CODIFYING A CHOICE OF LAW RULE FOR FRAUDULENT TRANSFER: A MEMORANDUM TO THE UNIFORM LAW COMMISSION[*]

KENNETH C. KETTERING[**]

TABLE OF CONTENTS

Apart from this introductory statement and the postscript, this paper consists of a memorandum the author submitted to the Committee on Scope and Program of the Uniform Law Commission, dated June 1, 2011, polished for publication.

———

 References in this paper to the Bankruptcy Code are to title 11, United States Code, as of January 1, 2011. References to the *First Restatement* and the *Second Restatement* are to RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934) and RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971), respectively.

[**] Visiting Professor, University of Miami School of Law. E-mail: kck@post.harvard.edu.

I. THE PROPOSAL

The Uniform Law Commission ("ULC") has had great success in codifying the law of fraudulent transfer. The current uniform law on the subject, the Uniform Fraudulent Transfer Act ("UFTA"), promulgated in 1984, has been enacted by 43 states. The UFTA was a modernization of the Uniform Fraudulent Conveyance Act ("UFCA"), promulgated in 1918, which was widely enacted in its time and remains the law in two states.[1]

Neither the UFTA nor the UFCA contains any choice of law rule. They therefore leave to other law—which in every state appears to be common law—determination of which jurisdiction's fraudulent transfer law applies when a given transaction is challenged.[2] The purpose of this paper is to propose that the ULC institute a project to draft a uniform law on that subject, either as part of a revised UFTA or as a stand-alone statute.

My interest in this subject is purely academic. I have recently published articles on fraudulent transfer law[3] and on choice of law in the uniform law process,[4] on which this paper liberally draws. I am a full-time academic and am not affiliated with or receiving compensation from any entity that has an economic interest in this issue. The subject is, nevertheless, of eminent practical significance, as I know from my experience as a practicing lawyer. The views expressed herein are exclusively my own.

II. BACKGROUND

Fraudulent transfer is the doctrine that marks the limits of an entity's right, vis-à-vis its creditors, to deal with its property. Its origin is conventionally traced to the English enactment in 1571 of the Statute of 13 Elizabeth, which prohibited debtors from making any transfer of property with "intent to delay, hinder or defraud creditors."[5] That statute was penal, but English lawmakers soon adapted its principle to private law, and in that form it was received into American law from colonial times. As previously noted, today almost all states have codified the doctrine by enacting the UFTA (or, in two laggard states, the older UFCA). If a

---

[1] The seven states that have not enacted the UFTA are Alaska, Kentucky, Louisiana (which repealed the UFTA in 2004 after enacting it in 2003), Maryland, New York, South Carolina, and Virginia. Of those, the UFCA is in force in Maryland and New York, and the other five have idiosyncratic statutes or rely upon common law. Of non-state territories, the UFTA is in force in the District of Columbia and in 2011 a bill to enact it was introduced in the U.S. Virgin Islands (currently a UFCA jurisdiction).

[2] For possible qualifications to the assertion that choice of law for fraudulent transfer is left to the common law in every state, see *infra* at notes 19 and 20.

[3] *See, e.g.*, Kenneth C. Kettering, *Securitization and Its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553, 1585-1622 (2008) [hereinafter *Discontents*]; Kenneth C. Kettering, *Pride and Prejudice in Securitization: A Reply to Professor Plank*, 30 CARDOZO L. REV. 1977, 1984-92 (2009) [hereinafter *Pride and Prejudice*].

[4] *See* Kenneth C. Kettering, *Harmonizing Choice of Law in Article 9 with Emerging International Norms*, 46 GONZ. L. REV. 235 (2011) [hereinafter *Harmonizing*].

[5] 13 Eliz., c. 5 (1571) (Eng.).

creditor successfully challenges a transfer of property by his debtor under either statute, the creditor's core remedy is to avoid the transfer, so that the creditor can proceed to enforce his remedies as creditor against the transferred property.[6] If a debtor becomes subject to a proceeding under the Bankruptcy Code, the debtor's trustee has the power to employ applicable state fraudulent transfer law to attack pre-petition transfers of property by the debtor, with the recovery inuring to the bankruptcy estate.[7] The bankruptcy trustee may also attack such transfers under a fraudulent transfer provision integral to the Bankruptcy Code, section 548. The same pattern prevailed under the former Bankruptcy Act, which from its inception in 1898 empowered a debtor's trustee to attack pre-petition transfers under state fraudulent transfer law as well as under a provision integral to the Bankruptcy Act.[8] Although differing in detail, the UFCA, UFTA, and section 548 are quite similar, to the degree that cases applying any of those statutes freely rely upon cases applying the others. The core of each remains the primordial rule that declares avoidable any transfer of property made by a debtor with intent to "hinder, delay, or defraud" the debtor's creditors.[9]

In centuries of cases applying this primordial rule, judges noted recurring facts thought to be indicative of the proscribed intent. These came to be dignified by the name of "badges of fraud," and as a general rule they were and are said to be merely possible indications of the proscribed intent.[10] One badge, however, came to be seen by many courts as presumptively, or conclusively, establishing the proscribed intent: namely, a transfer of property by a financially distressed debtor who does not receive fair value in exchange. The UFCA codified that application of the primordial rule in additional provisions that declare such a transfer to be avoidable *per se*, without regard to the debtor's intent.[11] That rule is widely referred to as the

---

[6] UFTA §§ 7, 8; UFCA §§ 9, 10.

[7] Bankruptcy Code § 544(b). It is a condition to application of section 544(b) by the trustee that there exist at least one creditor having the right to avoid the transfer under state law, but satisfaction of that condition is rarely a problem. Under *Moore v. Bay*, 284 U.S. 4 (1931), if such a creditor exists the transfer is avoidable in its entirety, without regard to the amount of that creditor's claim.

[8] The fraudulent transfer provision integral to the Bankruptcy Act as originally enacted in 1898 was section 67e, which simply invalidated a transfer "within four months prior to the filing of the petition, with the intent and purpose on [the debtor's] part to hinder, delay, or defraud his creditors." Act of July 1, 1898, ch. 541, § 67e, 30 Stat. 544, 564 (1898) (repealed 1938) [hereinafter Bankruptcy Act].

[9] UFTA § 4(a)(1); UFCA § 7; Bankruptcy Code § 548(a)(1)(A). Oddly, the Statute of 13 Elizabeth expressed the decisive phrase as "delay, hinder or defraud" (without comma in the original; spelling modernized), but the first codification of fraudulent transfer doctrine in English bankruptcy law permuted the verbs to "defraud, delay or hinder", 21 Jac., c. 19, § 7 (1623) (Eng.) (without comma in the original), and the verbs are permuted yet again in the modern American phrasing, "hinder, delay, or defraud", which appeared (complete with serial comma) successively in Bankruptcy Act § 67e (1898), UFCA § 7 (1918), Bankruptcy Act § 67d (as amended 1938), Bankruptcy Code § 548 (1978), and UFTA § 4(a)(1) (1984). The subject awaits its critic.

[10] There is no canonical set of badges of fraud, but an indicative list is set forth in UFTA § 4(b).

[11] UFCA §§ 4–6, 8. In the UFTA, the constructive fraud rules are codified in §§ 4(a)(2) and 5(a). The UFCA's drafters declared that its constructive fraud provisions merely codified "the present law in the great majority of states." NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, PROCEEDINGS OF THE TWENTY-EIGHTH ANNUAL MEETING 351 (1918) [hereinafter *UFCA Comments*]. Some have questioned that. *Compare* 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 262-72, at 449-67

"constructive fraud" prong of fraudulent transfer law, and the primordial rule from which it sprang, and which continued unaffected, is correspondingly referred to as the "actual fraud" prong. The Chandler Act of 1938 rewrote the Bankruptcy Act's integral fraudulent transfer provision to mirror the UFCA, including its constructive fraud rules,[12] and the modern codifications of fraudulent transfer law in the UFTA and section 548 of the Bankruptcy Code carry forward constructive fraud rules that are quite similar to those introduced by the UFCA.[13]

Fraudulent transfer law can warrant the avoidance of a transfer by a debtor even though the debtor is not in financial distress at the time of the transfer, because financial distress is not a condition to application of the primordial "actual fraud" rule. Indeed, some of the best known fraudulent transfer cases applied the doctrine to a transfer by a debtor who was not in financial distress.[14] Nevertheless, by its nature fraudulent transfer law is often invoked against a transfer by a debtor who is in financial distress and who soon finds himself in a bankruptcy proceeding. Notwithstanding the availability of the federal fraudulent transfer rule of section 548 in bankruptcy, and the similarity of that rule to the rules of the UFTA and the earlier UFCA, nonbankruptcy fraudulent transfer law remains important in the event of the debtor's bankruptcy because some of the differences of detail between those statutes are significant. The most significant is that section 548 is subject to a limitation period that is shorter than that which typically applies under nonbankruptcy fraudulent transfer laws. In general, a bankruptcy trustee may attack a transfer as fraudulent under section 548 only if the transfer was made within two years before the filing of the bankruptcy petition (and, before the 2005 amendments to the Bankruptcy Code, that period was only one year). By contrast, an action under the UFTA generally is subject to a limitation period of four years (extended by a discovery rule in the case of actual fraud).[15] The UFCA contained no limitation period and thus remitted the subject to other state law, and that other law likewise typically provided for a longer limitation period than that of section 548. For example, the UFCA remains in force in New York, and in that state the limitation period for actions under that statute is generally six years.[16]

(rev. ed. 1940), *with* John C. McCoid II, *Constructively Fraudulent Conveyances: Transfers for Inadequate Consideration*, 62 TEX. L. REV. 639, 652–56 (1983). The point now is academic.

[12] As amended by the Act of June 22, 1938, ch. 575, § 67d, 52 Stat. 840, 877–78 (1938) (repealed 1978), commonly called the Chandler Act, the fraudulent transfer provision integral to the Bankruptcy Act was § 67d. *See also* Nat'l Bankr. Conf., Analysis of H.R. 12889, 74th Cong., 2d Sess. 214 (1936) ("We have condensed the provisions of the Uniform Fraudulent Conveyance Act, retaining its substance and, as far as possible, its language.").

[13] UFTA §§ 4(a)(2), 5(a); Bankruptcy Code § 548(a)(1)(B).

[14] *See* Kettering, *Pride and Prejudice*, *supra* note 3, at 1984–89.

[15] UFTA § 9, discussed *infra* in part III.A.2.c.

[16] Specifically, in New York the limitation period for a fraudulent transfer action based on constructive fraud is six years; if based on actual fraud, the period is the longer of six years or two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it. N.Y. C.P.L.R. 213(1), (8) (McKinney 2009). *See* Metzger v. Yuenger Woodworking Corp., 824 N.Y.S.2d 96, 97 (N.Y. App. Div. 2006).

As noted earlier, neither the UFTA nor the UFCA sets forth a rule governing which state's fraudulent transfer law applies to an allegedly fraudulent transfer. (For simplicity, this paper generally uses the word "state," though in appropriate circumstances the law of a foreign nation or its political subdivision may be a candidate.) Review of the published comments of the committees that prepared those uniform laws and contemporaneous secondary literature reveals nothing to suggest that those committees ever considered including a choice of law provision.[17] That is not surprising. The first of the ULC's uniform laws to contain a choice of law provision was the Uniform Commercial Code ("UCC"), promulgated in 1951, long after the UFCA was promulgated in 1918, and problems with choice of law were not among the motivations for the updating of the UFCA by the UFTA in 1984.[18]

Choice of law governing fraudulent transfer therefore has been left to law outside the uniform acts. No state appears to have enacted a statute on the subject, with possible exceptions in Louisiana[19] and Oregon.[20] Hence for practical purposes the subject has been governed by common law in this country.

