying text.
\bibitem{112}U.F.T.A. § 3(b).
\bibitem{113}Id. § 3 comment 5 (citing 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1227 (1965)).
\bibitem{114}Nor does In re Madrid, 21 Bankr. 424 (Bankr. 9th Cir. 1982), aff'd on other grounds, 725
Once a creditor establishes that the consideration received by the debtor was inadequate, the creditor must prove additional factors to invalidate a transaction as constructively fraudulent. The three forms of constructive fraud which the UFTA incorporates from the prior uniform law emphasize verifiable indicia of the debtor’s fiscal welfare.

a. Transfers Made By An Insolvent Debtor

Under the UFTA present creditors may avoid transfers when the debtor/transferor has received inadequate consideration from the transferee and the debtor was insolvent at the time of the transfer or has been rendered insolvent as a result of the transfer. The bona fides of the debtor and transferee are not pertinent. This rule was a major innovation of the UFCA and continues in the new Act with an expanded definition of insolvency to help creditors prove and courts determine when a debtor is insolvent. The UFTA provides a simplified version of the UFCA's “balance sheet” test for insolvency: the new Act compares the value of the debtor's liabilities to the value of the debtor's assets. The definition of assets is expansive and includes unliquidated and contingent claims which are beyond the reach of creditors.

The UFTA also adopts the “equitable” test of insolvency: a debtor is insolvent when the debtor generally is not paying its debts as they mature. The presumption of insolvency under this test is rebuttable; the burden of proving the debtor's solvency shifts to the debtor or transferee.

116. See id. § 2; see also First Nat'l Bank v. Hoffines, 429 Pa. 109, 239 A.2d 458 (1968) (question of actual intent drops out of case) (construing UFCA § 4 which is identical to UFTA § 5(a)).
117. See Radin, supra note 44, at 8 (major aspect of UFCA eliminates any notion of estoppel or reliance in declaring prejudicial transactions fraudulent as to creditors); U.F.C.A. Prefatory Note (Act was drafted to remove all possibilities of legal presumptions of intent).
118. See U.F.T.A. § 2(a). In comparison, the UFCA provides that “[a] person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.” U.F.C.A. § 2(1).
119. See U.F.T.A. § 2(a). The UFTA adopts a similar definition from the Bankruptcy Code to determine when a partnership is insolvent. See id. § 2(c) (adapted from 11 U.S.C. § 101(26)(B) (1982)).
120. See U.F.T.A. § 2(a).
121. The UFTA defines assets simply as “property of a debtor,” subject to exemptions or encumbrances by a valid lien. U.F.T.A. § 1(2).
122. See id. § 1 comment 2. The UFTA definition does not require that an asset be available to discharge the debtor’s debts. Accordingly, although creditors may not levy execution on and sell an unliquidated tort claim, courts may include the claim as an asset of the debtor for purposes of determining whether the debtor is solvent. Id. (citing Manufacturers & Traders Trust Co. v. Goldman, 378 F.2d 904, 907-09 (2d Cir. 1978)).
124. The party seeking to uphold the transfer must prove that it is more probable than not that the debtor was solvent. U.F.T.A. § 2 comment 2.
the circumstances of each particular debtor, considering such factors as the number of accounts payable, the percentage unpaid, the age of the accounts, and any good faith disputes or other circumstances which might account for nonpayment.\(^\text{125}\)

b. Unreasonably Small Assets

The UFTA allows both present and future creditors to avoid a transfer made by a business debtor for inadequate consideration when the transfer left the debtor with "unreasonably small assets."\(^\text{126}\) The parallel UFCA provision refers to "unreasonably small capital."\(^\text{127}\) The UFTA drafting committee explains that the connotation of "capital" in corporation law has created uncertainty over which assets of the debtor courts should consider.\(^\text{128}\) In addition, the basis of a capital or stock valuation is uncertain, as the term may anticipate par value, market value, or the consideration received for stock issued.\(^\text{129}\) The drafters of the UFTA intend to focus attention on commercial realities. Therefore, the total market value of the debtor's assets is measured "in light of the needs of the business or transaction in which the debtor was engaged or about to engage."\(^\text{130}\)

c. Debtor's Accumulation of Debts Beyond Its Ability to Pay

The UFTA retains the UFCA rule\(^\text{131}\) permitting present and future creditors to avoid transfers for inadequate consideration when the debtor intends through the transfer to incur debts beyond its ability to pay.\(^\text{132}\) In states which have adopted the UFCA, creditors generally have asserted claims that the debtor entered into a transaction with the intent to incur debts beyond its ability to pay along with allegations of intentional fraud.\(^\text{133}\) Because the cases have broadly construed the intentional fraud rule\(^\text{134}\)—intent to hinder, delay, or defraud—the intent to incur debts

\(^{125}\) Id.

\(^{126}\) See id. § 4(a)(2)(i).

\(^{127}\) Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent. U.F.C.A. § 5 (emphasis added).


\(^{129}\) See id.

\(^{130}\) Id.

\(^{131}\) "Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors." U.F.C.A. § 6.


\(^{133}\) See, e.g., Oakford Realty Co. v. Boarman, 156 Md. 65, 143 A. 644 (1928) (holding that both § 6 and the intentional fraud section of UFCA (§ 7) require proof of an intention to defraud creditors); Hartnett v. Doyle, 16 Tenn. App. 302, 64 S.W.2d 227 (1933) (invalidating transfer upon proof that debtor intended to accumulate debts and to defraud creditors).

\(^{134}\) See, e.g., Klein v. Rossi, 251 F. Supp. 1 (E.D.N.Y. 1966) (intentional fraud held to extend
provision complements rather than expands the theories available to creditors asserting a fraudulent conveyance claim. The UFTA formulation, however, may make a difference because it proscribes transfers for inadequate consideration when the debtor has \textit{reason to believe} that the debtor will incur debts beyond its ability to pay.\textsuperscript{135} Reference to a reasonableness standard as well as actual intent may expose more suspect transactions.

3. Preferential Transfers

The UFTA invalidates preferential transfers to an insider to satisfy an antecedent debt when the debtor was insolvent and the insider had reason to believe that the debtor was insolvent.\textsuperscript{136} This innovation is available only to present creditors.\textsuperscript{137} Adopted from the Bankruptcy Code,\textsuperscript{138} the insider definition is nonexclusive and includes virtually anyone in a position to control the debtor.\textsuperscript{139}

Once creditors whose claims arose before the suspect transaction establish that the transferee was an insider, these creditors may challenge the transfer whether or not satisfaction of the antecedent debt represents less than reasonably equivalent value for the debtor's property.\textsuperscript{140} The UFTA provision expressly is inapplicable when the debtor receives new value from the insider.\textsuperscript{141} If an insider lends money to a debtor in exchange for the satisfaction of an antecedent debt, but also takes security for that loan, then the insider has given no new value to insulate the transaction from the insider preference rule.\textsuperscript{142} Insiders may assert defensively, however, that the transfer occurred in the ordinary course of business between the insider and debtor, or that at least a portion of the consideration paid to the debtor is new value given in a good faith attempt to rehabilitate the debtor.\textsuperscript{143}

B. Rights of Defrauded Creditors

Defrauded creditors may pursue one or more of several options under the UFTA, depending upon the posture of their particular claims. The creditor may request that the court set aside the fraudulent transfer, enjoin the transferee currently holding the property from removing it...
from the reach of the creditor, or appoint a custodian of the property.\textsuperscript{144} Under the UFCA, only creditors with unmatured claims could request a court to enjoin a transfer or appoint a receiver to protect the property until the creditors’ claims matured.\textsuperscript{145} Decisions construing the UFCA, however, have ignored the distinction and have granted anticipatory as well as present relief to all creditors.\textsuperscript{146} The UFTA officially eliminates the “confusing and unnecessary distinction between matured and unmatured claims, allowing any creditor to pursue any of the above forms of relief.”\textsuperscript{147} Under both acts a judgment creditor also may disregard a fraudulent transaction and directly attach or levy execution on the fraudulently transferred property.\textsuperscript{148} Even though the judgment creditor may pursue this alternative, practical considerations may discourage actions against the property before the fraudulent transfer is set aside. When a court finds, after attachment, that a challenged conveyance was not in fact fraudulent, an impatient creditor could face tort liability for wrongful attachment or conversion.\textsuperscript{149} On the other hand, the UFTA permits a defrauded creditor to seek a money judgment from any transferee of the debtor’s property.\textsuperscript{150} If the transferee has dissipated the property, creditors cannot locate the property, or the property is otherwise beyond the reach of creditors, a creditor may attempt to satisfy a claim from any

\textsuperscript{144} See id. § 7(a).

