

New York Adopts Uniform Voidable Transactions Act

December 10, 2019

On Friday, December 6, 2019, New York Governor Andrew M. Cuomo signed legislation enacting the Uniform Voidable Transactions Act (“NY UVTA”) and repealing Article 10 (§§ 270-281) of New York’s Debtor and Creditor Law, which was New York’s prior statute governing fraudulent conveyances. The UVTA is a model act, drafted by the Uniform Law Commission, which has been adopted by 20 states—in addition to New York—and which has been introduced in three others.¹

The new legislation enacting the NY UVTA replaces New York’s codification of the Uniform Fraudulent Conveyance Act (“NY UFCA”), which New York adopted nearly 100 years ago, in 1925. While the fundamental principles of New York’s fraudulent transfer laws remain the same, the adoption of the NY UVTA more closely aligns New York’s fraudulent transfer statute with the fraudulent transfer provisions of the U.S. Bankruptcy Code and the fraudulent transfer laws of other states. In addition, the newly adopted NY UVTA expressly sets forth certain key aspects of fraudulent transfer law—such as statutes of limitations and the definition and treatment of transfers to insiders—which had previously been governed by reference to other New York statutes or by case law. As the full set of changes—large and small—enacted by the NY UVTA is too numerous to note here, we review some of the most notable changes below.

Notable changes effected by the NY UVTA include:

- **The NY UVTA Provides Express “Lookback” Periods**

New York’s prior law, the NY UFCA, notably did not independently provide for any statutory period during which a fraudulent transfer claim might be brought—a gap which was filled by reference to the six-year statute of limitations in CPLR 213. The NY UVTA now expressly provides that actions to avoid a constructive fraudulent transfer must be brought within four years of the transfer or obligation to be avoided, and that actions to avoid an intentional fraudulent transfer must be brought within either four years of the transfer or obligation to be avoided or within one year of when the transfer or obligation was or reasonably could have been discovered, whichever is later. § 278. The NY UVTA also clarifies that any right of action is extinguished after this period—a further change from the prior NY UFCA, under which the six-year period functioned as a statute of limitations, rather than a statute of repose. Finally, the NY UVTA provides for a period of one year after the transfer in question to avoid a transfer to an insider—similar to the Bankruptcy Code’s insider preference reach back period of one year prior to the petition date, under 11 U.S.C. § 547(b)(4)(B).

- **The NY UVTA Eliminates New York’s “Good Faith” Requirement for Fair Consideration**

Previously, under the NY UFCA, a transfer could be avoided as constructively fraudulent if made without “fair consideration”—which, in turn, required both that the transfer be made for a “fair equivalent” and that the transfer be made or received in “good faith.” As the Second Circuit has observed, the role of “good

¹ In addition to New York, the UVTA has been enacted in Alabama, Arkansas, California, Georgia, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Nebraska, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, Utah, Vermont, Washington, and West Virginia. Bills proposing to enact the UVTA have been introduced in New Jersey, Massachusetts, and South Carolina.

faith” in a constructive fraudulent transfer is an “elusive” one, and courts applying New York law have often grappled with the circumstances in which a transfer for a “fair equivalent” should nonetheless be voidable as constructively fraudulent because not made or received in good faith.² While, on the one hand, the “good faith” requirement has allowed New York courts to address circumstances not covered by the prior law—such as preferential repayments of debts to insiders³—on the other hand it raised the specter of a transfer or obligation being voidable even if the debtor received a dollar-for-dollar equivalent in exchange.⁴

The NY UVTA eliminates the “good faith” element of a constructive fraudulent transfer and, instead, adopts the “reasonably equivalent value” requirement of the Bankruptcy Code and Uniform Fraudulent Transfer Act (“UFTA”). 11 U.S.C. 548; e.g., Del. Code Ann. tit. 6 §§ 1304-1305. This change should provide parties greater certainty when evaluating the legal risks of a transaction by removing a “state of mind” element from the consideration of whether a debtor received reasonably equivalent value in exchange for a transfer or obligation. Parties will have a wealth of judicial guidance interpreting the “reasonably equivalent value” test of the Bankruptcy Code and the UFTA, a predecessor to the UVTA.