The applicability of any state rule on choice of fraudulent transfer law may be limited in a bankruptcy proceeding. The reason is that it is not clear whether and to what extent a federal rule would preempt any state rule in that setting. If a fraudulent transfer claim is asserted under nonbankruptcy law in a bankruptcy proceeding, the court must first decide what choice of law rule to apply in order to

---

[17] The only comments on the UFCA by its drafters are the *UFCA Comments*, *supra* note 11, which were not published with the act, and a brief prefatory note. The closest approximations to systematic contemporaneous commentary on the UFCA appear to be the first edition of GLENN, *supra* note 11, published in 1931, and James Angell McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404 (1933). By contrast, the UFTA was accompanied by an extensive prefatory note and official comments. The reporter for the UFTA, Frank R. Kennedy, wrote two articles devoted to it, *The Uniform Fraudulent Transfer Act*, 18 U.C.C. L.J. 195 (1986) [hereinafter Kennedy 1986] and *Reception of the Uniform Fraudulent Transfer Act*, 43 S.C. L. REV. 655 (1992), and two post-UFTA articles addressed more generally to fraudulent transfer law, *Involuntary Fraudulent Transfers*, 9 CARDOZO L. REV. 531 (1987) and *Fraudulent Transfers and Obligations: Issues of Current Interest*, 43 S.C. L. REV. 709 (1992) (with Gerald K. Smith). Other commentators also addressed the UFTA contemporaneously with its promulgation, and citations are compiled in Appendix III to Kennedy's 1992 article.

[18] For a discussion of the ULC's spotty history in addressing choice of law, see Kettering, *Harmonizing*, *supra* note 4, at 242–50. The motivations for the drafting of the UFTA are detailed in its prefatory note.

[19] Louisiana law does not include fraudulent transfer as such, but does include a civil law analogue, the "revocatory action," codified at LA. CIV. CODE ANN. arts. 2036–2044 (2008). Louisiana enacted a comprehensive choice of law codification in 1991, which forms Book IV of the Louisiana Civil Code, *id.* art. 3515 et seq. A revocatory action might well be an issue of "delictual or quasi-delictual obligation" governed by articles 3542–3548; if it is not, it would seem to be governed by the residual rule of article 3515. However, no reported case has been found that considers the applicability of the Louisiana choice of law codification to a revocatory action.

[20] In 2009 Oregon (a UFTA state) enacted a choice of law codification for torts, OR. REV. STAT. §§ 31.850–31.890 (2009), following its enactment of a comparable codification for contractual claims in 2001, *id.* §§ 81.100–81.135. It is doubtful that either statute applies to a fraudulent transfer claim. Such a claim appears to be a "noncontractual claim" within the scope provision of the tort statute, *id.* § 31.855, but such a claim probably cannot be characterized as one against "the person whose conduct caused the injury," as per the core operative provision of the tort statute, *id.* § 31.875. No reported case has been found that addresses the issue.

select the particular nonbankruptcy law that governs the claim. *Klaxon Co. v. Stentor Electric Manufacturing Co.*[21] famously held that a federal court adjudicating a claim in a diversity case must apply the choice of law rules of the forum state (that is, the state in which the federal court sits) in order to determine the substantive law that applies to the claim. *Klaxon*, however, was a diversity case. The Supreme Court has not laid down a rule as to what choice of law rule a bankruptcy court should apply to issues governed by nonbankruptcy law, and lower federal courts are divided on the subject. Some hold that a bankruptcy court must apply the choice of law rules of the forum state, as in a diversity case.[22] Others hold that choice of nonbankruptcy law is governed by a uniform federal common-law rule, generally applying for that purpose the approach taken by the *Restatement (Second) of Conflicts of Laws* ("*Second Restatement*") and looking to the state with the "most significant contacts" (which approach is discussed in part IV of this paper).[23] Still others split the difference, treating choice of law in bankruptcy as being ultimately a federal question, but applying the choice of law rules of the forum state absent a federal interest that justifies use of a different rule.[24]

This uncertainty about federal preemption as to choice of law in bankruptcy by no means renders a state choice of law rule nugatory. Fraudulent transfer claims can and are brought outside of bankruptcy proceedings. Even as to a claim brought in a bankruptcy proceeding, the bankruptcy court may follow the *Klaxon* principle and apply the choice of law rule of the forum state. Finally, even if the bankruptcy court determines that a federal choice of law rule applies, that federal rule may amount to following the choice of law rule of the forum state, either as a matter of doctrine in the absence of a supervening federal interest or as a matter of convenience.

III. ILLUSTRATIVE CIRCUMSTANCES IN WHICH IT MAY BE IMPORTANT WHICH JURISDICTION'S FRAUDULENT TRANSFER LAW APPLIES

Choice of law can determine the outcome of litigation over an allegedly fraudulent transfer. If more than one jurisdiction is a plausible candidate for having its fraudulent transfer law apply, and if one candidate has enacted the UFTA and another candidate has not, the outcome may depend upon which substantive law is chosen. Despite their close family resemblance, the UFTA and the UFCA do differ

---

[21] 313 U.S. 487 (1941).

[22] *See, e.g.*, Amtech Lighting Servs. Co. v. Payless Cashways, Inc. (*In re* Payless Cashways), 203 F.3d 1081, 1084 (8th Cir. 2000). For a discussion of the split in the federal courts on this subject, see Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 906–22 (2006).

[23] *See, e.g.*, Lindsay v. Beneficial Reins. Co. (*In re* Lindsay), 59 F.3d 942, 948 (9th Cir. 1995). Dictum in *Vanston Bondholder Protective Committee v. Green*, 329 U.S. 156, 161–62 (1946), though two-edged, has been read by some to authorize bankruptcy courts to use a federal choice of law rule.

[24] *See, e.g.*, Bianco v. Erkins (*In re* Gaston & Snow), 243 F.3d 599, 605 (2d Cir. 2001); Compliance Marine, Inc. v. Campbell (*In re* Merritt Dredging Co.), 839 F.2d 203, 206 (4th Cir. 1988); FDIC v. Lattimore Land Corp., 656 F.2d 139, 146 (5th Cir. 1981).

in some details. If the law of the non-UFTA candidate jurisdiction is something other than the UFCA, the likelihood of an outcome-determinative difference increases greatly.

The foregoing point is sufficiently obvious that it need not be belabored, and part III.B discusses it briefly. Perhaps less expected is the point made in part III.A: namely, that choice of law may be important even if each of the candidate jurisdictions has enacted the UFTA. There are two reasons why that is so. First, the uniform text may be applied in different ways by different enacting jurisdictions. Second, states that have enacted the UFTA have made many nonuniform changes to its text. Those subjects are discussed below in parts III.A.1 and III.A.2, respectively.

To the extent that a statutory solution is sought for these conflicts, some of them might be addressed by refining the substantive rules of the UFTA, rather than by clarifying the choice of law rules. That is particularly the case as to conflicts arising from differing application of the uniform text, as described in part III.A.1. For that reason, if the ULC establishes a committee for the purpose of revising or supplementing the UFTA to address choice of law, consideration should be given to framing the committee's mandate to allow it also to propose revisions to the substantive rules of the UFTA.

The identification in this part III of situations in which choice of law can make a difference is illustrative and does not purport to be comprehensive.

A. Significance of Choice of Law as Between States that Have Enacted the UFTA

1. Different Substantive Law in UFTA States as a Result of Differing Application of the Uniform Text

a. Presumptions and burdens of proof

Application of fraudulent transfer law often requires factual determinations that are fuzzily defined, difficult to make, or both. In litigation much will turn on who has the burden of proving such facts and whether the party charged with that burden has the benefit of any presumptions. The UFTA, like the older UFCA, says little about such matters, thereby leaving them to the courts.[25] While both uniform laws contain the standard instruction that the law should be "applied and construed to

[25] The UFTA does contain a few miscellaneous observations about evidentiary matters. UFTA § 2(b) (presumption of insolvency arises from failure to pay debts as they become due); *id*. cmt. 2 (stating that the foregoing presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence, and rejecting the "bursting bubble" approach, under which the presumption would vanish upon introduction of any contrary evidence); UFTA § 4 cmt. 5 (stating that the existence of one or more of the badges of fraud enumerated in UFTA § 4(b) may be evidence of the debtor's intent but does not create a presumption of the proscribed intent); UFTA § 8 cmt. 1 (stating that the transferee of a transfer made with actual fraud who wishes to invoke the defense afforded by UFTA § 8(a) for a good faith transferee who gives reasonably equivalent value bears the burden of proving good faith and reasonable equivalence).

effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it,"[26] in fact courts in different states have taken different positions on these evidentiary matters. With apparent unanimity, and little or no discussion, courts have taken the position that such evidentiary matters are matters of substantive law, rather than procedural matters governed by the law of the forum. Evidentiary rules developed in a state in cases under the UFCA invariably continue to be applied after the state enacts the UFTA, in keeping with the universal equation of the two statutes except on details about which they expressly differ.

One such evidentiary rule employed by some states applies when a transfer is challenged as being constructively fraudulent. A transfer is constructively fraudulent if the debtor does not receive reasonably equivalent value in exchange and the debtor is insolvent (in any of three senses defined by the statute) at the time of the transfer, or is rendered insolvent by the transfer. Under ordinary litigation principles, a creditor who claims that a given transfer is constructively fraudulent bears the burden of proving the elements of his claim, and so bears the burden of proving both the absence of reasonably equivalent value and the debtor's insolvency. Some states, however, apply a presumption that if a transfer is shown to have been made without exchange of reasonably equivalent value, then the burden shifts to the transferee to prove that the debtor was solvent.[27] A more extreme version of this presumption is that the transferee bears the proving (and indeed by clear and convincing evidence) the debtor's solvency or exchange of reasonably equivalent value if the debtor was merely in debt at the time of the transfer.[28]

This presumption has been a conspicuous feature of litigation over failed leveraged acquisitions. In such litigation, it is common for the creditors of the failed debtor (or the bankruptcy trustee on their behalf) to seek to avoid under fraudulent transfer law the security interests in the assets of the debtor (*i.e.*, the acquired company) granted to the financier of the acquisition. In the eyes of most if not all courts, the financier of a leveraged acquisition does not provide reasonably equivalent value in exchange for those security interests. Hence the grant of those security interests is constructively fraudulent if the acquired company was insolvent, in one of the senses defined in the fraudulent transfer statute, immediately after the acquisition. Some courts have placed the burden of proving insolvency on the party asserting the fraudulent transfer claim.[29] Other courts have applied one of the presumptions

---

[26] UFTA § 11. UFCA § 12 is substantially identical.

[27] *See, e.g.*, Buchwald Capital Advisors LLC v. JP Morgan Chase Bank (*In re* M. Fabrikant & Sons, Inc.), 447 B.R. 170, 194–195 (Bankr. S.D.N.Y 2011) (applying New York UFCA).

[28] *See, e.g.*, SieMatic Mobelwerke GmbH & Co. v. SieMatic Corp., 643 F. Supp. 2d 675, 692 (E.D. Pa. 2009) (applying Pennsylvania UFTA).