\textsuperscript{145} Rights of Creditors Whose Claims Have Matured.

(1) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,

(a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

(b) Disregard the conveyance and attach or levy execution upon the property conveyed.


Rights of Creditors Whose Claims Have Not Maturated.

Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured, he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,

(a) Restrain the defendant from disposing of his property,

(b) Appoint a receiver to take charge of the property,

(c) Set aside the conveyance or annul the obligation, or

(d) Make any order which the circumstances of the case may require.

Id. § 10.

\textsuperscript{146} See, e.g., Lipskey v. Voloshen, 155 Md. 139, 141 A. 402 (1928) (granting injunction to judgment creditor); Matthews v. Schusheim, 36 Misc. 2d 918, 235 N.Y.S.2d 973 (Sup. Ct. 1962) (granting injunction and allowing receiver without regard to maturity of claim); Oliphant v. Moore, 155 Tenn. 359, 293 S.W. 541 (1927) (granting injunction to tort judgment creditor).

\textsuperscript{147} See U.F.T.A. Prefatory Note.

\textsuperscript{148} Compare id. § 7(b) with U.F.C.A. § 9(b).

\textsuperscript{149} See Rice v. Wood, 61 Ark. 442, 33 S.W. 636 (1896) (holding creditor liable for obtaining attachment of property not belonging to debtor); Dyett v. Hyman, 129 N.Y. 351, 29 N.E. 261 (1891) (creditors who attached property after alleged fraudulent conveyance held liable for wrongful attachment; court upheld underlying transaction as valid); Peterson v. Wiesner, 62 Nev. 184, 146 P.2d 789 (1944) (permitting owner of property wrongfully attached to recover for wrongful deprivation of property).

\textsuperscript{150} See U.F.T.A. § 8(b)(2).
party who received the property after the fraudulent transaction.\textsuperscript{151} The UFTA limits the right to recover a money judgment to the lesser of the transferred property value or the amount of the creditor's claim.\textsuperscript{152}

The UFTA remedies do not limit the other common law or statutory remedies available to a defrauded unsecured creditor.\textsuperscript{153} The UFTA, like the prior uniform Act, merely provides an additional remedy to the wronged unsecured creditor.\textsuperscript{154}

\section{Rights of Transferees}

The UFTA protects good faith purchasers for value.\textsuperscript{155} This protection is available even when the debtor's subjective intent is malicious and fraudulent.\textsuperscript{156} When the transferee gives inadequate consideration for a debtor's property, the new Act protects the good faith transferee to the extent of the value actually given to the debtor.\textsuperscript{157} This partial protection

\begin{enumerate}
\item \textsuperscript{151} See \textit{id}.\textsuperscript{a}.
\item \textsuperscript{152} See id. § 8(b). The UFTA calculates property value from the time of transfer, subject to equitable adjustment. See \textit{id}. § 8(c).
\item \textsuperscript{153} See \textit{id}. § 1 comment 2, § 4 comment 8.
\item \textsuperscript{154} Courts have interpreted the UFTA to leave the law of bulk sales intact (see Keedy v. Sterling Elec. Appliance Co., 13 Del. Ch. 66, 115 A. 359 (1921); Calvert Bldg. & Constr. Co. v. Winakur, 154 Md. 519, 141 A. 355 (1928); Lewis Brown Co. v. Mallory, 8 Tenn. App. 36 (1928)), to leave a state bulk mortgages law intact (see Rice v. Katz, 255 Mich. 1, 237 N.W. 27 (1931)), and to uphold the common law doctrine of fraudulent retention of possession (see American S.S. Co. v. Wickwire Spencer Steel Co., 42 F.2d 886 (S.D.N.Y. 1930), aff'd, 49 F.2d 766 (2d Cir. 1931); Wightman v. King, 31 Ariz. 89, 250 P. 772 (1926); Shipler v. New Castle Paper Prods. Corp., 293 Pa. 412, 143 A. 182 (1928)).
\item The UFTA also clarifies the rights of creditors by providing, for the first time, a statute of limitations, see U.F.T.A. § 9, and a means to calculate when the period of limitations should begin, see \textit{id}. § 6. The new Act supplies a general four-year limitation period, subject to two exceptions. First, creditors may bring intentional fraud claims within one year of the fraud's discovery if that time is outside the general limitation period. Second, creditors may challenge preferential transfers to insiders only within a one-year period. See \textit{id}. The UFTA adopted the formulas for determining the "time of transfer" (when to begin running of the limitation period) from section 548(d)(1) of the Bankruptcy Code. 11 U.S.C. § 548(d)(1) (1982), \textit{amended in 11 U.S.C.A.} § 548(d)(1) (West Supp. 1985). The time of transfer in real property transactions is the time of recordation. U.F.T.A. § 6(1)(i) comment 1. For personal property and fixtures transactions, the transfer occurs at notice filing or delivery of physical possession. \textit{id}. § 6(1)(ii) comment 1. When the parties fail to perfect transactions that the parties could have perfected by one of the above means, the UFTA deems the transaction to have taken place immediately before an action to set aside the fraudulent conveyance commenced. \textit{id}. § 6(2). The UFTA provides that all other transfers occur when the transaction becomes effective between the parties themselves. \textit{id}. § 6(3).
\item \textsuperscript{155} See U.F.T.A. § 8(a). The UFTA provides identical protection. Defrauded creditors may recover "against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediate from such a purchaser." U.C.A. § 9.
\item \textsuperscript{156} See Shay v. Gagne, 275 Mass. 386, 393, 176 N.E. 200, 202 (1931) (refusing to set aside challenged mortgage when mortgagor did not participate in debtor's fraudulent intent); Berger v. Hi-Gear Tire & Auto Supply, Inc., 257 Md. 470, 475, 263 A.2d 507, 510 (1970) (finding that debtor's fraudulent intent will not vitiate transaction unless grantee participates in fraudulent intent); Bolten v. Colburn, 389 S.W.2d 384, 390 (Mo. App. 1965) (purchaser from fraudulent debtor protected when the purchaser buys without notice of intent and for valuable consideration).
\item \textsuperscript{157} See U.F.T.A. § 8(d). The UFTA provided similar partial protection for good faith purchasers. U.F.C.A. § 9(2). See Merchants Discount Co. v. Esther Abelson, Inc., 297 Mass. 517, 520, 9 N.E.2d 528, 531 (1937) (innocent purchaser protected to amount of consideration paid); Osawa v.
may take the form of a lien on the property transferred or a reduced judgment against the transferee. The UFTA protects a good faith transferee who has not given reasonably equivalent value by enforcing the debtor's obligation to the transferee only to the extent of value given the debtor. The UFTA protection of good faith transferees for value also is available for subsequent transferees that did not deal directly with the debtor. The UFTA derived the provision protecting subsequent transferees from section 550(b)(1) of the Bankruptcy Code. Congress has interpreted the bankruptcy provision as precluding a fraudulent transferee from "laundering" a debtor's property through an innocent party. Subsequent transferees under the bankruptcy provision each must prove good faith to avoid liability.

