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REPORT ON LEGISLATION BY THE COMMITTEE ON COMMERCIAL AND UNIFORM STATE LAWS AND COMMITTEE ON BANKRUPTCY AND CORPORATE REORGANIZATION

A.1853-A **M. of A. Weinstein**
S.6180-A **Sen. Bonacic**

AN ACT to amend the debtor and creditor law, in relation to enacting the uniform voidable transactions act; and to repeal provisions of such law relating to fraudulent conveyances.

The Uniform Voidable Transactions Act

THIS BILL IS APPROVED

The bill would enact the Uniform Voidable Transactions Act (the "UVTA"), promulgated by the Uniform Law Commissioners in 2014, replacing the current provisions in Article 10 (§§ 270-281) of the Debtor and Creditor Law, which are based on the Uniform Fraudulent Conveyance Act (the "UFCA")—which was promulgated by the Uniform Law Commissioners in 1918 and enacted in New York in 1925.

DEVELOPMENT OF UNIFORM LAWS ON FRAUDULENT TRANSFERS

The Commissioners promulgated the Uniform Fraudulent Transfer Act ("UFTA") in 1984 to modernize and rationalize the 1918 UFCA. The UFTA incorporated many of the features of the fraudulent transfer provisions of the federal bankruptcy reform act of 1978. The 1984 UFTA became the law in forty-four states, the District of Columbia, and the U.S. Virgin Islands. In July 2014, the Uniform Law Commissioners approved modest improvements to the UFTA and renamed it the Uniform *Voidable Transactions* Act, to reflect that the act covers the incurrence of obligations, as well as transfers, and that so-called "fraudulent transfers" do not require proof of the elements of common law fraud. The UVTA provides remedies available to creditors injured by what traditionally have been referred to as "intentional" or "constructive" fraudulent conveyances or transfers—property transferred or obligations incurred (a) by a debtor with actual intent to hinder, delay or defraud its creditors or (b) for less than fair consideration by an insolvent or undercapitalized debtor.

REASONS FOR THIS BILL

New York Fraudulent Conveyance Law is Archaic. Article 10 of the Debtor and Creditor Law has not been updated significantly in 90 years and is based on a "model" statute promulgated in 1918. Only New York and Maryland retain the UFCA. The proposed legislation would modernize the New York statute to reflect 100 years of developments in commercial law, legal terminology and practice and resolve many open questions under the UFCA.

New York Fraudulent Conveyance Law is Inconsistent with Federal Law and the Law in Most States. The existing New York statute differs in several respects from the law of the 44 states that have enacted the UFTA or the UVTA, on which this bill is based, and from the fraudulent transfer provisions of the U.S. Bankruptcy Code. This sometimes leads to confusion and disparate results, depending on what law is applied. These differences also fuel costly litigation over choice-of-law issues. Enactment of this bill should ameliorate all of these issues.

New York Would Benefit From a Modern Statute Consistent with other Law. New York is the country's financial center and a leader in the development of commercial law. It is in the general public interest and the interest of commerce for New York (i) to have efficient and fair remedies for creditors who are victims of voidable transactions (ii) while also protecting the justified interests of innocent and good faith recipients or beneficiaries of challenged transactions from unwarranted or inappropriate avoidance claims. It is also in the public interest to minimize litigation over choice of law by making New York voidable transactions law consistent with the law applied in the majority of other states and bankruptcy courts and by having clear New York choice of law rules that produce predictable results. It is a serious embarrassment for New York to retain an archaic statute that adds significantly to cost and uncertainty in transactions with a tie to New York. Enactment of the UVTA would further the interests of New York as a preeminent commercial jurisdiction.

Updating the Law Would Benefit Present and Potential Future Creditors. Every present creditor or potential future creditor has an interest in an efficient and certain remedy in the event that a person or entity (a "debtor") attempts to hide its assets from creditors, or otherwise acts in a way that prejudices creditors. The class of present and potential creditors of a debtor engaging in improper transactions with its assets, who would benefit from making the law more efficient and certain includes the following:

- State and local taxing authorities, seeking to collect delinquent taxes;
- Present and potential involuntary tort creditors of a debtor;
- Present and potential clients of a professional debtor with malpractice claims;
- The non-moneyed spouse in a divorce action;
- Minors who are the beneficiaries of child support orders;
- Victims of a Ponzi scheme, where avoidance law is often the primary source of recovery;
- Lenders and merchants that extend unsecured credit.