[29] *See, e.g.*, Kupetz v. Cont'l Ill. Nat'l Bank & Trust Co., 77 B.R. 754, 762–63 (C.D. Cal. 1987), *aff'd sub nom*. Kupetz v. Wolf, 845 F.2d 842 (9th Cir. 1988) (applying California UFCA); Ohio Corrugating Co. v. DPAC, Inc. (*In re* Ohio Corrugating Co.), 91 B.R. 430, 435 (Bankr. N.D. Ohio 1988) (applying Bankruptcy Code § 548 and Ohio UFCA).

previously described and held that the financier bears the burden of proving the debtor's solvency.[30]

As a result, choice of law has been an important issue in some cases because precedent in the different candidate jurisdictions allocates the evidentiary burden differently. An example is *Murphy v. Meritor Savings Bank* (*In re O'Day Corp.*),[31] a bankruptcy case involving an attack on the financing of a failed leveraged acquisition in which it was disputed whether the applicable fraudulent transfer law was that of Massachusetts or Pennsylvania. The UFCA was in force in both states, but Massachusetts precedent would place on the trustee the burden of proving the debtor's insolvency after the transaction, while Pennsylvania precedent would place on the financier the burden of proving the debtor's solvency.

Other examples exist of presumptions established by some states, both in cases of constructive fraud and in cases of actual fraud.[32] States also differ as to evidentiary matters of other types. For example, most states contemplate that a claim under the actual fraud prong of fraudulent transfer law must be proved by clear and convincing evidence, but some states apply the preponderance of evidence standard.[33]

b. Interpretation of "actual fraud" as to statutory asset protection trusts

Another situation in which the uniform text of the UFTA may be applied differently by different enacting states arises in connection with a controversial current product: namely, so-called "asset protection trusts." An asset protection trust is a species of spendthrift trust—that is, a trust having a restraint on voluntary or involuntary alienation of the beneficiary's interest. Such a restraint, if enforced, shields the beneficiary's interest from the beneficiary's creditors. The spendthrift trust was a child of Pennsylvania law born in the 1800s, and so Pennsylvania courts were the first to face the question of whether such a trust might be self-settled—that is, whether a person may convey property to a spendthrift trust of which he himself is the beneficiary. Pennsylvania courts refused to allow the settlor's creditors to be thwarted by such an arrangement, and they based that holding on the primordial rule of fraudulent transfer law.[34] A transfer to a self-settled spendthrift trust was

---

[30] *See, e.g.*, Moody v. Sec. Pac. Bus. Credit, Inc., 127 B.R. 958, 993 (Bankr. W.D. Pa. 1991), *aff'd*, 971 F.2d 1056, 1065–66 (3d Cir. 1992) (applying Pennsylvania UFCA).

[31] 126 B.R. 370, 390 (Bankr. D. Mass. 1991).

[32] *See, e.g.*, DLJ Mortgage Capital, Inc. v. Kontogiannis, 594 F. Supp. 2d 308, 330 (E.D.N.Y. 2009) (applying presumption established under New York's UFCA that in the case of a transfer made between husband and wife, the transferee bears the burden of proving either the adequacy of consideration or the transferor's solvency); *In re* Consol. Capital Equities Corp., 143 B.R. 80, 84 (Bankr. N.D. Tex. 1992) (addressing choice of law between New York and California, both UFCA states at the time, because "the two states impose different burdens of proceeding on the substantive elements"; details not specified by the court).

[33] For a collection of cases, see Richard M. Cieri et al., *Breaking Up is Hard to Do: Avoiding the Solvency-Related Pitfalls in Spinoff Transactions*, 54 BUS. LAW. 533, 594 n.237 (1999).

[34] The root case is *Mackason's Appeal*, 42 Pa. 330, 338–39 (1862), which held that the arrangement violates the primordial rule of fraudulent transfer law as embodied in the original Statute of 13 Elizabeth.

considered to be a fraudulent transfer *per se*; the financial condition of the settlor at the time of the transfer was irrelevant.[35] As spendthrift trusts became accepted in other states, courts uniformly followed this rejection of the self-settled variety, until the doctrine's origin in fraudulent transfer law faded from memory and it was taken simply as an axiom of trust law. As such, it was codified in all three *Restatements of Trusts*.[36]

Lately there has been a vogue for statutory reversal of this rule. At least ten states, beginning with Alaska in 1997, have enacted statutes validating self-settled spendthrift trusts.[37] Except for Alaska, each of those ten states has also enacted the UFTA. This vogue has its roots in the mid-1980s, when offshore asset havens began to attract trust business by modifying their laws to improve asset protection for beneficiaries of locally-sited trusts. Legislatures in some of the enacting states have frankly admitted that their enactments are designed to draw business to providers of trust services in their state.[38]

To date such trusts have given rise to little reported litigation.[39] The viability of such a trust is largely dependent upon favorable application of fraudulent transfer law, for such a trust loses its utility to the extent that a transfer to the trust is avoidable as a fraudulent transfer. According to one commentator, most of the

---

See also Ghormley v. Smith, 21 A. 135, 136 (Pa. 1891) (such an arrangement is "against the public policy, as well as the statute of Elizabeth"); Patrick v. Smith, 2 Pa. Super. 113, 119 (1896) ("The prohibition of conveyances with intent to delay, hinder or defraud creditors, would be of little use if the debtor may put his estate beyond the reach of creditors and still get a living from it.").

[35] *See In re* Mogridge's Estate, 20 A.2d 307, 309 (Pa. 1941); State v. Nashville Trust Co., 190 S.W.2d 785, 790 (Tenn. Ct. App. 1945).

[36] "[T]he cases are uniform in holding that . . . a person cannot create a spendthrift trust for himself which shall be effective against the rights of his subsequent creditors." ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS, § 474 at 543 (2d ed. 1947). The rule is laid down in RESTATEMENT (THIRD) OF TRUSTS § 58(2) (2003), RESTATEMENT (SECOND) OF TRUSTS § 156(1) (1959), and RESTATEMENT OF TRUSTS § 156(1) (1935).

[37] A useful compilation of statutes pertaining to domestic asset protection trusts, frequently updated by its author for CLE presentations, was most recently published as Richard W. Nenno, *Planning and Defending Domestic Asset-Protection Trusts*, *in* AMERICAN LAW INST. & AMERICAN BAR ASS'N, PLANNING TECHNIQUES FOR LARGE ESTATES 894 (2010) (available on Westlaw). Mr. Nenno is counsel for a company in the business of serving as trustee for such trusts, so the materials should be read with the author's interest in mind. According to these materials, part I.C, effective asset protection trust statutes are in force in Alaska, Delaware, Nevada, New Hampshire, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming. Statutes have also been enacted in Colorado, Hawaii, Missouri and Oklahoma, but Nenno dismisses those four states because "the statutes in question are flawed and/or not fully developed."

[38] On the political economy of the domestic product and its offshore roots, see John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 CARDOZO L. REV. 2621 (2006), Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685 (2006), and Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000). Congress has intervened in this race to the bottom to the extent of amending the Bankruptcy Code in 2005 to provide a ten year limitations period for the Bankruptcy Code's integral fraudulent transfer provision in the case of a transfer by a debtor to "a self-settled trust or similar device" made with "actual intent to hinder, delay, or defraud" creditors. Bankruptcy Code § 548(e)(1). For a discussion of that provision, see Eason, *supra*, at 2667–77.

[39] *See* Nenno, *supra* note 37, at part IV.J ("No court has adjudicated whether a creditor may reach the assets of a properly designed and implemented domestic APT."). "APT" is Nenno's useful abbreviation for "asset protection trust."

enacting states have not enacted changes to their fraudulent transfer statutes as part of the legislation validating asset protection trusts.[40] That is not too surprising, for even advocates of the product do not seriously contend that a conveyance to such a trust should be completely immune from fraudulent transfer scrutiny. The product's advocates typically concede the illegitimacy of a conveyance to such a trust by one who is insolvent or who would be rendered insolvent (exclusive of his beneficial interest in the shielded assets) after the conveyance. Rather, the product's advocates contend that a conveyance to such a trust should not be considered a fraudulent transfer if the transferor has made provision to pay all of his present and reasonably foreseeable creditors. Hence, in that view, a transfer to shield assets from creditors is not avoidable if the shielded assets are only those in excess of the amount reasonably estimated to be necessary to satisfy his present and reasonably foreseeable creditors.[41] If a state has enacted legislation validating asset protection trusts, the state's fraudulent transfer law, even if not expressly amended, likely must be applied in a way consistent with the foregoing position, for continued adherence by the state's courts to the traditional rule that a conveyance to a self-settled spendthrift trust is a fraudulent transfer *per se* would render the legislature's validation of such trusts meaningless. But there is no reason why the fraudulent transfer law of another state should not continue to be applied in the traditional way, so that a conveyance to such a trust is treated as a fraudulent conveyance *per se*. The viability of this product, therefore, may depend upon which state's fraudulent transfer law is applied to a lawsuit by a creditor challenging a conveyance to such a trust.[42]

As previously noted, analysis of the efficacy of asset protection trusts blurs together what have come to be conceived of as distinguishable rules of trust law and

---

[40] According to Nenno, *supra* note 37, at part III.E, "Most of the domestic APT statues adhere closely to the UFTA's rules so that choosing between the law of the forum state and the law of the state where a domestic APT is created won't be a matter of great import in many situations." However, at least some of those states have recently amended their enactments of the UFTA while concealing the fact, via provisions in their APT statutes that apply "notwithstanding any other provision of law," specifically fraudulent transfer law, and not referencing those overriding provisions in their enactment of the UFTA. Thus, the Delaware APT statute was amended in 2007 to use this drafting ploy to prohibit fraudulent transfer attack on a transfer to a Delaware APT by a creditor whose claim arises after the transfer, unless the transfer was "made with actual intent to defraud such creditor," with the burden on that creditor "to prove the matter by clear and convincing evidence." It also shortens the statute of limitations. *See* DEL. CODE ANN., tit. 12, § 3572 (2007). The South Dakota APT statute was amended in 2008 to use the same ploy to bar fraudulent transfer attack on transfers to an APT unless "made with the intent to defraud that specific creditor." It also shortens the statute of limitations. S.D. CODIFIED LAWS §§ 55-16-9 to 55-16-10 (Supp. 2011).

[41] *See, e.g.*, Nenno, *supra* note 37, part III; Duncan E. Osborne & Jack E. Owen, Jr., *Planning for Asset Protection*, *in* AMERICAN LAW INST. & AMERICAN BAR ASS'N, ESTATE PLANNING IN DEPTH 913-17 (2008); John E. Sullivan III, *Future Creditors and Fraudulent Transfers: When a Claimant Doesn't Have a Claim, When a Transfer Isn't a Transfer, When Fraud Doesn't Stay Fraudulent, and Other Important Limits to Fraudulent Transfers Law for the Asset Protection Planner*, 22 DEL. J. CORP. L. 955, 988–95 (1997).