IV. APPLICATION OF THE UFTA TO ISSUES IMPLICATED IN PARTICULAR COMMERCIAL TRANSACTIONS

Because it adopts and occasionally reformulates several bodies of fraud law, the UFTA is to some extent a patchwork. The first portion of this article has described how the UFCA and the Bankruptcy Reform Act of 1978 inspired the UFTA. Drafters of uniform law should consult and incorporate established commercial concepts; they should not reinvent the wheel at each opportunity. But patchwork legislation has its dangers. The incongruities and inconsistencies of existing law may undermine coherent application of new law. As the drafters of the UCC recognized, the successful promulgation of new legislation may require that the drafters abandon the language and formulations of the existing law to effectuate the needs of the commercial community. Professor Frederick Beutel criticized the UCC for its variety of new and unfamiliar terms. Professor Grant Gilmore, one of the drafters of the Code, re-

Onishi, 33 Wash. 2d 546, 558-59, 206 P.2d 498, 505 (1949) (good faith purchaser recovers amount paid from interpleader fund).
158. U.F.T.A. § 8(d)(1), (3).
159. Id. § 8(d)(2).
160. See id. § 8(b)(2).
164. See Beutel, The Proposed Uniform [?] Commercial Code Should Not Be Adopted, 61 YALE L.J. 334, 337-48 (1952) ("If the needs of the regulation of commerce required it, lawyers, courts and business men could probably learn this new vocabulary. It would perhaps take a period of twenty-five or fifty years of confusion . . . ." Id. at 348). Commentators more recently have directed criticism toward the proposed New Uniform Payments Code, New Uniform Payments Code (Perm. Editorial Bd. Draft No. 3, 1983), which would revise Articles 3 & 4 of the UCC. See Geary, One Size Doesn't Fit All—Is a Uniform Payments Code a Good Idea?, 9 RUTGERS COMPUTER & TECH. L.J. 337, 341 (1983) ("[H]aving mastered these legal languages, should we all now be forced to forget them and learn Esperanto?"). But see Alces, A Jurisprudential Perspective for the True Codification of Payments Law, 53 FORDHAM L. REV. 83, 103 (1984) (arguing that "[c]ommercial attorneys have been willing to relearn" where beneficial new legislation is involved) (citing Llewellyn, Why We Need the Uniform Commercial Code, 10 U. FLA. L. REV. 367, 368 (1957)).
sponded that the new terminology would not alter established commercial practices as much as the terminology would clarify troublesome problem areas and avoid the unfortunate baggage attending some of the terms under pre-Code law. This section of the article focuses on the language of the UFTA and the new Act’s adoption of concepts from other bodies of commercial law.

This effort does not attempt to appraise the ultimate success or failure of the UFTA project. Indeed, nearly thirty years after the final draft of the UCC the debate over the success of that jurisprudential experiment persists. Nonetheless, as situations conducive to fraudulent transfer analysis confront courts and legislative bodies, some observations regarding the new uniform Act’s provisions may guide the interpretive process and inform the debate over the desirability of the UFTA’s formulation of fraudulent transfer law. This section of the article examines specific provisions of the UFTA to consider the statute’s essential characteristics. The reader who appreciates the manner in which the drafters drew distinctions and accentuated similarities has the frame of reference to construe the UFTA’s provisions.

The drafters of the new Act identify the crucial concept upon which the law of fraudulent transactions is premised: “the purpose of the Act [is] to protect a debtor’s estate from being depleted to the prejudice of the debtor’s unsecured creditors.” That purpose is not the exclusive province of the UFTA or its predecessor statute. The preference provision of the Bankruptcy Code proscribed transfers which operate “to the prejudice of other creditors holding unsecured claims . . . .” Succinctly, fraudulent transfer law endeavors to regulate nothing more. To conclude that fraudulent transfer legislation absolutely penalizes debtor actions which benefit some creditors at the expense of others would be to oversimplify; the necessary accommodation of competing financial interests and freedom of contract principles assures the continued integrity of

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165. See Gilmore, The Uniform Commercial Code: A Reply to Professor Beutel, 61 YALE L.J. 364, 379 (1952). See also id. at 367 (“[There are novel terms [in the UCC]: they have not previously been statutory words of art. On the other hand it would be hard to imagine that either a businessman or a lawyer would find them ‘strange . . . technical and exotic.’”) (quoting Beutel, supra note 164, at 337-38).

166. Compare Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 STAN. L. REV. 621, 635 (1975) (“This derogation of the legislative function [implicit in the UCC] appears to be premised on . . . [a] triad of dubious assumptions . . . .”) with Winship, Jurisprudence and the Uniform Commercial Code: A “Commote,” 31 SW. L.J. 843, 866 (1977) (in which Professor Winship, having reviewed Professor Danzig’s effort, concludes that “Danzig’s dichotomy between the proper roles for courts and legislatures oversimplifies both Llewellyn’s approach to semi-permanent legislation and the characteristics of the provisions of article II.”). Other examples of the debate over the success of the UCC are available. See, e.g., Carroll, Harpooning Whales, of which Karl N. Llewellyn is the Hero of the Piece; or Searching for More Expansion Joints in Karl’s Crumbling Cathedral, 12 B.C. INDUS. & COM. L. REV. 139 (1970); Leff, Unconscionability and the Code—The Emperor’s New Clause, 115 U. PA. L. REV. 485 (1967).


many transactions which some affected third parties would reasonably conclude are prejudicial to their best interests.

A statutory proscription of particular transactions or of transactions with particular consequences must offer a catalog of indicia to signal reliably those transfers that invidiously sacrifice some interests in favor of others. The laws must hold the “dirty guys” in without unduly inhibiting the regularity and predictability of commercial transactions.169 Achieving the best balance of general and specific terminology to assure commercially reasonable results is a significant challenge. The UFTA can be no better than the drafters’ success in achieving the balance; the new Act suffers most when general policies are sacrificed for the pyrrhic security of overspecification.

A. Specificity and Generalization

Like too many “matters legal,”170 courts and commentators can sense fraud more easily than define it.171 As noted above, the drafters of fraud law agree on its purpose—avoiding transactions which prejudice the interests of unsecured creditors. How best to effectuate that purpose, however, is unclear. The UFTA approaches the challenge from two perspectives. The Act generalizes by means of broad definition and specifies by reference to more precise indicia. This article suggests that the UFTA may change the law without improving it because the new Act lacks internal consistency. The new uniform law vacillates when treating certain transactions and fails to achieve the proper balance of the general and the specific to assure coherent, consistent application of the Act’s provisions.

1. Generalization: The UFTA Concept of “Transfer”

The UFTA offers a broad definition of “transfer,”172 designed such that courts may apply the Act’s avoidance mechanisms to virtually any type of transaction which could prejudice unsecured creditors. Section 6 of the UFTA, which designates the time at which a transfer is made or an obligation incurred, complements well the broad section 1(12) defini-
As discussed above, the comprehensiveness of the transfer concept made possible the fraudulent conveyance analysis of the \textit{Durrett} line of cases. Comment 12 to UFTA section 1(12) acknowledges that the Act's definition "is derived principally from § 101(48) of the Bankruptcy Code," and further explains that the Code's definition is no less comprehensive than that of the UFCA. Courts have held that the UFCA definition includes involuntary transfers such as foreclosure sales in several cited cases.