In addition, recipients of transfers who may be subject to “claw back” avoidance litigation would benefit from the new statute’s clarification of numerous substantive and procedural matters and its reduction of the uniquely long six-year “fraud” statute of limitations. The new statute also would eliminate the disincentive to organize a professional firm as a New York partnership caused by New York’s unique rules allowing “claw back” of compensation for services paid to partners after insolvency, which is unduly harsh and does not apply to other types of business organizations.

The UVTA (the “Act”) establishes the remedies available when a person indebted to others (or intending to incur future debts) transfers assets or incurs additional debts in circumstances that impair the ability of creditors to be repaid in full. The transfer (or debt incurrence) in question is voidable by an affected creditor if it is made by the debtor with actual intent to hinder, delay or defraud any creditor. It is also deemed “constructively” improper, without regard to intent, and, therefore, voidable if it is made by the debtor for less than reasonably equivalent value while the debtor is insolvent in a balance sheet sense, unable to pay its debts as they mature or will be left with unreasonably small capital to carry on its business. Included among constructively voidable transfers are “insider preferences” – transfers made by an insolvent debtor to a closely related or affiliated person.

Some of the Official Comments to the UVTA go beyond the function of explaining specific changes in the UVTA from the UFTA and do not specifically address New York case law. The City Bar does not believe they should be considered part of the legislative history of this Act in New York, except perhaps to the extent they are required to explain specific changes in the UVTA from the UFTA that are otherwise ambiguous. Except as expressly set out in this statute, there is no intention to change the substance of the law as it has evolved in New York relating to what were formerly referred to as “actually or constructively fraudulent transfers.”

SUMMARY OF SIGNIFICANT PROPOSED CHANGES TO NEW YORK LAW

Choice of Law

The UVTA makes the law of the place where the debtor/transferor is located when the transfer is made[1] the law applicable to the voidability of the transfer (UVTA § 10).[2] An organization is located at its place of business or, if it has more than one place of business, at its chief executive office. Currently, New York applies a common law “factors” choice of law analysis to fraudulent conveyance claims. This increases the cost of, and produces unpredictable outcomes in litigation and makes it difficult for parties to assess avoidance risk prior to engaging in a transaction.

[1] For simplicity of discussion and ease of reading, this memorandum refers only to avoiding “transfers made” or “transactions”, although the statute applies equally to both avoiding transfers made and avoiding obligations incurred.

[2] The rules for determining where a debtor is located under Section 10 of the UVTA are similar to those for determining where a debtor is located for the purposes of perfecting security interests under Article 9 of the Uniform Commercial Code.

Statute of Repose

Section 9 of the UVTA contains a four-year statute of repose—i.e., four years from the date the transfer was made or the obligation was incurred—for claims other than an "insider preference" (discussed below). Section 9(a) also includes a "discovery rule" for claims to void transfers made with actual intent to hinder, delay or defraud, which are preserved until "not later than one year after the transfer or obligation" "was or could reasonably have been discovered." UVTA § 9(a). New York now applies the six-year fraud statute of limitations to all avoidance claims, the longest period in the country during which a transfer may be challenged. *See* CPLR 213. Shortening the period to four years, while retaining a discovery rule, fairly balances other changes that benefit parties asserting claims and will eliminate a major incentive for "choice of law" litigation.

Clarification of Insider Preferences

Current New York law allows repayment of a debt to an insider to be recovered on the vague grounds that it was not made in "good faith," arguably allowing "claw back" even if the Debtor was not in insolvent when it made the payment. The UVTA renders voidable insider debt repayments by an insolvent debtor if the insider had reasonable cause to believe the debtor was insolvent. UVTA § 5(b).

Partnership Insolvency

New York law currently permits "claw back" of compensation for services when applied to a large professional partnership, whose "partners" are akin to employees. No such rule applies to other business organizations. The draconian impact of New York law was illustrated in the recent decision in the bankruptcy of *Dewey & LeBoeuf*.[3] All transfers to the partners after the partnership insolvency were recoverable by the trustee in bankruptcy, with no right to offset the value of services provided the partnership after the transfers. Adoption of the UVTA would eliminate this disincentive to operating partnerships subject to New York law.