[42] Successful litigation of such a claim would of course involve other issues, notably obtaining personal jurisdiction over the trustee. Note, however, that a suit brought in the courts of a state that has enacted legislation validating asset protection trusts might be decided on the basis of another state's fraudulent transfer law, if the choice of law rules applied by the forum point to that other state's law.

fraudulent transfer law, notwithstanding the common ancestor of those rules in fraudulent transfer law. Analysis of such trusts may also implicate other legal doctrines that, while overlapping with fraudulent transfer, are distinguishable from it, and to which choice of law principles are likewise opaque.[43]

2. Different Substantive Law in UFTA States as a Result of Nonuniform Amendments to State Enactments of the UFTA

Survey of nonuniformities in the laws of states that have enacted the UFTA is complicated by the existence of conflicting statutes that by their terms apply "notwithstanding any other provision of law" and that thus have the effect of overriding the state's enactment of the UFTA, without that fact being reflected in the state's enactment of the UFTA itself. That drafting technique amends the state's UFTA in a concealed way. Some such concealed amendments apply to sensitive subjects. For example, at least two states that enacted statutes validating asset protection trusts recently made concealed amendments to their enactments of the UFTA through this drafting technique, and those amendments greatly restrict the applicability of the state's fraudulent transfer law to a transfer made to an asset protection trust validated by the laws of the state.[44] Another example relates to state statutes pertaining to business corporations and other limited-liability entities. Between 1980 and 1984 the Model Business Corporation Act contained an optional provision that precluded application of law other than that act (including fraudulent transfer law) to a dividend or other distribution made by a corporation organized under that act.[45] Provisions to that effect are in force in the business corporation statutes of at least some states.[46]

Determining the full nature and extent of such concealed amendments would require a comprehensive survey of each state's statutory code, which is beyond the scope of this paper. This paper confines its survey of nonuniformities more modestly to changes made in the text of the UFTA itself by enacting states.[47]

States enacting the UFTA or its predecessor have been liberal with nonuniform amendments. Some of those amendments are idiosyncratic, in the sense that the amendment is not followed by other states. Some of those idiosyncratic amendments are quite substantial. For example, both uniform laws apply to the transfer of an asset by a debtor and to the incurrence of an obligation by a debtor, but Alabama deleted any applicability of its enactment of the UFTA to obligations

---

[43] *See, e.g., In re* Portnoy, 201 B.R. 685, 694 (Bankr. S.D.N.Y. 1996) (denial of discharge action against a bankrupt individual residing in the United States who, when in financial distress, transferred all of his assets to an offshore trust located in the Channel Island of Jersey; court's analysis of the concealment-of-assets count turned on whether the debtor could be said to have a property interest in that trust, which in turn, in the court's view, turned on whether that question should be analyzed under the law of Jersey or the law of New York).

[44] *See supra* note 40.

[45] MODEL BUS. CORP. ACT § 152 (1980) (deleted 1984).

[46] *See, e.g.*, MINN. STAT. § 302A.551(3)(d) (2010).

[47] Specifically, the survey of nonuniform state amendments to the UFTA in this part III.A.2 is based on the notes to the UFTA in the current edition (2006 & Supp. 2010) of *Uniform Laws Annotated*.

incurred by a debtor. New York, which retains the UFCA, has created an additional class of fraudulent transfer without parallel in either uniform law (and much caressed by the local bar), in a provision stating that any conveyance made without fair consideration by a person who is a defendant in an action for money damages is fraudulent as to the plaintiff in that action if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment, without regard to the defendant's intent or his solvency.[48]

At least three genres of nonuniform amendments have been adopted by a number of states, and they are summarized as follows.

a. Foreclosure sales and similar involuntary transfers

One set of nonuniformities relates to an issue historically associated with *Durrett v. Washington National Insurance Co.*:[49] namely, whether a forced disposition of a debtor's property (such as by a foreclosure sale), for an amount substantially less than its fair market value, can be avoided under the constructive fraud prong of fraudulent transfer law. In *BFP v. Resolution Trust Corp.*[50] the Supreme Court largely put that issue to rest as to foreclosure sales challenged under the Bankruptcy Code's integral fraudulent transfer provision, but not as to state fraudulent transfer laws. The UFTA creates safe harbors for a disposition of property resulting from noncollusive foreclosure of a mortgage or from enforcement of a security interest in accordance with Article 9 of the UCC.[51] At least two states (California and Pennsylvania) have contracted those safe harbors, by excluding a secured creditor's retention of ownership of collateral in satisfaction of the debt (a so-called "strict foreclosure"). At least one state (Pennsylvania) has expanded those safe harbors, by including execution sales. At least two states (Connecticut and Montana) have partially deleted or modified those safe harbors in ways that may have the effect of narrowing them.

b. Insider preferences

The UFTA contains a *sui generis* provision that had no parallel in the UFCA and that permits avoidance of a particular kind of transfer that is not really a fraudulent transfer at all, but rather a preference. Specifically, section 5(b) of the UFTA defines to be fraudulent a transfer of property made by an insolvent debtor on account of antecedent debt owed by the debtor to an insider of the debtor who has reasonable cause to believe the debtor to be insolvent.[52] The operation of this

---

[48] N.Y. DEBT. & CRED. LAW § 273-a (McKinney 2001). This nonuniform provision is unique in that it is possible for a given transfer eventually to be held fraudulent under this provision even though there is no way to ascertain whether the transfer is or is not fraudulent at the time it is made.

[49] 621 F.2d 201 (5th Cir. 1980).

[50] 511 U.S. 531 (1994).

[51] UFTA §§ 3(b), 8(e).

[52] The UFTA's operative provision on insider preferences, section 5(b), is accompanied by auxiliary

provision is quite similar to the operation in bankruptcy of section 547 of the Bankruptcy Code, which provides for avoidance of eve-of-bankruptcy transfers on account of an antecedent debt and which applies more onerously if the transferee is an insider. In particular, section 547 generally applies only to a transfer made within 90 days before the debtor's bankruptcy petition, but if the transferee is an insider of the debtor that period is extended to a year. The UFTA's insider preference provision is likewise crafted to apply only to a transfer made within one year before suit is brought to avoid it.[53]

Although novel, the UFTA's insider preference provision was not unprecedented. Both the UFTA and the older UFCA provide in effect that a debtor receives reasonably equivalent value (referred to as "fair consideration" in the older act) for a transfer that is made to pay or secure a debt.[54] As a result, payment or collateralization of a debt, even if preferential, cannot be avoided as constructively fraudulent under the UFTA. The UFCA, however, qualified its definition of "fair consideration" by providing that a debtor would not be considered to receive fair consideration for any transfer unless its receipt was in "good faith." Some courts employed that "good faith" element to avoid insider preferences. The "good faith" element, being globally applicable, created considerable uncertainty for analysis of any and all transfers, and so the drafters of the UFTA deleted it, but they felt it desirable to continue to provide for relief against insider preferences outside the bankruptcy system, and so added section 5(b) for that purpose.[55]

The purpose of section 5(b) is to provide for avoidance of preferential transfers to insiders outside of bankruptcy to essentially the same extent that such a transfer would be avoidable under section 547 of the Bankruptcy Code if a bankruptcy petition were filed.[56] Necessarily, however, the operation of those provisions differs in one fundamental respect: in bankruptcy, an avoided transfer is returned to the debtor's estate and inures to the benefit of all creditors, while in an action brought under section 5(b) outside of bankruptcy the avoided transfer inures to the benefit only of the plaintiff creditor. As a result, the effect of the UFTA's insider preference provision is not so much to undo the preferential transfer as to shift its benefit to a different creditor. Notwithstanding the judgment of the drafters of the UFTA, the desirability of that goal is debatable. For that reason, no doubt, at least

---

provisions at sections 1(1) (defining "affiliate"), 1(7) (defining "insider"), 1(11) (defining "relative"), 3(c) (in effect defining "present value"), 8(f) (exceptions to the general rule invalidating insider preferences), and 9(c) (one year limitation period).

[53] UFTA § 9(c).

[54] UFTA § 3(a); UFCA § 3.

[55] *See* Kennedy 1986, *supra* note 17, at 204–05.

[56] In principle section 5(b) of the UFTA is available to avoid an insider preference in a bankruptcy proceeding, via operation of section 544(b) of the Bankruptcy Code, just as with any other fraudulent transfer. But the similarity of section 5(b) to section 547 of the Bankruptcy Code renders section 5(b) of little independent significance in a bankruptcy proceeding. Indeed, the elements of section 5(b) are slightly more exacting those of section 547, in that the former, but not the latter, requires the insider transferee to have reasonable cause to believe the debtor to be insolvent.

four states (Arizona, California, Indiana and Pennsylvania) deleted the insider preference provisions from their enactments of the UFTA.

c. Statute of limitations

As noted previously, the UFTA contains its own statute of limitations, section 9. Under that provision the limitation period is generally four years from the time of the challenged transfer. If the claim is based on actual fraud, the claimant is entitled to the benefit of a discovery rule that extends the period, if necessary, to one year after the transfer "was or could reasonably have been discovered by the claimant." A claim based on the *sui generis* insider preference rule is limited to one year after the transfer, without benefit of a discovery rule.

Section 9 is phrased to extinguish the claimant's right and not merely bar the claimant's remedy. The UFTA's drafters intended that nuance of phrasing to have consequences. One is that the prescribed limitation period should apply to an action by the United States, which is not bound by a mere bar of remedy.[57] A second is that an action under state X's enactment of UFTA brought in a court of state Y should be limited by the limitation period in state X's enactment of UFTA (as well as whatever limitation period applies under the law of state Y).[58] That, of course, is an exception to the usual principle that treats the limitation period as a procedural matter that is governed exclusively by the law of the forum, in the absence of an applicable borrowing statute of the forum.

As a result, determination of which state's substantive law of fraudulent transfer applies to a given transaction may determine the applicable limitation period. Even as between states that have enacted the UFTA this point is consequential, for states have been free with nonuniform amendments to the limitation periods prescribed by section 9.[59] At least sixteen states have made substantive nonuniform changes to their enactments of section 9. Those changes are very diverse. Some states have lengthened the limitation period for some or all of actual fraud, constructive fraud, or insider preference.[60] Other states have shorted some of those periods.[61] Some

---

[57] *See* UFTA § 9 cmt. 1 ("This section rejects the rule applied in United States v. Gleaneagles Inv. Co., 565 F.S. 556, 583 (W.D. Pa. 1983) (state statute of limitations held not to apply to action by United States based on Uniform Fraudulent Conveyance Act).")

[58] *See Second Restatement* §§ 142, 143, referred to in UFTA § 9 cmt. 1.

[59] For cases in which the applicable limitation period apparently depended upon which state's fraudulent transfer law applied to the challenged transaction, see GFI Advantage Fund v. Colkitt, No. 03-Civ.-1256(JSM), 2003 WL 21459716, at *3 (S.D.N.Y. June 24, 2003), *amended on other grounds*, No. 03-CV-1256-JSM, 2003 WL 21556935 (S.D.N.Y. July 10, 2003); Tow v. Rafizdeh (*In re* Cyrus II P'ship), 413 B.R. 609, 611–12 (Bankr. S.D. Tex. 2008*);* Murphy v. Meritor Sav. Bank (*In re* O'Day Corp.), 126 B.R. 370, 392 (Bankr. D. Mass. 1991).

[60] For example, (i) Alabama for actual fraud changed the limitation period to six years for personal property and ten years for real property, with no discovery rule, and for constructive fraud shortened the period to one year in the case of an action brought by a creditor whose claim arose after the challenged transfer was made, (ii) Iowa lengthened to five years the basic limitation period for actual fraud and constructive fraud, (iii) Maine lengthened to six years the basic limitation period for actual fraud, constructive fraud and insider preference, and (iv) Nebraska and Tennessee lengthened to four years, and

states have narrowed or broadened in various ways the UFTA's discovery rule, which in the uniform text is applicable only to actual fraud.[62] Others have made miscellaneous changes.[63]

B. Significance of Choice of Law as Between a UFTA State and a Non-UFTA Jurisdiction

The potential significance of choice of law is much greater when at least one of the candidate jurisdictions has not enacted the UFTA. The differences between the UFTA and the law of a non-UFTA jurisdiction can be substantial even if the non-UFTA jurisdiction is another state of the United States. For example, in *In re Best Products Co.*,[64] the outcome of a fraudulent transfer claim arising from a failed leveraged acquisition, which settled rather than being litigated to a conclusion, would have turned in important part on whether the applicable law was that of New York, which had enacted the UFCA (the relevant provisions of which are substantially the same as those of the UFTA), or that of Virginia, which had not enacted either uniform law and whose idiosyncratic law contained no concept of constructive fraud, rendering the establishment of a fraudulent transfer claim far more difficult.