So long as the new Act's provisions reach involuntary transfers of the debtor's assets, the \textit{Durrett} analysis retains its vitality. In UFTA section 3(b), clarifying the reasonably equivalent value concept, the drafters try to avoid the \textit{Durrett} result explicitly by providing that transfers "pursuant to a regularly conducted, noncollusive foreclosure sale" are necessarily transfers for reasonably equivalent value. The drafters are comfortable, then, in concluding that a regularly conducted foreclosure sale could not, as a matter of law, deplete the debtor's estate to the prejudice of the debtor's unsecured creditors. Creative counsel and judges, however, may construe the "regularly conducted, noncollusive" language of UFTA section 3(b) to reach a result similar to that accomplished by the \textit{Durrett} rule. Counsel can argue that the sale was conducted irregularly, or was collusive. If such an argument succeeds, then the provision would have no more effect than UCC section 9-507(2). This UCC section admonishes that a party cannot assail an Article 9 sale of property subject to a security interest merely because "a better price could

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174. \textit{See supra} notes 70-75, and 111-14 and accompanying text.
175. U.F.T.A. § 1 comment 12; \textit{see also} 11 U.S.C.A. § 101(48) (1985). This section of the Bankruptcy Code states: "(48) 'transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest." \textit{Id.}
176. \textit{See supra} notes 70-75 (in which the drafters state that they have rejected the rule of \textit{Durrett} in favor of that espoused in \textit{In re Madrid}, 21 Bankr. 424 (Bankr. 9th Cir. 1982), aff'd on other grounds, 725 F.2d 1197 (9th Cir.), cert. denied, 105 S. Ct. 125 (1984)). For a discussion of \textit{Madrid} and \textit{Durrett}, \textit{see supra} notes 70-75 and accompanying text.
177. Section 9-507(2) of the UCC provides:

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

have been obtained by a sale at a different time or in a different method from that selected by the secured party.”

In several instances, courts have reviewed foreclosure sales which left the debtor owing a substantial deficiency and have found a basis other than a low price to upset the sale. These courts have found ways to conclude that the sale was commercially unreasonable.

Although in defining transfer the UFTA considers all of the facts surrounding a conveyance of a property interest, this article skeptically views the effect which courts will give the section 3(b) definition of value. To the extent section 3(b) compromises the broad parameters of the transfer definition, the section may allow courts to reach a Durrett-like result. The regression from the broad transfer definition at least is unfortunate and could prove inefficacious.

2. Specification: The “Insider” Transferee
   a. “Insider” Status

The UFTA’s insider definition is dichotomous. Subsection 1(7)(iv) provides that the term insider “includes . . . an affiliate, or an insider of an affiliate as if the affiliate were the debtor . . . .” Section 1(1) defines affiliate. Because the Act uses the intentionally nonexclusive “includes” modifier in describing what constitutes insider status, under­

179. Id.

180. See, e.g., Liberty Nat’l Bank & Trust Co. v. Acme Tool Div., 540 F.2d 1375, 1381-82 (10th Cir. 1976) (holding the sale of oil drilling rig commercially unreasonable in part due to a lack of publicity and auction irregularities, but noting the low price received as a factor); Connex Press, Inc. v. International Airmotive, Inc., 436 F. Supp. 51, 56-57 (D.D.C. 1977) (holding the sale of large jet commercially unreasonable due in part to inadequate publicity, but identifying the low price received in sale as factor in decision), aff’d without opinion, 574 F.2d 636 (D.C. Cir. 1978); Atlas Constr. Co. v. Dravo-Doyle Co., 3 U.C.C. Rep. Serv. (Callaghan) 124 (Pa. Ct. C.P. 1965) (inadequate publicity combined with below-market sales price established sale of truck crane as commercially unreasonable). See generally B. CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 4.8[b] (1980) (discussing the effect on courts of low foreclosure sale prices). Clark notes that while “a low price received at foreclosure is not fatal . . . , a low price calls for a close review of the facts surrounding the sale.” Id. at 4-66. Indeed, Clark discusses some authority in which courts have determined, in apparent opposition to the language of section 9-507(2), that receipt of a low foreclosure sale price alone can mark such a sale as commercially unreasonable. See id. at § 4.8[b] (citing, e.g., Credit Bureau Metro, Inc. v. Mims, 45 Cal. App. 3d 12, 119 Cal. Rptr. 622 (1975); Family Fin. Corp. v. Scott, 24 Pa. D. & C.2d 587, 1 U.C.C. Rep. Serv. (Callaghan) 647 (Pa. Ct. C.P. 1961)). Clark cautions, however, that “[j]ust as the courts weigh the price received heavily when other elements of commercial unreasonableness are present, so will they frequently uphold a low price when the sale passes muster in all other respects.” Id. at 4-68. See also AMERICAN BAR ASSOCIATION, CONDUCTING A COMMERCIAL REASONABLE SALE OF COLLATERAL UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, A PANEL PRESENTATION FOR THE SECTION OF CORPORATION, BANKING AND BUSINESS LAW (Aug. 1, 1983) (describing requisites of a commercially reasonable disposition).

181. See U.F.T.A. § 1(12).

182. See id. § 3(b).

183. Id. § 1(7)(iv).

184. See id. § 1(1).

185. The UFTA follows the Bankruptcy Code and specifies that includes is not to be read in a limiting fashion. See U.F.T.A. § 1 comment 7 (“As in the Bankruptcy Code . . . , the word ‘in-
sonal relationships which should arouse courts' suspicion in some detail is difficult. Courts will apply more careful scrutiny to transactions with relatives, general partners, partnerships, directors, officers, and persons in control of the debtor. Insider transfers certainly warrant that treatment, but whether the UFTA drafters made the reasons requiring exceptional treatment of such transactions fully operative is unclear.

Parties in a position to compel or cajole transfer of the debtor's property to themselves are insiders, the parties particularly well-postured to receive the estate's property to the prejudice of unsecured creditors. A debtor will convey or transfer its property to particular third parties and thereby prejudice unsecured creditors, as the debtor and the transferee will benefit more from such an action than from an equitable disposition of the property. Either the debtor foresees some direct pecuniary benefit to itself in the transfer or prefers to benefit a particular transferee or group of transferees for less commercially obvious reasons. In any event, if the debtor transfers its assets to one creditor rather than to another creditor for reasons which do not reciprocally enhance the pecuniary value of the debtor's estate, then the transfer may be voidable because "[c]onsideration having no utility from a creditor's viewpoint does not satisfy the statutory definition [of value]."

As Holmes suggested, courts can draw conclusions about relevant subjective circumstances more confidently when the courts receive sufficient objective indicia. Because the context is more susceptible to

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11 U.S.C. § 102(3) (1982) ("'includes' and 'including' are not limiting").

186. The UFTA, however, excludes limited partners from the insider definition. See U.F.T.A. §§ 1(7)(i)(C), 1(7)(ii)(E), 1(7)(iii)(D), § 1 comment 7. The comment states, in pertinent part, that while the UFTA derives its insider definition from the Bankruptcy Code,

[t]he definition has been restricted . . . [in the UFTA] to make clear that a partner is not an insider of an individual, corporation, or partnership if any of these latter three persons is only a limited partner. The [Bankruptcy Code] definition . . . does not purport to make a limited partner an insider . . . , but it is susceptible of a contrary interpretation and one which would extend unduly the scope of the defined relationship when the limited partner is not a person in control of the partnership.