"Badges of Fraud" – Defendant in Litigation

New York law is also unique in making all transfers by a defendant during pending litigation, if made without "fair consideration," voidable as to the plaintiff in the litigation (but not other creditors) if the plaintiff obtains an unsatisfied judgment. Debtor and Creditor Law § 273-a. Under the uniform statute, a transfer by a defendant in a pending litigation is a "badge of fraud" that may be relied upon, along with other factors, by all injured creditors in evaluating whether actual intent to hinder, delay or defraud creditors can be inferred. UVTA § 4(b)(4).

Good Faith as an Element of Fair Consideration

New York law permits the avoidance of a transfer as constructively fraudulent if the plaintiff proves it was received in "bad faith" even if the debtor was given "equivalent value",

[3] At 518 B.R. 766 (Bankr. S.D.N.Y. 2014).

thereby encouraging claimants to put into issue the recipient's knowledge at the time it received a transfer that did not injure creditors. Debtor and Creditor Law §§ 273-275 (elements); § 272 (definition). Under the UVTA and the Bankruptcy Code, *the transferee's intent* is irrelevant to the question of whether a transfer is voidable. The transferee must prove its own "good faith" only when it asserts an affirmative defense to a transfer claimed voidable *based on the transferor's improper intent*.

Measure of Fair Consideration in Security Transfers

Under current New York law, the test of fair value for a grant of a security interest is whether the debt being secured is "disproportionately small" as compared to the value of the collateral subject to the security interest. The UVTA abandons this test as unnecessary and inconsistent with the modern law of security interests that adequately protects the debtor's interest in the residual value of any excess collateral granted a secured creditor.

Burden of Proof

The burden of proof for all claims and defenses under the UVTA is "preponderance of the evidence." UVTA §§ 4(c), 5(c), 8(h). New York's current law requires "clear and convincing" proof of the transferor's intent to hinder, delay or defraud creditors. The UVTA rejects any analogy to common law fraud and its heightened standard of proof. UVTA § 4 cmt. 10.

Burdens and Presumptions; Insolvency Standard

Unlike current law, the UVTA specifies the elements of each claim and each defense and allocates the burden of proof on each element of the claim to the plaintiff (UVTA §§ 4(c), 5(c) while allocating the burden of proof of most elements of the affirmative defenses to the defendant (UVTA § 8(g)). These provisions will provide clarity to parties and courts.

Transferees

The UVTA clarifies the protections available to initial transferees and subsequent transferees of property transferred in a voidable transaction, including the credit available for any amounts paid for or expended to improve the property. Adoption of these rules in New York would enhance the protections to innocent parties that enter into transactions without knowledge of the impaired financial condition of the transferor from whom they receive their interest in the property transferred.

SECTION-BY-SECTION SUMMARY ANALYSIS AND COMPARISON TO EXISTING NEW YORK LAW

The New York statute follows the text of the uniform statute with the addition of § 286-a addressing the recovery of attorney's fees in claims under the statute and the omission of UVTA § 11 which address series organizations created under the law of other jurisdictions such as Delaware limited liability companies and statutory trusts. New York law does not provide for series organizations and there is no developed New York law on the recognition to be given in

New York to Series organization created in other jurisdictions. The treatment of series organizations is left to case law development.

Section 270. Definitions.

This section supplies definitions of key terms used elsewhere in the Act, including:

- "Asset", "claim", "creditor", "debt" and "debtor", "lien", "property", "transfer", "valid lien". These are the basic definitions that identify the parties and obligations subject to the statute, similar to present Debtor & Creditor Law § 270 (UFCA § 1);

- "Affiliate", "insider", "relative". These new definitions, similar to those appearing in Bankruptcy Code § 101, determine the scope of persons subject to the insider preference rules;

- "Organization", "person" – These terms are basic building blocks defined in the statute for clarity;

- "Electronic", "record", "sign". The Act introduces new definitions to reflect that agreements can be made through electronic communications, coordinating the Act with e-sign legislation

Other than with respect to the new definitions in §1 relating to electronic media, the majority of the definitions contained in §1 are either substantially similar to those contained in Debtor & Creditor Law §270 - 272 or, as stated above, are new definitions similar to those appearing in Bankruptcy Code §101. However, with respect to the definition of "insolvency", the UVTA has deleted the separate definition of insolvency applicable to partnerships, thereby making partnerships subject to the same insolvency test as all other debtors. Debtor & Creditor Law §271(2) has provided a separate definition of insolvency for partnerships, adding to the partnership's assets, the value of the separate assets of a general partner in excess of the amount sufficient to meet the claims of such general partner's creditors that has not been part of the uniform legislation since 1984.