Another example is *RCA Corp. v. Tucker*,[65] a nonbankruptcy case involving a gratuitous transfer by a husband to his wife, both domiciled in Florida at the time of transfer; at the time of transfer the husband was a defendant in a long-drawn-out lawsuit brought in New York several years previously, when the couple had been domiciled in New York. The litigation burden on the eventual judgment creditor of the husband who later challenged the transfer depended upon whether Florida or New York fraudulent transfer law applied, for (as noted previously) New York's

---

Montana to two years, the limitation period for insider preference.

[61] For example, Arkansas and Mississippi shortened to three years the basic limitation period for actual fraud and constructive fraud.

[62] For example, (i) Arkansas deleted the discovery rule, (ii) California capped all limitations periods with a bar to an action more than seven years after the challenged transfer was made, (iii) Montana broadened the discovery rule by lengthening the period after discovery to two years, (iv) New Jersey broadened the discovery rule by starting the "one year after discovery" clock ticking at the time the plaintiff actually discovers the challenged transfer (rather than the time at which the plaintiff actually discovers it or "reasonably could have" discovered it, per the uniform text), and (v) Arizona starts the "one year after discovery" clock ticking at the time the "fraudulent nature" of the challenged transfer was or reasonably could have been discovered (rather than the challenged transfer alone, as per the uniform text).

[63] For example, (i) Minnesota deleted section 9 altogether, leaving the limitation period to other law (which among other things may not operate to extinguish the claim), (ii) Nevada shortened the limitation period for a transfer to a spendthrift trust, and (iii) Texas provided special limitations periods for claims on behalf of a spouse, minor or ward.

[64] 168 B.R. 35, 51–53 (Bankr. S.D.N.Y. 1994), *appeal dismissed*, 177 B.R. 791 (S.D.N.Y.), *aff'd*, 68 F.3d 26 (2d Cir. 1995); *see also* 1992 Republican Senate-House Dinner Comm. v. Carolina Pride Seafood, Inc., 858 F. Supp. 243, 247–48 (D.D.C.) (choice of law important because fraudulent transfer law of District of Columbia, which had not then enacted either uniform law, did not include constructive fraud, unlike California, which had the UFTA), *vacated after settlement*, 158 F.R.D. 223 (D.D.C. 1994).

[65] 696 F. Supp. 845 (E.D.N.Y. 1988).

version of the UFCA has a nonuniform provision making fraudulent any conveyance without fair consideration by a person who is a defendant in an action for damages, without regard to intent or solvency, if the debtor fails to satisfy a judgment rendered in that action.[66] The court's decision to apply New York law thus allowed the judgment creditor to prevail on the fraudulent transfer claim as a matter of law. By contrast, under Florida law the judgment creditor would have prevailed only if it were able to prove fraudulent intent on the part of the husband.

Differences between the laws of candidate jurisdictions can be as great or greater if one of the candidate jurisdictions is a foreign country or a political subdivision thereof.[67] Thus, for instance, *Atsco Ltd. v. Swanson*[68] involved a conflict between New York and Malaysian fraudulent transfer law, significant because the latter had no concept of constructive fraud. Indeed, many foreign asset havens have notoriously weakened their fraudulent transfer laws to an extreme degree, for the very purpose of encouraging transfers into the country by persons seeking to place their assets beyond the reach of their creditors.

Reported cases involving conflicts over fraudulent transfer law in which the law of a foreign jurisdiction is a contender have been less common than one might have expected, but such cases do exist.[69] A widely-noted case of that ilk is *French v. Liebmann* (*In re French)*,[70] which held that a debtor's chapter 7 trustee had power to avoid as constructively fraudulent an eve-of-bankruptcy transfer of real property located in the Bahamas, when the debtor and the transferee were both individual United States residents, notwithstanding that the transfer could not be avoided under the law of the Bahamas. Conversely, *Fogerty v. Petroquest Resources, Inc.* (*In re Condor Insurance Ltd.*)[71] held that a United States bankruptcy court has authority to

---

[66] *See supra* text at note 48.

[67] Though not always, of course. *See, e.g.*, Elgin Sweeper Co. v. Melson Inc., 884 F. Supp. 641, 648–50 (N.D.N.Y. 1990) (finding the fraudulent transfer laws of Ontario and New York to be substantially identical in respects applicable to the case). For a brief summary of avoidance law in some European countries, *see* Juraj Alexander, *Avoid the Choice or Choose to Avoid? A Quest to Make Sensible the Choice of Avoidance Law Under the European Insolvency Regulation*, *in* NORTON ANNUAL REVIEW OF INTERNATIONAL INSOLVENCY 4–7 (Bruce Leonard ed. 2010) (available on Westlaw).

[68] 816 N.Y.S.2d 31, 32 (N.Y. App. Div. 2006).

[69] *See, e.g.*, Silica Tech, LLC v. J-Fiber, No. 06-10293-WGY, 2009 WL 2579432, at *11–22 (D. Mass. May 19, 2009) (diversity case in which court grappled with a party's contention that German fraudulent transfer law applied to a given assignment of patents; court concluded that German fraudulent transfer law indeed differed from the Massachusetts UFTA, and applied Massachusetts choice of law rules (specifically, the *Second Restatement* "most significant contacts" methodology) to conclude that Massachusetts fraudulent transfer law applied); Metex Mfg. Corp. v. Manson Environ. Corp., No. 05-2948-HAA, 2008 WL 474100, at *5–10 (D.N.J. Feb. 15, 2008) (declining to apply New Jersey fraudulent transfer law to a transfer of real property in Ontario, allegedly in violation of the actual fraud prong of fraudulent transfer law); United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F. Supp. 2d 198, 215–16 (S.D.N.Y. 2002) (diversity case; Canadian fraudulent transfer law held applicable).

[70] 440 F.3d 148 (4th Cir. 2006). The transfer in *French* was made sufficiently soon before the bankruptcy petition that it was susceptible to attack under section 548 of the Bankruptcy Code, but the transfer was equally susceptible to attack on the basis of nonbankruptcy fraudulent transfer law, and had the transfer been made earlier, outside the section 548 reachback period, nonbankruptcy fraudulent transfer law surely would have played a more prominent role in the case. For cases contrasting with *French*, see *infra* note 82.

[71] 601 F.3d 319 (5th Cir. 2010).

apply foreign fraudulent transfer law (in that case, the law of the Federation of Saint Kitts and Nevis). (It should be noted, however, that the issue in *Condor* was not strictly choice of law, but rather whether a bankruptcy court has the power to entertain such foreign-law claims under chapter 15 of the Bankruptcy Code, enacted in 2005. This illustrates a point to which we will return in part IV: namely, that if a conflict involving foreign fraudulent transfer law arises in the context of a bankruptcy case, resolution may be dominated by preemptive rules of bankruptcy law.)

Not surprisingly, some courts have been reluctant to apply unfamiliar foreign fraudulent transfer laws. For example, *FDIC v. British-American Corp.*[72] involved a nonbankruptcy fraudulent transfer claim in a transaction with a strong Fiji connection; the court found sufficient federal interest in the case to warrant applying the UFCA as a matter of federal common law. *A/S Kreditt-Finans v. CIA Ventico de Navegacion S.A.*[73] stemmed from a situation in which a Panamanian entity obtained a judgment in the Southern District of New York against a Norwegian entity, which the judgment creditor sought to collect by arresting a Norwegian-registered vessel owned by the judgment debtor (and encumbered by a bevy of Norwegian mortgages held by Norwegian mortgagees) when the vessel arrived in Philadelphia. A day before the arrest, however, the judgment debtor had conveyed the vessel to a different Norwegian entity. The judgment creditor sought to proceed with the arrest, asserting that the transfer had been fraudulent. The court acknowledged the existence of a choice of law issue, but treated New York and Pennsylvania as the only contenders, simply asserting in a footnote that neither Norwegian nor Panamanian law was relevant.[74]

IV. CURRENT APPROACHES TO CHOICE OF LAW FOR FRAUDULENT TRANSFER

Ascertaining the current state of the law pertaining to choice of law for fraudulent transfer is no trivial task, for in this country there appears to be next to no published commentary on the subject. Garrard Glenn's classic treatise on fraudulent transfer barely alludes to choice of law, and the most closely analogous modern treatise, by Peter Alces, says nothing.[75] Scholarly treatise-writers whose home is choice of law have done little more than take note of the subject.[76] Domestic periodical literature on the subject during the past four decades amounts to no more than a single article, published in 1993 in the wake of the leveraged acquisition boom of the 1980s, written by a practitioner who, one suspects, had an

---

[72] 755 F. Supp. 1314, 1324–25 (E.D.N.C. 1991).

[73] 560 F. Supp. 706 (E.D. Pa. 1983), *aff'd mem.*, 729 F.2d 1446 (3d Cir. 1984).

[74] *Id.* at 710 n.11.

[75] The treatises referred to are GLENN, *supra* note 11, § 42, at 71, § 62a, at 102, and PETER A. ALCES, THE LAW OF FRAUDULENT TRANSACTIONS (first published in 1989 and in its current incarnation a regularly-updated looseleaf).

[76] *See, e.g.*, PETER HAY ET AL., CONFLICT OF LAWS § 19.3, at 1237–38, § 19.8, at 1243–44 (5th ed. 2010); LUTHER L. MCDOUGAL, III, ET AL., AMERICAN CONFLICTS LAW § 80, at 328, § 157, at 582–83 (5th ed. 2001).

axe to grind.[77] One must go back to the mid-1960s, before the appearance of the *Second Restatement*, to find the next most recent contributions, which were a brief essay and an even briefer student comment inspired by the same case.[78]

A literature on choice of law governing the exercise of avoidance powers in multinational bankruptcy has begun to develop.[79] However, that literature focuses on the question of which country's avoidance powers should be employed when bankruptcy proceedings take place as to a debtor in more than one country. The literature therefore scants the more basic question of the choice of law rule that should be applied to an avoidance doctrine that, like the UFTA, is available outside bankruptcy as well as in bankruptcy. Any limitation on the employment by a United States bankruptcy court, in a multinational bankruptcy, of avoidance powers that are ordinarily applicable in a bankruptcy proceeding—whether such avoidance power is integral to the Bankruptcy Code or arises under state law—is in the domain of bankruptcy law, not state law.[80] A bankruptcy court should have no difficulty applying a supervening federal choice of law rule for state-law fraudulent transfer claims in a multinational bankruptcy as a matter of federal common law, if it perceives a need to preempt state choice of law rules in that setting. Accordingly, state lawmakers need not take any special note of the effect that the choice of law rules applicable to state-law fraudulent transfer claims would have on such claims in a multinational bankruptcy proceeding. (Indeed, even if it were thought desirable for state choice of law rules to take multinational bankruptcy into account, by specifying different choice of law principles for claims brought inside and outside a bankruptcy proceeding, it is doubtful that such an approach would be enforceable, given the exclusive federal power over bankruptcy under the Constitution and courts' consequent disdain for state laws that have effect only in bankruptcy.[81])

---

[77] Thomas H. Day, *Solution for Conflict of Laws Governing Fraudulent Transfers: Apply the Law That Was Enacted to Benefit the Creditors*, 48 BUS. LAW. 889 (1993), discussed *infra* at text accompanying note 115.