Id. § 1 comment 7. See also 11 U.S.C.A. § 101(28) (1985) (the Bankruptcy Code definition of "insider" status).


188. For a discussion of the "control" concept, see Douglas-Hamilton, Creditor Liabilities Resulting from Improper Interference with the Management of a Financially Troubled Debtor, 31 Bus. LAW. 343 (1975). Douglas-Hamilton discusses the ways in which a court may find a creditor "in control" of corporate debtors, primarily in the context of federal securities law. She identifies three situations in which courts may find creditor liability: first, when a creditor may exercise voting control over the corporate debtor by having the power to elect a majority of directors (as where a controlling block of shares serves as loan collateral); second, when a creditor has significant control over the selection of the personnel who will manage the troubled debtor; and, finally, when the creditor can influence either the debtor's management or those persons with voting control through financial domination. Id. at 344-46. See also Ash & Broude, The Consequences of Lender Control, in LEVERAGED BUSINESS ACQUISITIONS 205 (Practicing Law Institute No. 305, 1979) (citing Douglas-Hamilton as reviving the doctrine of lender control).

189. U.F.T.A. § 3 comment 2.

190. See O. HOLMES, supra note 9, at 33. ("[W]hile the law . . . always, in a certain sense, measure[s] legal liability by moral standards, it nevertheless . . . is continually transmuting those
overreaching and commercially unreasonable behavior, courts scrutinize insider transfers. Experience suggests that insiders may take undue advantage of unsecured creditor's interests. If the substance of and reason for the insider and affiliate formulations in the UFTA is this subjective idea of undue advantage, then the Act gains little by describing insider status in precise, specific, even formalistic terms. Moreover, if the reason behind the rule is insubstantial and application of the terminology supersedes contextual analysis, then the object of the legislation may be compromised and application of its provisions becomes awkward. Parties able to exert improper influence on the debtor may escape insider status, as the UFTA may not specify these parties' particular relation to the debtor. The problem with the UFTA's treatment of insiders goes beyond the definitional provisions. The new Act inconsistently applies the policies implicated in insider transactions and therefore undermines courts' ability to apply the new Act coherently. The next section of this article describes the UFTA's ambivalent treatment of certain transfers to insiders.

b. Preferential Transfers to Insiders

Section 5(b) of the UFTA renders voidable transfers by a debtor to an insider made "for other than a present, reasonably equivalent value" when the debtor was insolvent and the transferee "had reasonable cause to believe the debtor was insolvent." In comment 3 to the section, the drafters explain that "[a]voidance of the . . . transfer without reference to the [transferee's] state of mind and the nature of the consideration exchanged would be unduly harsh treatment of the creditors of the [transferee] and unduly favorable to the creditors of the [debtor]." That explanation undermines the detailed definition of insider; the drafters, by directing that courts afford the transferee's state of mind due deference, have frustrated the provision's utility. The comment's reference to the insider transferee's state of mind and the section 5(b) reference to the insider transferee's reasonable belief sacrifice any certainty and pre-moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated."); cf. Baltimore & O.R.R. v. Goodman, 275 U.S. 66, 70 (1927) (Holmes, J., writing for the Court) ("[W]e are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts."). But cf. Pokora v. Wabash Ry., 292 U.S. 98, 105 (1934) (Cardozo, J., writing for the Court) ("The need [for caution in framing standards of conduct] is the more urgent when there is no background of experience out of which the standards have emerged.").

191. See In re Process-Manz Press, Inc., 236 F. Supp. 333 (N.D. Ill. 1964) (secured claims of a creditor "in control" of the debtor corporation subordinated), rev'd on other grounds, 369 F.2d 513 (7th Cir. 1966), cert. denied, 386 U.S. 957 (1967) (discussed in Douglas-Hamilton, supra note 188, at 349-50); In re American Lumber Co., 7 Bankr. 519 (D. Minn. 1979) (debtor's post-default grant of security interest to creditor, and the creditor's subsequent exercise of liquidation powers and management control, was preferential, fraudulent, and resulted in subordination of secured creditor's claims to unsecured creditors).


193. Id. § 5 comment 3.
dictability that the detailed insider definition provides. The nature of insider status implies that once the court characterizes a transferee as an insider the transferee necessarily had reasonable cause to question the debtor's solvency.

In sections 1(7) and 5(b) the UFTA fluctuates between a specific and a general stance. Although an area as amorphous as fraud law is perhaps best defined in general terms to allow courts the flexibility necessary to proscribe a large number of transactions circumscribed only by the limits of creditors' ingenuity, good commercial reasons for specificity remain. The vagaries of post hoc characterization should not unduly hamper commercial transactions. Attorneys should be able to explain to sophisticated clients whether and to what extent a court may scrutinize a particular transaction as an insider transaction. The balance is a difficult one to strike for all cases at all times. However the drafters may ultimately resolve the tension between a specific and a general position, fraud law must treat insiders consistently. The Act's insider provisions should be unequivocal; they should not alternate between affording insiders favored and suspect creditor status. But the drafters of the UFTA are inconsistent. The statute seems to permit contextual, fact-determinative analysis by reference to objective indicia. On the other hand, the statute inexplicably reverses direction and refers to the transactors' state of mind and reasonable belief.

Another section of the Act treats insiders inconsistently. Although the UFTA characterizes particular transactions as fraudulent and provides consequently for punitive consequences, the drafters leave open a safety-valve: section 8 permits some transferees to plead and prove their good faith and to recover the less than reasonably equivalent value they have given the debtor. That recovery is unavailable to the insider transferee who took on account of an antecedent debt, for less than reasonably equivalent value, from an insolvent debtor, when the insider had "reasonable cause to believe that the debtor was insolvent." The comments to section 8(d) conclude in terms not found in the text of the Act that:

An insider who receives property or an obligation from an insolvent debtor as security for or in satisfaction of an antecedent debt of the transferor or obligor is not a good faith transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or the obligation was incurred. 194

Therefore, section 8(d) does not protect an insider transferee. This result seems consistent with the commercial consequences of insider status. The Act presumes such transferees are culpable without providing an opportunity to prove their good faith. Once again, however, the UFTA vacillates.

194. Id. § 8 comment 4.
Subsection 8(f) complements 8(d). The former refers specifically to section 5(b) insider preferences:

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

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

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

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

At some point in the drafting process the NCCUSL may have been comfortable without section 8(f) because the subsection as currently drafted does not appear in early drafts of the Act. The final draft includes the subsection, however, and undermines the Act's treatment of insiders. The comments to the subsection explain that section 8(f) adapts the Bankruptcy Code section 547(c) preference provisions. Subsection

195. *Id.* § 8(f).

