

## The Uniform Voidable Transactions Act in a Nutshell

In December of 2016, Michigan became one of currently 15 states,<sup>iii</sup> including North Carolina,<sup>iv</sup> to adopt the Uniform Voidable Transactions Act (“UVTA.”)<sup>v</sup> In 2014, the Uniform Law Commission promulgated the UVTA, which amends the Uniform Fraudulent Transfer Act (“UFTA”).

The UFTA is the most widely adopted

statute in the United States (including Ohio<sup>vi</sup> and Florida<sup>vii</sup>) addressing fraudulent transfer law. Briefly, fraudulent transfer law permits creditors to void a debtor’s transaction in two situations: when a debtor engages in a transaction with the intent to hinder, delay or defraud any creditor,



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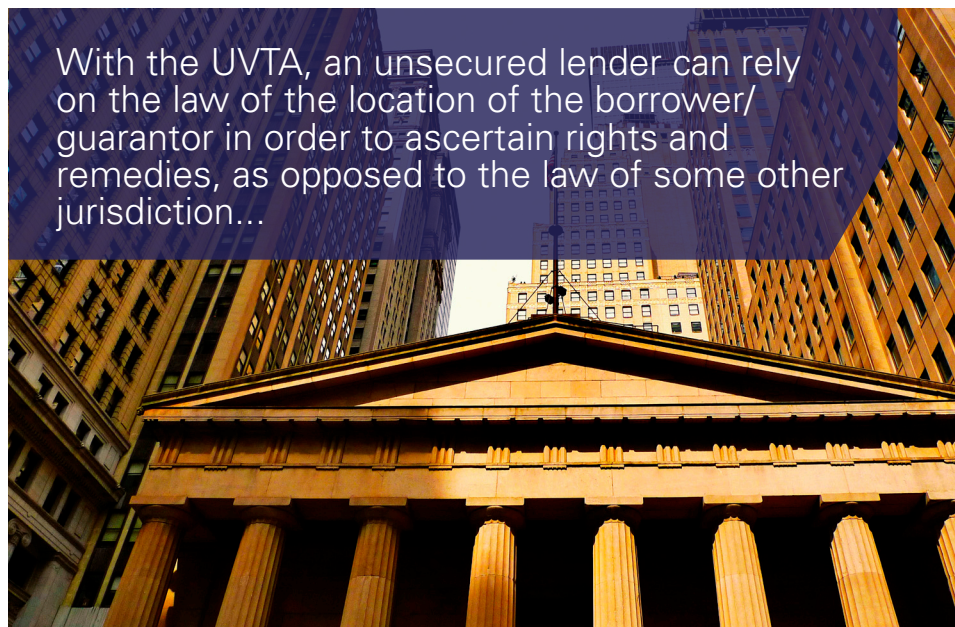


and Mark Hildreth<sup>ii</sup>

or when a debtor makes a transfer without receiving “reasonably equivalent value” under certain conditions.

Modern fraudulent transfer law traces its roots to the Statute of 13 Elizabeth, enacted by the English Parliament in 1571. Although most states have adopted the UFTA, there are still differences among the states, such as the availability of costs for creditors, longer statutes of limitations for creditors, liability for those who assist with a fraudulent transfer, or protections for charities that receive proceeds of fraudulent transfers.

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The UVTA provides four significant changes to the UFTA. The first change is a choice of law provision, requiring the voidable transaction law of the debtor’s “location” to govern the voidable transaction claim. Second, the UVTA clarifies that the creditor’s burden of proving intent to hinder, delay or defraud is by a “preponderance of the evidence” as opposed to “clear and convincing evidence” – a standard used by some courts. Third, the UVTA identifies “series” LLCs, and clarifies that transactions between a series and another series can be viewed as

voidable transactions. Fourth, the term fraudulent is replaced with “voidable,” reflecting the fact that fraud (in its common law sense) is not a requirement for setting aside a transfer.