[78] These are Albert A. Ehrenzweig & Peter Kay Westen, *Fraudulent Conveyances in the Conflict of Laws: Easy Cases May Make Bad Law*, 66 MICH. L. REV. 1679 (1968) and Comment, *Choice of Law in Fraudulent Conveyance*, 67 COLUM. L. REV. 1313 (1967), both of which were inspired by *James v. Powell*, 19 N.Y.2d 249 (1967), discussed *infra* at text accompanying note 89. In addition, there is a quantity of practitioner-oriented literature that refers to the choice of law issue in the context of asset protection trusts and leveraged acquisitions, but for the most part such literature is of little analytic interest.

[79] For a recent dialogue on the subject, see Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT'L. L. 401 (2010) and Jay Lawrence Westbrook, *A Comment on Universal Proceduralism*, 48 COLUM. J. TRANSNAT'L L. 503 (2010).

[80] The Bankruptcy Code already codifies limitations of this sort. *See* Bankruptcy Code § 1521(a)(7) (avoidance actions under U.S. law may not be brought in a chapter 15 proceeding); *cf.* Bankruptcy Code § 1523(a) (avoidance actions under U.S. law may be brought in a full U.S. bankruptcy proceeding); Fogerty v. Petroquest Res., Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319 (5th Cir. 2010) (fraudulent transfer claim under the law of the country of the debtor's main proceeding may be brought in a chapter 15 proceeding). Moreover, as discussed *supra* at notes 21–24, most bankruptcy courts have been receptive to applying, as a matter of federal common law, a federal choice of law rule, especially when a federal interest is perceived to supervene state interests.

[81] *See* Ronald J. Mann, *The Rise of State Bankruptcy-Directed Legislation*, 25 CARDOZO L. REV. 1805 (2004).

In this connection, it should also be noted that courts are divided on the question of whether the avoidance powers of a United States bankruptcy court apply at all to a transaction that takes place (in some sense) outside the territory of the United States.[82] This question stems primarily from a judicially-recognized canon of statutory interpretation to the effect that a federal statute should not be construed to apply extraterritorially absent clear indication that Congress intended it to have extraterritorial effect. Although reported cases to date that have considered the application of this doctrine to the Bankruptcy Code's avoidance powers involved avoidance powers created by the Bankruptcy Code, if the courts give the doctrine effect at all there is no obvious reason why it would not be applied equally to avoidance powers created by nonbankruptcy fraudulent transfer law that the Bankruptcy Code authorizes the bankruptcy trustee to wield. Again, however, state lawmakers need not take any special note of the effect this doctrine may have on the applicability of state fraudulent transfer law in a multinational bankruptcy, for this doctrine too is in the realm of federal bankruptcy law, and thus under the control of the federal courts and Congress.[83]

Hence the literature on the emerging subject of choice of avoidance law in multinational bankruptcy is only indirectly relevant to the crafting of choice of law principles for state-law fraudulent transfer claims.

The state of current law was succinctly summarized by a treatise which, in the course of a lengthy analysis of the application of fraudulent transfer law to securitization transactions, devoted the following paragraph to choice of law: "[T]here does not seem to be a universally recognized choice-of-law rule in this area. Consequently, it may be difficult to determine which state's fraudulent

---

[82] *Compare* French v. Liebmann (*In re* French), 440 F.3d 148 (4th Cir. 2006) (applying the Bankruptcy Code's integral fraudulent transfer provision, section 548, to a pre-petition transfer of Bermuda real property by the debtor in a U.S. chapter 7 case), *with In re* Midland Euro Exch., Inc., 347 B.R. 708 (Bankr. C.D. Cal. 2006) (holding that Bankruptcy Code section 548 did not apply to a pre-petition transfer by the debtor in a U.S. chapter 7 case, which transfer was viewed by the court as extraterritorial). Analysis is further confused by the suggestion that comity might render U.S. avoidance powers unenforceable extraterritorially, at least in some cases, regardless of how the Bankruptcy Code is construed as to extraterritorial effect. *See* Gitlin v. Societe Generale (*In re* Maxwell Commc'n Corp.), 93 F.3d 1036 (2d Cir. 1996) (declining to avoid a preferential transfer under Bankruptcy Code section 547 on grounds of comity when the debtor was subject to cooperative parallel bankruptcy proceedings in the United States and the United Kingdom and the U.K. proceeding was deemed primary). For a cogent analysis, see Jay Lawrence Westbrook, *Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases*, 42 TEX. INT'L L.J. 899, 910 (2007) (asserting that "the so-called presumption [against extraterritoriality] is really code for a choice-of-law analysis").

[83] As to the role of Congress, observe that in the Supreme Court's most recent engagement with the presumption against extraterritoriality, Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869 (2010), the court applied the doctrine to hold that the antifraud provision of the Securities Exchange Act of 1934 does not apply to misconduct in connection with securities traded on a foreign exchange. In response, Congress almost immediately amended the statute to provide for extraterritorial jurisdiction over actions brought by the Securities and Exchange Commission. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, § 929P(b), 124 Stat. 1376, 1865 (Supp. 2010) (amending Securities Exchange Act of 1934 § 27, 15 U.S.C. § 76aa).

conveyance law applies."[84] That is a discreet understatement. "Chaotic" is nearer the mark.

To begin with, the two *Restatements of Conflicts of Laws* (usually referred to herein respectively as the *First Restatement* and the *Second Restatement*) each make specific reference to choice of law for fraudulent transfer. As is characteristic of the two Restatements, however, what the *First Restatement* says on the subject bears no resemblance to what the *Second Restatement* says.

The *First Restatement*, issued in 1934, sets forth a simple sharp-edged rule: fraudulent transfer law is determined by the situs of the property at the time of the challenged transfer.[85] This rule follows from a conception of fraudulent transfer as being essentially a flaw in the transferee's title, and hence appropriately treated for choice of law purposes in the same way as such issues as the voidability of a transfer on account of failure to record a deed, illegality, or fraud between the parties. The situs approach seems to have been followed by courts generally during the decades before the *First Restatement.* Of course courts are rarely unanimous about anything, and there are cases of that era that support reference to the law of the debtor's domicile, or alternatively to the law of the state in which the instrument of conveyance was executed (state of execution also being the state whose law would govern a written contract under then-current choice of law principles).[86]

The situs rule is in keeping with the rigid "vested rights" approach to choice of law that dominated the era leading up to the *First Restatement*. The revolution in American choice of law thinking that occurred during the last century rejected that approach (globally, of course, and not merely with respect to fraudulent transfer) in favor of approaches that pay more attention to the policies underlying the substantive law involved and that determine the governing law on the basis of the interests that the contending jurisdictions have in enforcing those policies. Even courts that nominally followed the "vested rights" methodology were apt to subvert it when they deemed it appropriate to do so, by using some device to escape from the prescribed result. One such device was recharacterization: *i.e.*, the court declares "this case doesn't really fall within category X defined by the *First Restatement*, which prescribes that the governing law be chosen by rule A; rather, this case falls within category Y, which prescribes that the law be chosen by rule

---

[84] SECURITIZATION OF FINANCIAL ASSETS § 5.05[h][1], text at n.732 (Jason H.P. Kravitt ed., 2d ed. 1995 & Supp. 2010).

[85] *First Restatement* § 218 (setting forth the situs rule as to the validity of conveyance of land); *id.* cmt. f ("Whether a conveyance valid between the parties to it, is either void or voidable with respect to third parties, as for instance, where it is in fraud of creditors . . . , is determined by the law of the state in which the land is."); *First Restatement* § 257 (setting forth the situs rule as to the validity of a conveyance of a chattel); *id.* cmt. b ("The substantial validity of a conveyance as to third parties, as for instance, when it is alleged to be in fraud of creditors . . . , is determined by the law of the state where the chattel is at the time of conveyance."). A caveat expresses no opinion as to whether, for chattels, the governing law should be that of the jurisdiction where "the entire unit is managed," in the case of a conveyance of "an aggregate unit made up of a number of units, themselves aggregates." *First Restatement* § 256, caveat; *id.* § 257 cmt. c. The *First Restatement* does not appear to speak to a fraudulent transfer of intangible property.

[86] Older cases are gathered in P.H. Vartanian, Annotation, *Conflict of Laws as Regards Validity of Fraudulent and Preferential Transfers and Assignments*, 111 A.L.R. 787 (1937).

B." *Irving Trust Co. v. Maryland Casualty Co.*,[87] a widely-noted 1937 opinion by Learned Hand, employed that device to escape the situs rule as to an avoidance claim. That case involved a corporation in financial distress that transferred to certain creditors in New York various properties, including land in other states. After the corporation went bankrupt, its trustee sought to compel the transferees to reconvey the land on the ground that a New York statute made the conveyance avoidable as a preference.[88] The court held that if a breach of the relevant statute could be proven the transferees could be compelled to reconvey not only the land in New York, but also the land in other states, escaping the situs rule by deeming the transferees' acceptance of title to be a tort, hence warranting choice of law under the principles applicable to torts.

Irving Trust was a harbinger of the revolution in conflicts of law methodology. The *Second Restatement* conflicts methodology generally proceeds directly to analysis of the interests of the contending jurisdictions, discarding the mask of manipulating rigid categories in the style of the *Irving Trust*. Yet some modern courts continue to apply the situs rule to fraudulent transfers, notwithstanding that a jurisdiction other than the situs would seem to have a greater interest in the outcome of a given claim. Another widely noted case, *James v. Powell*,[89] decided by the highest court of New York in 1967, is illustrative. The court in that case applied the situs rule to hold that Puerto Rico's fraudulent transfer law, not New York's, applied to a transfer of land sited in Puerto Rico, made by a New York judgment debtor to avoid execution under a judgment against him originally rendered in New York in favor of a New York creditor. Other modern cases also continue to apply the situs rule.[90]

The *Second Restatement* has been popular among courts as a general matter since it was promulgated in 1971. As to fraudulent transfers, the *Second Restatement* adopted the same characterization trick employed in *Irving Trust*. In a single section, glossed by comments, the *Second Restatement* states that a fraudulent transfer claim applicable to a transfer of land is governed by the law that would be applied by the courts of the situs, which courts "would usually" apply

---

[87] 83 F.2d 168 (2d Cir. 1936), noted in 50 HARV. L REV. 129 (1936) and 4 U. CHI. L. REV. 135 (1936).

[88] The statute in question was not the UFCA, but rather a New York statute applicable to corporations that imposed liability upon corporate officers, directors and stockholders in the event the corporation made an "illegal transfer" of its property "when it is insolvent or its insolvency is threatened." *Irving Trust*, 83 F.2d at 170. The court interpreted the statute as also making the transfer itself illegal and hence warranting a remedy against the transferee. *Id.* at 172. For choice of law purposes there is no reason to treat an action against a transferee under that statute differently from an action under a statute that calls itself a fraudulent transfer statute.

[89] 225 N.E.2d 741 (N.Y. 1967). The two brief articles referred to *supra* in note 78 both criticized this case and would have permitted application of New York fraudulent transfer law.