196. See *U.F.T.A.* § 8(f) (Proposed Draft 1984) (copy on file at the University of Illinois Law Review office). In this earlier draft, § 8(f) stated: "A creditor may not recover under subsection (b)(2) from a good-faith transferee or obligee who took for value or from any subsequent transferee or obligee." *Id.*

197. See *U.F.T.A.* § 8 comment 6. Section 547(c) of the Bankruptcy Code provides as follows:

(c) The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was—

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 10 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—

(A) (i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or
8(f)(1) and (2) are consistent with the Bankruptcy Code. In contrast, subsection 8(f)(3) is new and, with UFTA section 6(4), is more favorable to the interests of commercial lenders than are the Bankruptcy Code provisions.198

The UFTA and Bankruptcy Code conflict over the troubled debtors' "feeding-the-lien" of the secured lender, thus improving the secured creditor's position by exercising an "after-acquired property" clause. A hypothetical explains how parties can accomplish this transaction and clarifies the difference between the UFTA and the Bankruptcy Code:

Debtor enters into a loan and security agreement with Bank. Debtor grants Bank a security interest in all of Debtor's accounts "now or hereafter received by or belonging to Debtor for goods sold by it or services rendered by it to secure repayment of the loan and any attorney's fees incurred by Bank in collecting the loan." The loan advances cannot exceed 60 percent of the total of the accounts outstanding. On October 1, Debtor borrows $60,000 and has outstanding accounts of $100,000, creating a "collateral cushion" of $40,000. As of February 1, Debtor owes Bank $55,000 on the loan but only $50,000 of outstanding accounts exists. At this point, Bank is undersecured and a $5,000 deficiency exists. By March 1, however, once more $100,000 of outstanding accounts exist and Debtor owes the Bank only $60,000. Bank's position has improved between February 1 and March 1.

Under the Bankruptcy Reform Act of 1978, Bank would receive a voidable preferential transfer to the extent Debtor reduced the deficiency during the ninety days (or, if Bank is an insider, one year) before Debtor files the bankruptcy petition. That is the improvement of position, or two-point test.200

The Bankruptcy Code section presumes that the Bank's improved position is preferential despite the Bank's good faith.201 Section 8(f) of

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198. The applicable Bankruptcy Code section is 547(e)(3), which provides that "[f]or the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred." 11 U.S.C. § 547(e)(3) (1982). Both the Bankruptcy Code and the UFTA, therefore, provide that a transfer occurs when a debtor acquires rights in the collateral. See U.F.T.A. § 6(4).


the UFTA provides that the good faith of the Bank is relevant. Indeed, good faith would insulate from avoidance an improved position accomplished by an after-acquired property clause.\textsuperscript{202} So long as the Bank improves its position (enhances its collateral base) \textit{in return for} present value—new advances given to rehabilitate the Debtor—courts cannot void the transfer. The UFTA does not require that the new advance equal the amount of the after-acquired property, the collateral which becomes subject to the Bank’s security interest. If the future advance does equal the amount of the after-acquired property, then section 5(b) will not proscribe the transfer (Debtor’s acquired rights in the collateral subject to the Bank’s security interest)\textsuperscript{203} because it does not result from an antecedent debt. Section 8(f)(3) therefore does more than insulate transfers of after-acquired property in exchange for matching new value. The section also permits the Bank to improve its position to the prejudice of unsecured creditors under the guise of rehabilitating the Debtor. The UFTA accomplishes this result by not incorporating the Bankruptcy Code’s two-point test. This result is manifestly pro-financial institution and suggests that unsecured creditors may lose an important safeguard against fraudulent transfers unless they can refute the fraudulent transferee’s protest of good faith.\textsuperscript{204} Moreover, deferring to the rights of insiders further compromises the UFTA’s treatment of parties uniquely postured to exert control over fiscally unsound debtors. Section 8(f) particularly is troublesome because of the timing of its inclusion in the draft UFTA. The provision was not in the draft submitted to the Commissioners at the beginning of the Colorado meeting. Nevertheless, section 8(f) appeared in the draft which emerged from the Conference only seven days later.\textsuperscript{205}

\textbf{B. The Insolvency Requirement.}

Although the UFTA proscribes transactions executed “with actual intent to hinder, delay, or defraud any creditor of the debtor” without reference to the solvency of the debtor/transferor,\textsuperscript{206} transactions accompanied by less insidious \textit{mens rea} are subject to avoidance only when the debtor is insolvent before or after the transfer.\textsuperscript{207} This formulation retains standard, familiar, fraudulent conveyance law. This article assumes that by focusing on the debtor’s solvency to distinguish between transactions which merely injure rather than utterly destroy the debtor’s fiscal

\textsuperscript{202} See U.F.T.A. § 8(f).

\textsuperscript{203} See id. § 6(4).

\textsuperscript{204} The drafters of the UFTA, while expressly providing creditors with the “good faith” exception, apparently have permitted courts to allocate the burden of proof on the issue. Neither the applicable UFTA section nor the comment to that section discusses the matter. See U.F.T.A. § 8(f)(3); id. § 8 comment 6.

\textsuperscript{205} Copies of preliminary drafts are on file at the University of Illinois Law Review office.


\textsuperscript{207} See supra notes 115-25 and accompanying text; U.F.T.A. § 5. See also supra notes 126-35 and accompanying text; U.F.T.A. § 4(a) (discussing other forms of constructive fraud).
integrity, proponents of fraudulent transfer law mean to limit the transactions which are presumptively avoidable. Ex post facto review of all the debtor's transactions would spawn too much litigation and compromise too many deals from the vantage offered only by hindsight. Although courts will punish intentional wrongdoing, complaining creditors must either prove such intent or establish the insolvency of the debtor.

The drafters of the UFTA acknowledged (indeed codified) the difficulty of establishing subjective bad intent by cataloging the indicia of control in the insider and affiliate definitions. In deciding which transactions should be subject to avoidance, however, the insolvency of the transferor may not matter. Further, insolvency analysis may confuse the purpose and operation of fraudulent transfer law. To reach a conclusion regarding the efficacy of the insolvency criterion, this article considers two important commercial contexts in which fraudulent conveyance analysis has received attention.

1. Upstream and Cross-stream Guaranty Relationships

Upstream guaranties arise when a subsidiary corporation guarantees its parent's indebtedness; cross-stream guaranties describe a corporation's guaranty of an affiliated corporate debtor, such as one subsidiary's guaranty of another subsidiary's performance. Professor Rosenberg has suggested that the two types of guaranty contracts entail the guarantor's (debtor's) assumption of a liability, the guaranty obligation, without the realization of a counterbalancing asset. Therefore, the debtor executes an upstream or cross-stream guaranty "without receiving a reasonably equivalent value in exchange for the . . . obligation." Then, so long as the debtor is insolvent, state or federal fraudulent conveyance law applies and the guaranty contract is subject to avoidance.

Insolvency analysis exposes the metaphysics of this type of fraudulent conveyance attack. Creditors who take upstream and cross-stream guaranties argue that the solvency of the debtor should not be in issue because when the subsidiary or affiliate corporation assumes the guaranty obligation, the guaranty's liability is necessarily offset by the concomitant subrogation rights which the common law assures those who answer for the debt of another. Comment 2 to the UFTA section 1(2) definition of asset provides that "a contingent claim of a surety for reimbursement, contribution, or subrogation may be counted as an asset" in the solvency

210. See id. at 256.
212. See Manufacturers & Traders Trust Co. v. Goldman (In re Ollag Constr. Equip. Corp.), 578 F.2d 904, 908 (2d Cir. 1978) ("[C]ontingent subrogation and contribution rights must be valued as assets in determining solvency.").
calculus.\(^{213}\) Professor Rosenberg argues, however, that

[t]he notion that the guaranty of a solvent obligor is offset by a contingent asset based on the right of subrogation is simply not realistic; when and if the guarantor is called upon to perform, the value of that contingent asset in all likelihood would be discounted severely because it probably would be no longer collectible. Otherwise, the guarantor would not have been called upon to perform.\(^{214}\)

The courts now consider the valuation of contingent subrogation and contribution rights without embracing the Rosenberg analysis.\(^{215}\) Commentators, notably those promoting the positions of creditors who take the upstream or cross-stream guaranty, are likewise less receptive to arguments which question the valuation of subrogation rights.\(^{216}\) From the perspective of the drafters of fraudulent transfer law, however, the debate's outcome and the courts' valuation of subrogation rights should not be quite as interesting as the cause for all of the fuss: creditors who have given nothing tangible, no "hard" corporeal assets, to a debtor/guarantor seek to uphold the guaranty contract, often secured by real and personal property, because executing the guaranty does not render the debtor/guarantor insolvent. Such creditors can make such an argument, and fend off fraudulent conveyance attack, only because the drafters of fraudulent conveyance law have decided that solvency matters. Because the issue is apposite only when the transaction rendered the debtor insolvent, or left the debtor with "unreasonably small capital [assets],"\(^{217}\) lenders who take upstream and cross-stream guaranties can avoid confronting the "reasonably equivalent value" issue.