Section 271. Insolvency.

Insolvency of a debtor is one of the required elements for voiding constructively voidable transactions. Transfers made with actual intent to hinder, delay or defraud any creditor are voidable without regard to the debtor-transferor's financial condition or the consideration received by the debtor. But constructively voidable transfers require both lack of equivalent value for the transfer and impairment of the debtor's financial ability to repay creditors. "Insolvency is one of these financial impairments. A debtor is insolvent if the debtor's debts exceed the debtor's assets at a fair valuation. Section 271(b) includes a presumption that a debtor who is generally not paying its undisputed debts is insolvent, which shifts the burden of persuasion on insolvency from the plaintiff-creditor to the defendant debtor or transferee. Section 271(c) deprives the defendant of the benefit of the value of any assets improperly transferred under the Act in determining insolvency. The definition of "assets" excludes property encumbered by a valid lien, and section 271(d) excludes the debt that is so secured from the debtor's liabilities in the computation of insolvency under Section 271(a).

The language of present Debtor & Creditor Law § 271 (UFCA § 2) has been updated. The special rule adding the net value of partner's assets in excess of their debts applicable to partnership debtors appearing in Debtor & Creditor Law § 2(2) (UFCA § 3(1) has been deleted as unnecessary along with Debtor & Creditor Law §277 (UFCA §8) which contained a special rule making all transfers of an insolvent partnership's property to its partners voidable without regard to value given by the partner.

Source – UVTA § 2

Section 272. Value.

The "value" received in exchange for a transfer (or debt incurrence) by a debtor is another key concept for avoidance of transactions not requiring a showing of actual intent to hinder, delay or defraud creditors. One element for the avoidance of such transactions under Section 273(a)(2) and 274(a) of the Act is the failure of the debtor to receive "reasonably equivalent value" in exchange for the transaction.

Section 272(a) sets out various rules for determining what constitutes "value". Thus, satisfaction of an antecedent debt owed by the debtor constitutes value to the debtor for a transaction. As a result, transfers of property by a debtor to pay or secure its preexisting debt that might be subject to avoidance as preferential in a bankruptcy case or assignment for the benefit of creditors are not subject to avoidance under this law, unless they are also shown to involve actual intent to hinder, delay or defraud or were made to an "insider" of the debtor. Section 272(a) also includes a new special rule that the receipt by a debtor of an "unperformed promise to furnish support" made by a promisor "otherwise than in the ordinary course of the promisor's business" is not "value" for the purposes of the statute.

Section 272(b) provides that a person gives reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, non-collusive disposition upon default under a mortgage or security agreement. The foreclosure sale may not be avoided even through the price obtained in the foreclosure is less than the "fair market value" of the property that might have been realized in a sale by a willing seller not subject to compulsion. This rule has already been established for foreclosure sales of real property by the United Sates Supreme Court in the application of the analogous provisions of the federal Bankruptcy Code, and is intended to protect the finality of, and eliminate risk in, purchases at foreclosure sales in order to enhance the value that may be obtained.

Section 272(c) provides that a transfer is made for "present value" if it intended to be contemporaneous and is in fact substantially contemporaneous, in order to identify when transfers to insiders may be deemed payments of antecedent debts for avoidance purposes under Section 274(b).

The Act eliminates the potential that the plaintiff-creditor can establish lack of fair value for the transfer by providing that the transfer was not made in good faith, even though the debtor received reasonably equivalent value. Under the revised statute , the plaintiff must prove that the debtor received less than reasonably equivalent value, and then the burden shifts to the defendant-transferee to establish that it acted in good faith under Section 277. However, the ability of a plaintiff-creditor to avoid "insider preferences", which the case law had permitted on the grounds of lack of bad faith, is directly preserved by Section 274(b). The potential to avoid transfers for security on the ground that the debt was disproportionate to the value of the collateral contained in Debtor & Creditor Law § 272 is eliminated as unnecessary in § 272. The statute recognizes that there is no harm to the debtor or its other creditors if the secured debt is less than the value of the property since the surplus value of the collateral remains available to the creditors.

Section 273. Transfer or obligation voidable as to present or future creditor.