- **The NY UVTA Provides for a New, State-Law Insider Preference Statute**

New York’s prior law, the NY UFCA, did not provide an express cause of action to avoid a transfer to insiders (though, as noted above, transfers to insiders could be found to lack the “good faith” required for “fair consideration”). The NY UVTA now provides for an express cause of action to avoid transfers to insiders if the insider had reasonable cause to believe that the debtor was insolvent. §274(b). The NY UVTA also includes an express, statutory definition of “insider” that substantially mirrors the definition of “insider” in the Bankruptcy Code.

- **The NY UVTA Provides for a Simpler Choice-of-Law Analysis**

The NY UVTA now provides for a straightforward choice-of-law analysis: the applicable law is the law of the place where the debtor-transferor is located at the time of the transfer—which, for an organization, is defined as either its sole place of business or, if has more than one place of business, its chief executive office. § 279. This test is expected to lead to more predictable outcomes than the multi-step choice of law analysis previously applied by New York courts,⁵ which in turn should allow parties to more accurately assess prospectively the fraudulent transfer laws that will govern a transaction.

- **The NY UVTA Eliminates New York’s Special Fraudulent Transfer Law for Litigation Defendants**

New York’s prior statute, the NY UFCA, provided that a transfer made by a defendant during the pendency of a litigation is voidable by the plaintiff in the litigation—without consideration of the defendant’s solvency at the time of the transfer—if a plaintiff obtained an unsatisfied judgment, and the transfer was made without fair consideration. NY UFCA § 273-a. The NY UVTA eliminates this provision and does not include any special statute addressing transfers by defendants. To be sure, transfers by insolvent defendants—or transfers defendants make with actual intent to defraud—remain subject to the general actual and constructive fraud provisions of the NY UVTA. The NY UVTA also specifically enumerates whether “the debtor had been sued or threatened with suit” as a “badge of fraud” that may be

² *Sharp Int’l Corp. v. State St. Bank & Trust Co. (In re Sharp Int’l Corp.)*, 403 F.3d 43, 53-54 (2d Cir. 2005).

³ *Sharp*, 403 F.3d at 54-55.

⁴ E.g., *Long Oil Heat, Inc. v. Spencer*, 375 F. Supp. 3d 175, 197 (N.D.N.Y. 2019) (citing *Chen v. New Trend Apparel, Inc.*, 8 F. Supp. 3d 406, 448-449 (S.D.N.Y. 2014)).

⁵ See, e.g., *Drenis v. Haligiannis*, 452 F. Supp. 2d 418 (S.D.N.Y. 2006).

considered when evaluating whether a defendant acted with actual intent to “hinder, delay, or defraud” creditors. § 273(b)(4).

Whether this change will have a significant practical effect remains to be seen. For one, plaintiffs pursuing fraudulent transfer claims to collect unsatisfied judgments will now be required to prove insolvency in connection with a constructive fraudulent transfer claim, but will no longer need to plead alternative claims under a special statute for judgment creditors. That requirement may put additional emphasis on assessments of whether plaintiffs in pending or anticipated litigation are sufficiently likely to prevail or win claims of sufficient magnitude such that the expected risk-adjusted value of the adverse judgment renders the debtor insolvent.⁶

The Two Statutory Regimes Will Coexist for Years

The NY UVTA will become effective 120 days from the date of signature. By its terms, the NY UVTA applies to transfers made, or obligations incurred, on or after the effective date. New York’s prior Debtor Creditor Law which, as noted above, codified the UFCA, will govern transfers made, obligations incurred, or rights of action accrued before April 4, 2020.

As a result, we expect that the NY UFCA will be applied and interpreted alongside the NY UVTA for a number of years—potentially as long as a decade—until all transfers made or obligations incurred before the effective date are beyond the limitations period under prior law. Accordingly, while the NY UVTA represents a major incremental step in the development of New York’s fraudulent transfer laws, principles and cases governing NY UFCA will remain relevant for years to come—and will present New York courts with ample opportunity to comment on the extent to which prior cases will govern the New York courts’ interpretation of the NY UVTA.

⁶ See, e.g., *Xonics Photochemical, Inc. v. Mitsui & Co. (In re Xonics)*, 841 F.2d 198 (7th Cir. 1988).

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