Understood in the context of the essential purpose of fraud law and properly construed, the reference to unreasonably small assets should be sufficient to function as uniform legislation on this topic. The enigma, then, is why the UFTA retains the insolvency idea in section 5(a). The concept has outlived its usefulness in a complex financial world where solvency analyses are more matters of professional opinion than fixed, verifiable measures. The drafters of the Bankruptcy Code acknowledged and codified the flexible valuation determinations.\(^{218}\) The real problem

\(^{213}\) U.F.T.A. § 1 comment 2.

\(^{214}\) Rosenberg, supra note 209, at 256 (emphasis added).


\(^{217}\) U.F.C.A. § 5.

\(^{218}\) See H.R. REP. NO. 595, 95th Cong., 2d Sess. 178 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6138 (describes the previous preference provision of the Bankruptcy Code as including "several impediments to the proper functioning" of the provision, among which
with confusing fraud law by retaining the insolvency standard in section 5(a) alongside the unreasonably small assets test, section 4(a)(2)(i), is that the objective indicia of section 5 may overcome the more subjective inquiry of section 4 and may insulate some transfers by creating a safe harbor.

Counsel for a creditor who has received an upstream or cross-stream guaranty would argue that relying on the unreasonably small assets standard eviscerates the specificity, certainty, and predictability of the section 5 insolvency requisite. Counsel would urge a court to focus, instead, on the debtor's solvency. Indeed, the fact that the unsecured creditors of the debtor/guarantor are in court challenging the guaranty makes the argument that the debtor retained unreasonably small assets easy, even tautological. If the debtor had sufficient assets, then the complaining creditors would have satisfied their claims without judicial intervention. To preclude such circular analysis, courts may have to construe the unreasonably small assets language by referring to objective criteria: the balance sheets of the debtor/guarantor. As the next section of the article illustrates, however, the "certainty" offered by financial statements is ephemeral at best, manipulable at worst.

2. Leveraged Business Acquisitions

Although the potential factual contexts vary, the leveraged business acquisition is sufficiently general to support observations which accurately describe the dynamics of more than limited, isolated transactions. A generic hypothetical is useful:

The aging management and shareholders (sellers) of a privately held company approach a group interested in acquiring the company. Ambition-rich but relatively cash-poor, the acquisition group arranges financing through a bank or commercial finance company. The lender advances the loan proceeds against the assets (accounts receivable, inventory, equipment, real property) of the acquired company. The acquisition group pays for the sellers' interest in cash (and perhaps a promissory note). Sellers transfer ownership of the company and its assets to the acquisition group subject to the security and perhaps mortgage interest of the lender. The individual members of the acquisition group, at the insistence of the secured lender, often will execute personal (usually secured) guaranties of the acquisition loan.219

One of the pitfalls of such transactions from the lender's perspective is the potential for fraudulent conveyance challenges under state and fed-

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eral law. One commentator notes that the transaction may prejudice the
unsecured creditors of the acquired corporation:

[W]here the acquisition takes the form of a merger or asset purchase
. . . . the acquired assets simply become part of the acquiring [entity]
. . . . In such a case, where the enabling loan is secured by the
present and after-acquired assets of the acquiring [entity] . . . , the
lender has now achieved not mere parity with pre-existing creditors
but priority in the assets of the acquired corporation.220

The commentator further explains, in terms familiar to fraudulent trans­
fer analysis, that the net result of the transaction is to encumber the
debtor's assets “without providing a direct benefit to the corporation.”221

Practitioners’ guides suggest various devices which acquisition lenders
may use to preclude or limit avoidance of the security interest portion
of the leveraged acquisition as a fraudulent conveyance.222 These guides
advise lenders’ counsel to obtain appraisals, and procure cash flow and
balance sheet projections “showing ability of company to continue its
business for at least one year and meet its assumed and future obligations
as they mature.”223 In addition to supplying indispensable loan memo­
randum information, such precautions “also establish bona fides and
good faith of lender in entering into transaction in reliance upon bor­
rower’s solvency and future working capital viability.”224 Appearances
aside, here is the essence of the leveraged business acquisition trans­
action from the perspective of unsecured creditors: assets to which such credi­
tors once could look to realize their claims against the debtor corporation
are now, ostensibly, beyond their reach. The crucial element is the grant
of the subordinating security interest, not the change of ownership.
Compare this with the effect that a conventional Article 9 secured trans­
action has on the debtor’s unsecured creditors.

Under the UFCA courts have considered the discrepancy between
the amount of a debtor’s loan and the value of the collateral hypothe­
cated by the debtor to secure the loan.225 When the discrepancy is large,
courts are more likely to allow parties to avoid the security interest.226
The UFTA does not distinguish between absolute transfers and security
transfers: “The premise of this Act is that when a transfer is for security
only, the equity . . . remains available to unsecured creditors and thus
cannot be regarded as the subject of a fraudulent transfer merely because
of the encumbrance resulting from an otherwise valid security trans­fer.”227
This solution of a commercial incongruity is welcome, but the

220. Rosenberg, Fraudulent Conveyance and Preference Implications of Leveraged Acquisitions,
in LEVERAGED BUSINESS ACQUISITIONS 147, 151 (Practicing Law Institute No. 305, 1979).
221. Id. at 152.
222. See Reisman, supra note 219, at 26-27.
223. Id. (emphasis added).
224. Id. at 27.
225. See supra notes 97-101 and accompanying text.
226. See cases cited supra note 100.
fraudulent transfer analysis of conventional Article 9 secured transactions and leveraged business acquisitions remains confused. The next sentence of the same UFTA comment creates the confusion, by explaining that “[d]isproportion between the value of the asset securing the debt and the size of the debt secured”\textsuperscript{228} may still raise fraud problems when the transaction suggests “an intent to hinder, delay, or defraud creditors”\textsuperscript{229} of the transferor. Parties may avoid, then, an Article 9 security interest. Similarly, courts may void leveraged business acquisitions under the UFTA because “the corporate assets and cash flow are encumbered with an obligation which was incurred without providing a direct benefit to the corporation.”\textsuperscript{230} The acquisition also might provide the basis of an intentional fraud claim. Neither transaction is voidable under UFTA section 5(a), constructive fraud, however, unless the debtor/transferor was insolvent at the time of the transaction.