This is the first of the two principal operative sections of the Act and sets out two of the four principal rules for the avoidance of transfers. Rights to avoid transfers are extended to both creditors existing at the time of the transfer and future creditors, for transfers that are voidable under Section 273. Section 273 is substantially similar to existing New York law and not intended to affect any material changes to that law. Because of this, the City Bar does not regard the general discussion of fraudulent transfer law in the Official Comments to Section 4 of the UVTA to be necessary or authoritative to interpret this section. Specifically, comment number 2 and comment number 8 to Section 4 of the UVTA are inconsistent with New York law and are not supported by the text of the UVTA. Therefore, these two comments should not be considered when interpreting the UVTA, as enacted in New York. It is worth noting that other jurisdictions have reached the same conclusion regarding these two comments.[4]

The first category of transaction voidable under Section 273 covers those made with "actual intent to hinder, delay or defraud any creditor of the debtor (Section 273(a)(1)), similar to present Debtor & Creditor Law § 276 (UFCA § 7). These transfers are referred to as transfers subject to avoidance for "actual intent." No showing of common law deceit is required. Recognizing the difficulties in proving the state of mind of the transferor, Section 273(b) incorporates a list of traditional "badges of fraud" developed in the case law from which actual intent may be inferred. Claims based on actual intent do not require proof either of lack of an exchange of reasonably equivalent value or of the debtor's impaired financial condition, although both facts are "badges of fraud" relevant to establishing actual intent. Because of the requirement of proof of actual intent, the Act does not identify any particular transactions or types of transactions as *per se*, or even presumptively, voidable. The requirement of proof by a preponderance of the evidence of "actual intent to hinder, delay or defraud" a creditor must be met in every instance, as required by the case law. Thus, the making of a transfer by a debtor against whom a suit has been commenced or threatened will no longer render the transaction *per se* voidable. However, it continues to be a badge of fraud that may in appropriate circumstances support a finding of actual intent.

Section 273(a)(2) also permits the avoidance of transfers made by a debtor for which it did not receive reasonably equivalent value, if that debtor (i) was left with unreasonably small assets for a business or transaction in which it was engaged or about to engage or (ii) intended to incur or believed or reasonable should have believed that it would incur debtors beyond its

[4] *See, i.e.* Arkansas Act 1086, Sect. 2.

ability to pay as they came due. These conditions have been referred to as “equitable insolvency.” The transferor here has created an unreasonable risk that parties with which it is transacting business, or will in the future transact business, will be left unpaid.

The analogous rule in the present statutes are contained in Debtor & Creditor Law § 274 (UFCA §5). “Conveyance by a Party in Business and Debtor & Creditor Law § 275 (UFCA § 6) “Conveyance by a Person About to Incur Debts.”

Section 273(c) establishes the burden of persuasion to avoid a transfer on Section 273 grounds as the preponderance of the evidence, explicitly excluding the “clear and convincing” standard as the proper standard to establish a claim under the section, including claims based on "actual intent to hinder delay or defraud” under Section 273(a)(1). The current statute contains no rules or burden of proof.

Source – UVTA § 4.

Section 274. Transfer or obligation voidable as to present creditor.

This is the second of the two principal operative sections and sets out the other two principal rules for the avoidance of transfers. Rights under this section of the Act are extended only to creditors with claims at the time of the transfer. This is in contrast to Section 273, which allows both present and future creditors to avoid transfers.

Section 274(a) permits creditors who claims arose prior to the transaction to avoid transactions that are made without reasonably equivalent value by a debtor who is insolvent in the balance sheet sense as defined in Section 272 or who becomes insolvent by reason of the transaction. This rule is similar to present Debtor & Creditor Law § 273 (UFCA § 4)

Section 274(b) establishes the special rules applicable to transfers by a debtor to its insiders as defined in Section 270(8). The prior case law had permitted avoidance of such transfers, despite the presence of an exchange of equal value in the form of debt satisfaction, on the grounds that such transfers were made in bad faith. The modification of the definition of reasonably equivalent value to eliminate the “good faith” requirement would eliminate this ground to avoid insider preferences. Thus, Section 274(b) deals with the subject directly. While payment of a debt owed to an unrelated creditor is considered reasonably equivalent value, the potential for abuse where a debtor prefers relatives or other affiliated parties while insolvent, subjects such transfers to scrutiny under Section 274(b).