Other than these and a few other changes to the UFTA, the UVTA also features updated “Official Comments” reflecting the aforementioned changes, as well as citations to updated case law. This is important because the UFTA Official Comments (adopted in 1984) do not contain case law examples beyond the early 1980’s. Among the updates in the Official Comments include analysis related to limited liability companies (LLCs) and domestic asset protection trusts – entity forms that were not popular (or even in existence) in 1984.

The driving force behind the amendments to the UFTA was the choice of law provision, as the test for determining which jurisdiction’s law would apply to cross-border fraudulent transfers is not clear. In these situations, parties often use a multi-factor test under the Restatement Second of Conflicts of Law. With the UVTA, an unsecured lender can rely on the law of the location of the borrower/guarantor in order to ascertain rights and remedies, as opposed to the law of some other jurisdiction, like the Cook Islands, when attempting to seek relief. The same holds true for involuntary creditors, such as tort victims or spouses in divorce,<sup>viii</sup> who would otherwise experience great difficulty seeking relief (if any) in pro-debtor jurisdictions like the Cook Islands.

*TrustCo Bank v. Mathews*<sup>ix</sup> is a recent case out of Delaware that illustrates how lenders can be injured by an unfavorable choice of law decision,

as well as a debtor’s use of vague notice to toll the one-year statute of limitations applicable to certain fraudulent transfers. In *Mathews*, the debtor, a guarantor, created an asset protection trust in Delaware and then transferred assets prior to the borrower’s default on the loan. The Delaware court did not apply the lender’s preferred choice of fraudulent transfer law, and also found sufficient notice was provided to the bank when the debtor submitted a financial statement that included a reference to “estate planning.” Once a bank officer received the statement, the statute of limitations began to run, to the lender’s detriment.

The UVTA reflects an update to creditors’ rights law, and serves as a reminder that as transactions become more sophisticated, creditors, too, must be vigilant in protecting their rights. As transactions continue to expand beyond state and country lines, creditors of the parties involved must understand the consequences of such expansion. Creditors in all jurisdictions, especially those without the UVTA, must be increasingly aware of how a debtor can force a creditor to seek relief under the law of a pro-debtor location.

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## FOOTNOTES

<sup>i</sup> Dave Slenn was appointed by the American Bar Association’s Business Law Section as an Advisor to Uniform Law Commission’s Drafting Committee for amendments to the Uniform Fraudulent Transfer Act that produced the Uniform Voidable Transactions Act (UVTA), as well as a member of the Florida Bar’s Business Law Section task force that analyzed and supported the adoption of the UVTA in Florida. Dave also testified on behalf of the Florida Bar’s Business Law Section before the Florida Senate’s Committee on Banking and Insurance in favor of Florida’s adoption of the UVTA.

<sup>ii</sup> Mark Hildreth is board certified in business bankruptcy law by the American Board of Certification and is a member of the UVTA task force of the Florida Bar Business Law Section.

<sup>iii</sup> Michigan Uniform Voidable Transactions Act, effective April 10, 2017. See Mich. Comp. Laws Ann. § 566.31, *et seq.*

<sup>iv</sup> North Carolina Uniform Voidable Transactions Act, effective October 1, 2015. See G.S. § 39-23.1, *et seq.*

<sup>v</sup> The UVTA is currently pending in eight states.

<sup>vi</sup> Ohio Uniform Fraudulent Transfer Act, Ohio Rev. Code Ann. § 1336.01, *et seq.*

<sup>vii</sup> Florida Uniform Fraudulent Transfer Act, Fla. Stat. Ann. § 726.101, *et seq.*

<sup>viii</sup> *Riechers v. Riechers*, 178 Misc. 2d 170, 174, 679 N.Y.S.2d 233, 236 (Sup. Ct. 1998), *aff’d*, 267 A.D.2d 445, 701 N.Y.S.2d 113 (1999).

<sup>ix</sup> *TrustCo Bank v. Mathews*, No. CV 8374-VCP, 2015 WL 295373, at \*2 (Del. Ch. Jan. 22, 2015).