The similarities between a conventional Article 9 security interest and a leveraged business acquisition are significant from the perspective of the debtor’s unsecured creditors. One of the reasons that Article 9 secured lenders provide a collateral cushion in sophisticated loan transactions, advancing funds against only seventy to eighty percent of the value of the assets securing the loan, is to provide an asset fund from which parties may obtain attorneys’ fees and collection expenses. Indeed, the Bankruptcy Code expressly provides that secured creditors may obtain reimbursement for attorneys’ fees “[t]o the extent . . . [a] secured claim is secured by property the value of which . . . is greater than the amount of such claim . . . .”\textsuperscript{231} Satisfaction of such obligations in no way accrues to the direct benefit of the debtor’s unsecured creditors. Because the language in the UFTA comment is contradictory, the new Act leaves open the question whether the “[d]isproportion between the value of the asset securing the debt and the size of the debt secured” may be a measure of intent to hinder, delay, or defraud under the UFTA. The extent to which the question remains open also is, arguably, a measure of the similarity between the typical Article 9 financing transaction and the leveraged business acquisition. If courts will equate a large discrepancy with actual fraudulent intent and, also, find subjective fraud in the context of leveraged business acquisitions, then the debtor’s solvency no longer matters—the transactions are avoidable and insolvency analysis is inapposite. Recall that the solvency of the debtor/transferor is not in issue when a creditor attacks a transfer as intentionally fraudulent.

The UFTA does not clearly provide such a result. Instead, the drafters vacillate. Part of the problem, perhaps its crux, is the indeterminacy of the concept of “direct” benefit. After all, businesspeople do not brave the vicissitudes of the commercial world for the benefit of

\textsuperscript{228} Id.
\textsuperscript{229} U.F.T.A. § 4(a)(1).
\textsuperscript{230} Rosenberg, supra note 220, at 152.
their creditors. Fraudulent transfer law balances benefit to the owners of a corporation against detriment to the corporation's unsecured creditors. The fraudulent transfer analysis in either event should focus on the transaction's commercial substance from the perspective of the transferee and the unsecured creditors of the debtor/transferor; evaluation of the debtor/transferor's solvency just does not seem important. Although more aggressive use of the actual fraud provisions is necessary, the UFTA does not accommodate such analysis. So long as the several bodies of state and federal fraudulent transfer law adopt insolvency as a certain measure, courts will refer to less consequential, more manipulable phenomena, such as balance sheets, and will obscure the subtle fraudulent transfer balance. In both the corporate guaranty and leveraged business acquisition contexts, the ambiguity of insolvency analysis may obscure the substance of the transaction. Courts, commentators, and commercial attorneys focus on the calculable solvency of the debtor/transferor. Creditors thus should keep the transferor afloat for the duration of the applicable statute of limitations. Therefore, insolvency, which has become more an accountants' state of mind than an inevitable state of affairs, may be a relic of a less enlightened commercial world. A business need not be insolvent to seek the protections of the Bankruptcy Reform Act of 1978. The concept remains only to "protect" transferees. Insolvency provides a means to construct a safe harbor, as the "reasonably equivalent value" inquiry is inapposite when the debtor was solvent at the time of the challenged transfer. By retaining both the insolvency standard (section 5(a)), and the "unreasonably small assets" concept (section 4(a)(2)) and reference to intentional fraud in the context of secured transactions, the UFTA threatens to perpetuate formal rather than substantive analysis.

V. CONCLUSION

This article has presented the provisions of the UFTA and described the way in which the new Act would adjust the rights of the parties affected by certain fraudulent transactions. Legislatures and courts must carefully consider the dynamics of commercial transactions and think through the way in which the UFTA would apply to allegedly fraudulent transfers. This analysis should focus on the incentives and safe harbors which the Act provides. This article has given careful attention to the language of the Act because the Act will, in large part, structure transactions. The balance between specific and general terminology is crucial in this area of commercial law. Perhaps the drafters of the UFTA did not achieve the proper balance. Because acquiescing in the formulations

232. Courts may extinguish claims under the UFTA at various intervals, depending upon the nature of the cause of action. See U.F.T.A. § 9.
233. See 2 COLLIER BANKRUPTCY MANUAL ¶ 301.03 (L. King 3d ed. 1981).
which have obtained heretofore is inappropriate, this article views the new Act’s adoption of existing fraud principles critically.

In particular, this article questions the UFTA’s treatment of insiders and urges that the drafters reconsider the insolvency criterion in light of contemporary commercial practices. The authors hope that this article will provide a starting point to consider this most recent codification of fraud law, an area of the law which legislatures should conclude is not subject to neat formulation.
§ 1. **Definitions**

As used in this [Act]:

1. **“Affiliate”** means:
   (i) a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,
     (A) as a fiduciary or agent without sole discretionary power to vote the securities; or
     (B) solely to secure a debt, if the person has not exercised the power to vote;
   (ii) a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,
     (A) as a fiduciary or agent without sole power to vote the securities; or
     (B) solely to secure a debt, if the person has not in fact exercised the power to vote;
   (iii) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or
   (iv) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

2. **“Asset”** means property of a debtor, but the term does not include:
   (i) property to the extent it is encumbered by a valid lien;
   (ii) property to the extent it is generally exempt under nonbankruptcy law; or
   (iii) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

3. **“Claim”** means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

4. **“Creditor”** means a person who has a claim.

5. **“Debt”** means liability on a claim.

6. **“Debtor”** means a person who is liable on a claim.
(7) “Insider” includes:
   (i) if the debtor is an individual,
       (A) a relative of the debtor or of a general partner of the debtor;
       (B) a partnership in which the debtor is a general partner;
       (C) a general partner in a partnership described in clause (B); or
       (D) a corporation of which the debtor is a director, officer, or person in control;
   (ii) if the debtor is a corporation,
       (A) a director of the debtor;
       (B) an officer of the debtor;
       (C) a person in control of the debtor;
       (D) a partnership in which the debtor is a general partner;
       (E) a general partner in a partnership described in clause (D); or
       (F) a relative of a general partner, director, officer, or person in control of the debtor;
   (iii) if the debtor is a partnership,
       (A) a general partner in the debtor;
       (B) a relative of a general partner in, a general partner of, or a person in control of the debtor;
       (C) another partnership in which the debtor is a general partner;
       (D) a general partner in a partnership described in clause (C); or
       (E) a person in control of the debtor;
   (iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
   (v) a managing agent of the debtor.

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

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

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

(11) “Relative” means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.
(12) “Transfer” means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

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

§ 2. Insolvency

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

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

(c) A partnership is insolvent under subsection (a) if the sum of the partnership’s debts is greater than the aggregate, at a fair valuation, of all of the partnership’s assets and the sum of the excess of the value of each general partner’s nonpartnership assets over the partner’s nonpartnership debts.

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

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

§ 3. Value

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

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

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

§ 4. Transfers Fraudulent as to Present and Future Creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

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

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

(ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due.

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

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

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

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

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

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

§ 5. Transfers Fraudulent as to Present Creditors

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

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

§ 6. When Transfer is Made or Obligation is Incurred

For the purposes of this [Act]:

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

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

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

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

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

(5) an obligation is incurred:

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

(ii) if evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

§ 7. Remedies of Creditors

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

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

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

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

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

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee: [sic]
or

(iii) any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the
§ 8. **Defenses, Liability, and Protection of Transferee**

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

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

1. the first transferee of the asset or the person for whose benefit the transfer was made; or
2. any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

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

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

1. a lien on or a right to retain any interest in the asset transferred;
2. enforcement of any obligation incurred; or
3. a reduction in the amount of the liability on the judgment.

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

1. termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or
2. enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

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

1. to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;
2. if made in the ordinary course of business or financial affairs of the debtor and the insider; or
3. if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

§ 9. **Extinguishment of [Claim for Relief] [Cause of Action]**

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

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

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

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

§ 10. **Supplementary Provisions**

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

§ 11. **Uniformity of Application and Construction**

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

§ 12. **Short Title**

This [Act] may be cited as the Uniform Fraudulent Transfer Act.

§ 13. **Repeal**

The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed[.]