Section 274(b) also recognizes certain defenses the insider may establish. If the insider gives new value after the transfer, if the transfer to the insider was made in ordinary course of business of the debtor and insider, or if the transfer was made in a good faith effort to rehabilitate the financial affairs of the debtor and was given both to secure new value as well as to satisfy an antecedent debt, then the insider preference is not voidable.

Section 274(c) establishes the preponderance standard as the burden of persuasion for claims under Section 274, subject to Section 271(b) which permits the plaintiff creditor to establish “equitable” insolvency – that the debtor was not paying its undisputed debts as they came due – and then shifts to the transferor-defendant the burden of establishing that the debtor was not balance sheet insolvent. This rule is new since the predecessor statutes contain no codified rules on burden of proof.

Source – UVTA § 5

Section 275. When transfer is made or obligation is incurred.

This section establishes the period within which an action to void or recover a voidable transfer must be commenced for the purposes of Section 278 “Extinguishment of Claim for Relief.”

Section 275(1) follows the usual rules (i) that a transfer of real property other than fixtures is complete when it is recorded and becomes effective against a good faith purchaser (ii) and that the transfer of personal property and fixtures is complete when it is effective against lien creditors. These are the same tests as Bankruptcy Code § 547(e). Where it was possible to perfect a transfer under the rules of subsection (1) but the necessary steps were not taken, the transfer is deemed made immediately before the commencement of the action to avoid the transfer (Section 275(2)). If applicable law does not permit perfection as provided in Section 275(1), the transfer is effective when it is effective between the parties, but not earlier than when the debtor has rights in the asset transferred (Section 275(3)). The transfer of property pursuant to an agreement is not effective before the debtor acquires the property to be transferred (Section 275(4)).

Section 275(5) sets the rules for determining when an obligation is incurred. If the obligation is oral, it is effective when it is effective between the parties; if the obligation is subject to the statute of frauds, such as an undertaking to pay the debt of another (General Obligations Law § 5-701(2) or a conveyance of real property other than a short term lease (General Obligations Law § 5-703), then the obligation is not incurred for the purposes of the Act until in writing.

Section 275(5)(ii) and the related definitions permit electronic communications to serve as sufficient record for the purposes of the statute. These rules are new.

Source – UVTA § 6

Section 276. Remedies of creditor.

Section 276 specifies the relief that is available to a creditor to address a voidable transaction.

Section 276 (a)(1) permits the avoidance of the transfer made or obligation incurred to the extent necessary to satisfy the creditor’s claim. The basic relief is to unwind the voidable transaction by cancelling the obligation or reversing the transfer, subject to the rights of transferees set forth in Section 277. The transaction is avoided only to the extent necessary to satisfy the claim of the creditor bringing the challenge. This does not change existing law.

Section 276 (a)(2) makes attachment and other provisional remedies under the CPLR available against the transferee or the asset transferred or other property of the transferee. The plaintiff creditor will have to comply with the requirements of the CPLR, including the necessary evidentiary showing and security for any claim by the transferee of the property subjected to the provisional remedy if the creditor does not ultimately prevail on its claim. *See, e.g.*, CPLR 6212.

Section 276 (a)(3) states that the plaintiff creditor may obtain injunctive relief, appointment of a receiver or other provisional or final remedies as circumstances may require, "subject to applicable principle of equity and in accordance with applicable law.

Section 276 (b) specifies that if the creditor has a judgment against the debtor, the court may authorize the creditor to levy execution on the asset transferred in the hands of the transferee or the proceeds of the transfer, presumably in the hands of the transferor.

Section 276 combines in one section the remedy sections of existing law which separately specify the relief available to a creditor whose claims have matured in Debtor & Creditor Law § 278; UFCA § 9) and creditors whose claims have not matured (Debtor & Creditor Law § 279; UFCA § 10).

Source – UVTA § 7.

Section 276-a Attorney's Fees in an action or special proceeding to avoid a transfer or obligation.

The statute contains a non-uniform provision that would carry forward the current concept of Section 276-a of the Debtor & Creditor Law, which gives the prevailing party the right to attorney's fees in certain circumstances. That relief will be available, without regard to whether actual intent or constructive intent is established, where the underlying claim of the creditor entitles him to attorney's fees, subject in the case of the transferee to the defenses and protections of Section 277.