[90] *See, e.g.*, Citizens Bank of Clearwater v. Hunt, 927 F.2d 707, 710 (2d Cir. 1991) (nonbankruptcy case applying the situs rule to an interfamily transfer of residential real property); O'Neil v. Jones (*In re* Jones), 403 B.R. 228, 233 (Bankr. D. Conn. 2009) (applying the situs rule to a challenged interfamily transfer of residential real property); Metex Mfg. Corp. v. Manson Envtl. Corp., No. 05-2948-HAA, 2008 WL 474100, at *5–10 (D.N.J., Feb. 15, 2008) (declining to apply New Jersey fraudulent transfer law to a transfer of real property in Ontario).

their own local law; but "on occasion" courts in the situs or elsewhere "may" apply the choice of law methodology applicable to torts, as set forth in section 145 of the *Second Restatement*.[91] These provisions do not attempt to identify the "occasions" on which it would be appropriate for a court to employ the tort methodology, rather than the situs rule that is still stated to be the baseline. Moreover, these provisions speak only to transfers of land; the *Second Restatement* does not address fraudulent transfer law as to property other than land.[92] With apparent unanimity, however, the courts that purport to apply the *Second Restatement* approach to choice of law for fraudulent transfer have ignored the conditional and limited nature of what the *Second Restatement* actually says, and have taken it to stand for the simple proposition that the choice of law methodology applicable to torts under the *Second Restatement* applies to fraudulent transfers, period.

The *Second Restatement's* choice of law methodology for torts centers on section 145. Paragraph (1) of that section calls for application of the law of the state having the most significant relationship to the occurrence and to the parties under the principles of section 6. Paragraph (2) sets forth the following list of contacts to be taken into account in applying the principles of section 6:

> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.

---

[91] Section 223 of the *Second Restatement* provides that the effectiveness of a conveyance of land is determined by the law that would be applied by the courts of the situs, who "would usually" apply their own local law. Comment i to that section, supported by comment f, states that courts "might well" deviate from the situs rule as to a fraudulent transfer. The final paragraph of the Introductory Note to Chapter 9, Topic 2, which immediately precedes section 223, states that choice of law applicable to a fraudulent transfer "may" be governed by application of the methodology applicable to torts, set forth in section 145. The *Second Restatement* contains no other reference to transfers in fraud of creditors, except for a passing reference in section 301 cmt. b.

[92] Kaiser Steel Corp. v. Jacobs (*In re* Kaiser Steel Corp.), 87 B.R. 154, 159 (Bankr. D. Colo. 1988), stated that section 244 of the *Second Restatement* applies to fraudulent transfers. That is not correct. The text of section 244 (which pertains to conveyance of an interest in chattels) differs from the text of section 223 (which pertains to conveyance of an interest in land) in that section 244, unlike section 223, is phrased to apply only to the validity and effect of a conveyance "as between the parties to the conveyance"—*i.e.*, not as against third parties. (The reason for the difference probably relates to the drafters' desire to minimize conflict with the provisions of UCC Article 9 pertaining to security interests in personal property, which of course are governed by the UCC's own choice of law rules.) Contrary to *Kaiser*, Comment j to section 244 does not state that section 244 applies to a fraudulent transfer. Indeed, Comment j begins by reiterating the applicability of the section to questions of validity "as between the parties to the conveyance." The point is of little practical significance, however, because section 244 prescribes for chattels essentially the same interest analysis that section 233 prescribes for land, with somewhat less emphasis on the weight to be given the situs.

These contacts "are to be evaluated according to their relative importance with regard to the particular issue." Section 6(2), in turn, sets forth a further list of policy considerations potentially relevant to choice of law that are to be considered in the absence of an applicable statute controlling choice of law, as follows:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

This interest analysis methodology is characteristic of the *Second Restatement*. Its outstanding feature is its diffuseness. It has often been remarked that the result of directing courts to engage in interest analysis in this style is that "each case is decided as if it were unique and of first impression,"[93] and that "it is the Restatement's very flexibility and malleability that has made it so attractive to the courts,"[94] for it allows them to do whatever they want. That malleability of course undercuts predictability in structuring transactions that may be susceptible to fraudulent transfer attack, and increases litigation costs if such an attack is litigated.

As previously noted, courts that purport to apply a federal choice of law rule to state-law fraudulent transfer claims that are brought in a bankruptcy proceeding commonly purport to apply the tort methodology of the *Second Restatement*. There is no visible difference between the analysis of courts that apply that methodology as a matter of federal law and those that apply it as a matter of state law. Bankruptcy courts sitting in states that apply the tort methodology of the *Second Restatement* indeed have often been able to avoid deciding whether to apply a federal or a state choice of law rule, on the ground that the same choice of law methodology would be followed either way.[95] (Of course, if a state were to enact a

---

[93] P. John Kozyris, *Interest Analysis Facing its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L. J. 569, 580 (1985).

[94] WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICTS OF LAWS § 77, at 241 (Rev. 3d ed. 2002). For a case in which the judge positively reveled in the liberty afforded him by interest analysis, see *In re* Worldcom, Inc., No. 02-13533 (AJG), 2003 WL 23861928 (Bankr. S.D.N.Y. Oct. 31, 2003), which involved a fraudulent transfer claim relating to an intercompany note issued in a complex acquisition financing. After summarizing the interest balancing approach of *Second Restatement* section 145, the court observed, "Thus, under this analysis, 'applicable law' could be the law of the state in which the debtor is incorporated, the transferee's principal place of business is located, the merger was negotiated and consummated, the state where the creditors are located, or the state whose law would provide the most benefit to the creditors as a group." *Id.* at *40.

[95] *See, e.g.*, MC Asset Recovery, LLC v. Commerzbank AG, 441 B.R. 791, 805 (N.D. Tex. 2010); *In re* Consol. Capital Equities Corp., 143 B.R. 80, 85 (Bankr. N.D. Tex. 1992); Ferrari v. Barclays Bus. Credit,

statute that prescribes a choice of law rule other than the *Second Restatement's* tort methodology, that would raise the stakes on the question of whether the bankruptcy court should apply a federal or a state choice of law rule.)

Given the diffuseness of the *Second Restatement's* tort methodology, the cases that purport to apply it resist summary description, and none of the modern cases stands out particularly from the rest. As typical as any is *Ferrari v. Barclays Business Credit, Inc.* (*In re Morse Tool, Inc.*),[96] which involved the failed leveraged acquisition of a debtor headquartered and incorporated in Michigan, the majority of whose operations, employees, inventory and tangible assets were in Massachusetts; other manufacturing operations and assets were in Michigan; the largest concentration of its bankruptcy creditors (by number and in amount) was located in Massachusetts (the court did not say how it determined the "location" of each creditor, but one guesses that it used the mailing addresses on their proofs of claim); the acquisition was closed in New York and a party to the acquisition was headquartered there; and the acquisition financier was incorporated in Connecticut and had its place of business there. The court enumerated these facts and concluded that "although no one state holds a majority of the significant contacts, Massachusetts comes closest of the four states to doing so."[97]

Another specimen, also involving a fraudulent transfer claim made in bankruptcy, is *MC Asset Recovery, LLC v. Commerzbank AG*.[98] The case is primarily devoted to deciding under the *Second Restatement* methodology which of several candidate states' fraudulent transfers laws would apply to a guaranty given in a sophisticated business transaction by a large corporate debtor, involving players in many states. The district court wound up selecting the fraudulent transfer law of Georgia over the primary alternative contestant, New York, overruling the bankruptcy court's selection of New York. Though the court trudged through the *Second Restatement* methodology at length and did not reduce its thinking to a concise statement, it seems that Georgia was the winner essentially because the debtor's principal place of business was there. Such factors as "location of injury" and "location of conduct causing the injury" were also deemed to point to Georgia, but it is hard to see how those factors (as the court chose to articulate them) could ever be said to point to a location other than the debtor's principal place of business (*e.g.*, "The degrading of the economic well-being of [the debtor]—the injury flowing from the guaranty—occurred where [the debtor] had its principal place of business.")[99] The court was also encouraged by the fact that the number of creditors (by head count) located in Georgia outnumbered those in New York. notwithstanding that the number of creditors by dollar amount was greater in New York. (Again, the court did not say how it decided where a creditor is "located,"

Inc. (*In re* Morse Tool, Inc.), 108 B.R. 384, 385 (Bankr. D. Mass. 1989); Kaiser Steel Corp. v. Jacobs (*In re* Kaiser Steel Corp.), 87 B.R. 154, 157–60 (Bankr. D. Colo. 1988).

[96] 108 B.R. 384 (Bankr. D. Mass. 1989).

[97] *Id.* at 388.

[98] 441 B.R. 791 (N.D. Tex. 2010).

[99] *Id.* at 806.

but a fair guess is that it used the mailing addresses on the proofs of claim.) Though the bankruptcy court was impressed by the fact that New York's fraudulent transfer law was more protective of creditors than Georgia's (thereby, in the bankruptcy court's view, better serving the policies underlying fraudulent transfer law), the district court was not.

Other recent cases that purport to apply interest analysis in the style of section 145 of the *Second Restatement* to determine choice of law for fraudulent transfer, and that are not otherwise cited in this paper, are noted in the margin.[100]

A third illustrative case, arising outside of bankruptcy, applies neither the *Second Restatement* methodology nor the situs rule. The case arose from a use of fraudulent transfer law that has been common in recent years: namely, to recover from the "winning" investors in a Ponzi scheme, who received large distributions before the collapse of the scheme, for the benefit of the "losing" investors who were left holding the bag after the collapse.[101] Such actions have been brought against winning investors on behalf of the losing investors by a receiver appointed on their behalf, sometimes at the behest of the Securities and Exchange Commission. Such a case was *Terry v. June*.[102] The court, daunted by the difficulty of ascertaining which jurisdiction(s)' fraudulent transfer law(s) applied to such claims, initially cut the Gordian knot by declaring that the federal interest was sufficient to justify applying the rules of the UFTA as a matter of federal common law. Upon reconsideration, however, the court reversed itself and returned to the *Erie*[103]–*Klaxon* orthodoxy of applying the fraudulent transfer law of the relevant state, the relevant state being determined by the choice of law rules of Virginia, the state in which the court sat. The court concluded that a fraudulent transfer claim should be treated as a tort for the purpose of Virginia's choice of law rules (thus following *Irving Trust*–*Second Restatement* that far), but then concluded that under those Virginia rules, actions sounding in tort are governed by the law of the place of the wrong (the *lex locus delecti* principle of the *First Restatement*). This meant applying the law of the jurisdiction in which the last event occurred that created the

---

[100] *See* Lancer Partners L.P. v. Anderson, No. 05-60606 CIV-Marra, 2005 WL 3704700 (S.D. Fla. Sept. 27, 2005); Official Committee of Unsecured Creditors v. Blomen (*In re* HydroGen, L.L.C.), 431 B.R. 337, 353−54 (Bankr. S.D.N.Y. 2010). A strange bankruptcy case is *Asarco LLC v. Americas Mining Corp.*, 382 B.R. 49 (S.D. Tex. 2007), in which the challenged transfer was the stripping of a subsidiary corporation of its crown jewel asset (controlling stock in a corporation that owned a mine in Peru) for the benefit of an affiliated corporation. The situation was replete with facts complicating choice of law analysis – *e.g.*, the debtor corporation and the transferee corporation were both headquartered in Arizona, the debtor owned property in many states, the parent corporation of the group was headquartered in Mexico, etc. After an extended choice of law analysis the court chose Delaware as having the most significant contacts, though Delaware was merely the state of incorporation of some of the corporations involved. *Id.* at 61–64. The court casually noted at the end of its analysis that the litigants had all agreed that Delaware law should apply, *id.* at 64, leaving it a mystery why the court analyzed choice of law at all.

[101] For other reported cases applying fraudulent transfer law to the winning investors in Ponzi schemes in which the choice of law issue was considered, see Drenis v. Haligiannis, 452 F. Supp. 2d 418, 425−28 (S.D.N.Y. 2006); SEC v. Infinity Grp. Co., 27 F. Supp. 2d 559, 564−65 (E.D. Pa. 1998).