Source – former Debtor & Creditor Law § 276-a; not part of the UVTA

Section 277. Defenses, liability, and protection of transferee or obligee.

Section 277 elaborates and codifies the defenses available to transferees or obligees who are sued. These defenses include those of both initial transferees who deal directly with the transferor as well as "subsequent transferees" who acquire the property that is the subject of the claims but had no direct dealings with the transferor. The protections or defenses vary depending on the knowledge of the transferee and the value given. The section clarifies that the defenses and offsets available to transferees depend on their knowledge or actions rather than on the transferor's state of mind or intent, which are elements in establishing the claim.

Section 277(a)(1) establishes that, with respect to a claim under Section 4(a)(1) based on the actual intent of the transferor to hinder delay or defraud its creditors, the transaction is not voidable against a person who establishes that he took in good faith and for a reasonably equivalent value given to the debtor. The transfer or obligation also is not avoidable against any subsequent transferee of a person who has established good faith and reasonably equivalent value. The section highlights that the absence of good faith is not an element of an "actual intent claim under Section 273(a)(1). Under present New York law, that plaintiff must establish both lack of equivalent value and lack of good faith as elements of the measure of fair consideration (Debtor & Creditor Law § 272; UFCA § 3). Good faith is not a part of the definition of fair value under Section 272 of the UVTA. The defense for transferees available under existing law requires absence of "knowledge of the fraud at the time of purchase" (Debtor & Creditor Law § 278(1); UFCA § 9(1)).

Under Section 277(b) to the extent that a transaction is avoided, the creditor's remedies are to recover a judgment for the lesser of the value of the asset transferred (subject to possible equitable adjustment) or the amount of the creditor's claim. This judgment may be entered against (1) the initial transferee or the person for "whose benefit the transfer was made" or (2) a subsequent transferee of the initial transferee who cannot establish that it took for value in good faith. If any subsequent transferee establishes those defenses, then no judgment can be entered against any of its subsequent transferees. Good faith is not defined in the statute but is a concept familiar from the Debtor & Creditor Law and other bodies of law. Under Section 277(c), remedies to recover the asset are not available against a person who has a defense against the claim under Section 8(b)(1). As under Bankruptcy Code § 550(a) relief is available against a person benefitted by the transfer even if that person is not the transferee.

Under section 277(d) even if a transaction is voidable, the good faith transferee or obligee is entitled, to the extent of value given, to a lien on the asset transferred, enforcement of the obligation or reduction in liability on a judgment. This is consistent to the offsets available to a "purchaser without actual fraudulent intent" under current law. Debtor & Creditor Law § 278(2); UFCA § 9(2)).

To correct what the drafters saw as misapplications of prior law, Section 277(e) excludes from avoidance categories transactions that have been identified as not the proper subject of avoidance. The first is the termination of a lease pursuant to its terms and applicable law even where the lease has a below market rent and defaulting lessee might, in the absence of the default, have been able to realize value from the lease by an assignment pursuant to the terms of the lease or in a bankruptcy case. The second is the enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. This subsection extends to personal property the finality of regularly conducted non-collusive foreclosure of real property established in Section 272(b). "Strict foreclosure" – the acceptance of the collateral in satisfaction of the debt when UCC §§ 9-620 to 9-622 – is excluded since that action does not subject the collateral to a market test for a commercially reasonable disposition. These rules are new to the statute but codify the holdings of the better reasoned case law.

Section 277(f) provides two defenses available to a transfer avoided as an "insider preference" under Section 274(b). Similar to the defenses available under Bankruptcy Code § 547(c) to preference claims under that statute, a transferee has a defense (1) to the extent that the insider gave "new value" to or for the benefit of the debtor after the transfer was made, except where the new value was secured by a valid lien (similar to Bankruptcy Code § 547 (c)(4), (2)) the transfer was made in the ordinary course of business or financial affairs (similar to Bankruptcy Code § 547 (c)(2), or (3) made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secures present value given for that purpose as well as an antecedent debt. The third alternative addresses the pattern where, in exchange for a new advance or other value given to the debtor, the insider receives collateral securing not just the new value but also the pre-existing indebtedness.

Section 277(g) allocates the burden of persuasion between the transferors and transferee for each of the defenses in the section.

Section 277(h) establishes the applicable standard for the burden as preponderance, consistent with Sections 273(c) and 274(c). Except for burden of proof, which is not addressed in current law, these rules are an elaboration of concepts appearing in the present statutes. Similar rules apply under Bankruptcy Code § 550.

Source – UVTA § 8

Section 278. Extinguishment of claim for relief.

In a change from present law, Section 278 establishes a four year "statute of repose" for avoidance claims with a one year discovery period for actual intent claims. For "insider preference" claims under Section 274(b), the period is one year (conforming to the reach back period under Bankruptcy Code § 547(b)(4)(B)). This is a change from New York's present six year statute of limitations with a two year discovery period in CPLR § 213(8). The rationale is that, as described elsewhere, and highlighted by the change in nomenclature from "fraudulent transfers" to "voidable transactions", claims under the statute are not claims of common law fraud or deceit. New York's present period of limitations is longer than the periods applicable in most other states. Section 278 operates as a statute of repose terminating the right and not merely the remedy, and, therefore, any other state applying New York voidable transfer law should apply the New York statute of repose, and New York would be expected to apply the applicable stature of repose of any other state the voidable transfer law of which it is applying in any case.

Source – UVTA § 9

Section 279. Governing law.

Section 279 is a choice of law rule determining which state's laws will apply to the avoidance of any transfer. New York has not had a statute providing a choice of law rule for voidable transfers. The courts have applied the tort principles of conflicts of law using various discretionary factors in order to attempt to identify the state with the greatest interest in the transaction, and focusing frequently on the place of the "injury" as the proper choice of law. The Act establishes a clear rule that the law of the location of the debtor/transferor is the applicable choice of law. Section 279(a) gives rules for the determination of a debtor's location – an individual is located at the individual's residence, an organization is located at its one place of business or its chief executive office if it has more than one place of business, similar to the rules for organization other than registered organizations organized under state law under Section 9-307 of the Uniform Commercial Code. This adoption of a clear rule should provide more predictable outcomes for both creditors and debtors and minimize unnecessary litigation over choice of law rules.

The adoption of this procedural choice of law rule is not intended to imply any substantive change to New York law. There is no intention to deprive persons located in New York of the ability they may otherwise have in appropriate circumstances to avail themselves in the conduct of their affairs of types of transactions, or business or personal planning entities or structures, including trusts, governed by or organized under by the laws of other states. There is also no intention to override the choice of law rules of states in which such entities or structures are organized or authorized, to the extent they are applicable, as, for example, to such matters as creditor remedies.

Source – UVTA § 10

Section 280. Supplementary provisions.

Section 12 expressly incorporates other principles of law carrying forward present law (Debtor & Creditor Law § 280; UFCA § 11)

Source – UVTA § 12.

Section 281. Uniformity of application and construction

As with the existing law and other uniform act adoptions, Section 13 calls for uniform construction with the enactments of other jurisdictions. Existing law is the same (Debtor & Creditor Law § 281; UFCA § 12).

Section 281-a. Relation to electronic signatures in global and national commerce act.

This section expressly addresses the interaction of the article with federal e-Sign legislation by, as authorized by the federal statute, superseding its application except for specified protections to consumers.

Source – UVTA § 14

IMPACT ON OTHER AREAS OF NEW YORK LAW

<u>Civil Procedure, Remedies, Pleading and Proof</u>

As summarized above, the new legislation would change or clarify applicable choice of law rules, the available provisional and final remedies, and rules of pleading, presumptions and burden of persuasion.

<u>Family Law</u>

Avoidance claims can arise in the context of divorce and property settlements, where a spouse may have transferred property to frustrate equitable distribution rights. The UVTA also clarifies the protections from claims of creditors of the transferring spouse available to an innocent spouse who has received property in connection with the dissolution of a marriage.

Tax and Tort Claimants

The UVTA provides the same protections for involuntary tort and tax creditors as it does for contractual creditors against the debtor's improper transfers. This will aid involuntary creditors in collecting on their claims.

Real Property and Personal Property Security Interests

The UVTA protects a purchaser of real or personal property that is the subject of a foreclosure sale by establishing the finality of a transfer pursuant to a regularly conducted foreclosure sale. This does not apply to property retained by the secured creditor in a "strict foreclosure" where there is no market test of the property value. This protection for purchasers should improve the prices realized in foreclosure sales, to the benefit of both borrowers and their creditors.

Criminal Law

The proposed legislation proposes no changes to criminal law applicable to persons who commit frauds punishable under the Criminal Law.

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