[102] 359 F. Supp. 2d 510 (W.D. Va. 2005), *amended by* 420 F. Supp. 2d 493 (W.D. Va. 2006).

[103] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

fraudulent transfer claim. This led the court to conclude that the claim against the winning investor who was the defendant in the case was governed by Florida fraudulent transfer law to the extent that his excess distributions were paid by check drawn on the fraudster's Florida bank account, by Michigan fraudulent transfer law to the extent paid by wire transfer to the investor's Michigan bank account, and by Bahamian fraudulent transfer law to the extent paid to the investor's Michigan bank account through an account in the Bahamas (with some qualms expressed about the consistency with Virginia public policy of applying the fraudulent transfer law of the Bahamas, a notorious asset haven).

V. CODIFYING A CHOICE OF LAW RULE FOR FRAUDULENT TRANSFER

A. Should the Uniform Law Commission Undertake Such a Project?

Nothing approaching a consensus on choice of law for fraudulent transfer has emerged in the courts, there is no apparent legislative experience on the subject, and to date scholars have barely noticed it. Those facts define the need for attention to the subject. But they could also be viewed as reasons to avoid drafting a uniform law to address it. The current statement of policy published by the Committee on Scope and Program on appropriate subjects for a uniform law states that "[a]s a general rule, the ULC . . . should avoid consideration of subjects that are . . . entirely novel and with regard to which neither legislative nor administrative experience is available."[104] Moreover, the policy statement also discourages projects that are "controversial because of disparities in social, economic, or political policies or philosophies among the states,"[105] which might have some application to such a project insofar as it affects domestic asset protection trusts. Finally, the ULC's experience with uniform laws devoted exclusively to codifying a choice of law rule has not been particularly happy. The only two such projects of which I am aware resulted in uniform laws that were not widely enacted and withdrawn.[106]

Such considerations are not prohibitive. The ULC has already addressed the subject of fraudulent transfer, and indeed the uniform laws it has produced on that

---

[104] Comm. on Scope and Program, Unif. Law Comm'n, Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts 2 (August 2010).

[105] *Id.*

[106] These were the Uniform Statute of Limitations on Foreign Claims Act (promulgated 1957, enacted by three states, withdrawn 1978) and the Uniform Conflict of Laws – Limitations Act (promulgated 1982, enacted by five states, withdrawn 2000). Both addressed the choice of law applicable to the period within which a claim must be brought. Statutes of limitation traditionally have been characterized as "procedural" for conflict of laws purposes, with the result that the limitation period prescribed by the forum state's law is applied. The forum-shopping to which that rule leads has been addressed in most states by "borrowing statutes" that require application of a limitation period other than the forum state's if some stated aspect of the claim is connected in some stated way with another jurisdiction. Those "borrowing statutes" are widely divergent, and the two uniform laws just mentioned were attempts by the ULC to regularize the situation. After studying the prospect of trying a third time, the ULC in 2005 decided not to do so. For further discussion of the ULC's record in addressing choice of law in its uniform laws, see Kettering, *Harmonizing*, *supra* note 4, at 242–50.

subject are among its most successful and enduring creations. To address choice of law applicable to fraudulent transfer would not be a foray into a new area, but rather a refinement of an existing product, a product that is incomplete absent attention to the subject. The ULC has had successful experience of a comparable sort. None of the uniform laws promulgated by the ULC before 1951 contained choice of law provisions, and the ULC has successfully revised some of its early products to include such provisions when the need was felt. For example, the original 1914 version of Uniform Partnership Act said nothing about which jurisdiction's law governs relations among partners or between the partnership and its partners, while the 1992 revision added a carefully-drafted provision on the subject.[107]

The same reasons that impelled the ULC to attend to fraudulent transfer law in the first place suggest that the operation of that law be clarified in this respect. Indeed, the interesting question is why a demand for clarification has not emerged previously.

One explanation is that much behavior that in earlier times was policed only through the broad principles of fraudulent transfer law is today policed through narrowly-focused statutes. The perfection rules of personal property security law, bulk sales laws, the absolute priority rule that governs distributions in bankruptcy reorganizations, and even the constructive fraud rules present in the modern codifications of fraudulent transfer law, are all examples of enactments that regulate behavior that originally was policed only by the primordial rule of fraudulent transfer law. We live now in an age of statutes, and in consequence the very general doctrine of fraudulent transfer (which is so broadly applicable and so broadly phrased that it has a feel more like common law than a statute) is increasingly displaced by more specific enactments.

Another explanation is that the close similarity of the successive generations of fraudulent transfer statutes with each other and with the received common law has made it unnecessary to consider the choice of law issue very often, because in most cases the substantive law of each candidate jurisdiction is substantially the same. That element is eroding for a variety of reasons, among them the following: (a) universal awareness of the potential applicability of fraudulent transfer law to transactions that are generally viewed as untainted by any true fraud, such as leveraged acquisitions, upstream guaranties, and low-price foreclosure sales, which transactions take place commonly and in enormous dollar volume, thereby raising the stakes on relatively small differences between different jurisdictions' laws, (b) partly in consequence of point (a), the insistence of various constituencies in the states on amending their fraudulent transfer laws, either openly or in a concealed way, and (c) the increasing internationalization of everything, which increases the likelihood that a transaction may implicate a foreign jurisdiction whose fraudulent transfer law is quite different from the American norm.

All of the constituencies that were interested in the drafting of the UFTA in 1984 should be interested in a revision project of this nature. In addition, some

---

[107] UNIF. P'SHIP ACT § 106 & cmt. (1997).

transactional patterns have emerged since 1984 that were then lesser known or unknown and to which fraudulent transfer law is of substantial interest. The constituencies involved in such transactions also would be likely to be interested in such a revision project. Those include leveraged acquisitions, multinational bankruptcies, and asset protection trusts.

B. If a Choice of Law Rule for Fraudulent Transfer is Codified, What Should it Say?

A project to develop a uniform law on choice of law for fraudulent transfer requires an opening bid as to the content of such a law. Following are some thoughts and a tentative proposal.

A transfer may "hinder, delay or defraud" a debtor's creditors for different reasons, and it is not necessarily the case that all fraudulent transfers should be analyzed the same way for choice of law purposes. It is convenient initially to focus on fraudulent transfers of the kind most familiar today, namely those in which the transfer is made for less than reasonably equivalent value (which might equivalently be phrased as saying that the transfer diminishes the debtor's net worth). By definition, constructive fraud claims are always of that kind and insider preference claims are never of that kind; an actual fraud claim may or may not be of that kind.

In the case of a fraudulent transfer of that kind, we can begin with three desiderata. The first two are predictability and transparency. Those are always high values in a commercial setting—and fraudulent transfer issues often do arise in commercial settings, though they also arise in other settings in which predictability and transparency may not be as valuable. An entity that extends credit to a debtor should be able to assess the extent to which future dispositions by the debtor of its assets may increase the credit risk; a transferee who receives a transfer of property from a debtor should be able to assess the extent to which he may be at risk of having the transaction avoided at the behest of a disgruntled creditor of the debtor.

A third desideratum is resistance to manipulation by the debtor, or by the debtor acting in concert with the transferee. Fraudulent transfer law represents a balancing of the interest of the transferee in the stability of the transfer made to it and the interest of the debtor's creditors in not allowing the debtor to divest assets that may be needed to pay its debts. Striking that balance is the purpose of fraudulent transfer law, but the creditors are not parties to, nor are they in a position to prevent, asset transfers that are subject to fraudulent transfer attack. A choice of law rule that would allow the debtor, or the debtor in concert with the transferee, to shop for a jurisdiction with a debased fraudulent transfer law would vitiate the purpose of the doctrine.

For that reason, it would be absurd to select the fraudulent transfer law applicable to a given transaction on the basis of the law selected by the debtor and

transferee to govern the challenged transfer as between themselves. Happily, that is a folly that modern courts have eschewed.[108]

There would be little point in codifying the choice of law principle (or, rather, methodology) most commonly employed by modern reported cases, namely that set forth in the *Second Restatement* for torts. If codification is to achieve predictability and transparency, a rule less diffuse than the interest analysis of the *Second Restatement* is required.

The situs rule laid down by the *First Restatement* is a poor way of selecting fraudulent transfer law as a general matter, both for reasons that have been long recognized as applicable to the situs rule in general and for reasons specific to fraudulent transfer law. It has long been recognized that the traditional justifications for the situs rule are, in the main, fallacious.[109] One justification is that only the situs courts can directly affect land[110] within the situs state; therefore every non-situs court should apply the law of the situs to ensure that courts of the state will enforce the forum court's judgment. That justification ignores the power of a non-situs court having personal jurisdiction over the contestants for the land, which often will not need the cooperation of courts in the situs state to enforce its judgment; it also ignores the Full Faith and Credit Clause insofar as the candidate jurisdictions are domestic.[111] A second justification is that the situs rule preserves the integrity of the recording system. That justification fails because a fraudulent transfer claim (like many other challenges to land title) does not arise from the validity or lack of validity of recorded instruments of conveyance; record title is irrelevant to a fraudulent transfer contest. A third justification emphasizes the special interest the situs state has in land within its borders. But while that interest applies to issues of land use, environmental protection, and the like, it is not implicated by the question of entitlement to the value of the property.

The debility of the situs rule is illustrated by the familiar situation in which a leveraged acquisition fails, and the unsecured creditors of the debtor (or the debtor's trustee in bankruptcy on their behalf) file suit to avoid the security interests in the debtor's property granted to the acquisition financier. In a typical transaction of that nature, the financier will have security interests in substantially all of the debtor's property, which may be located in any number of jurisdictions. Whether the acquisition financing was a wrong to creditors should be treated as a single

---

[108] *See, e.g.*, *In re* Lea Fabrics, Inc., 226 F. Supp. 232, 236–37 (D.N.J. 1964); Ferrari v. Barclays Bus. Credit, Inc. (*In re* Morse Tool, Inc.), 108 B.R. 384, 386 (Bankr. D. Mass. 1989); Hassett v. Far West Fed. Sav. & Loan Ass'n (*In re* O.P.M Leasing Servs., Inc.), 40 B.R. 380, 392 (Bankr. S.D.N.Y.), *aff'd*, 44 B.R. 1023 (S.D.N.Y. 1984).

[109] For a relatively recent restatement of this point, see William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 424–26 (2000).

[110] I refer to land, both for specificity and because the pull of the situs principle is strongest in that context, but the same arguments apply *mutatis mutandis* to other property.

[111] Conceivably the fact that the Full Faith and Credit Clause does not have extraterritorial effect might be a reason to distinguish foreign from domestic jurisdictions in formulating a choice of law rule for fraudulent transfer. For discussion of the impact of the Full Faith and Credit Clause in a different choice of law setting, see Kettering, *Harmonizing*, *supra* note 4, at 278–83.

question, and it would serve no sensible purpose to treat it as a set of different questions governed by the laws of different jurisdictions as to different items of the debtor's property.[112]

Furthermore, the situs principle fails entirely in the case of intangible property, which has no situs. Of course a statute might designate a fictitious situs, but the need to engage in such a fiction underscores the unreality of looking to situs as the guiding principle in the first place.

Still other reasons to reject the situs rule are specific to fraudulent transfer law. One is that fraudulent transfer law applies to incurrence of obligations, as well as to transfers of property. The situs rule has no meaning as applied to an obligation.

Perhaps the strongest reason to reject the situs rule is that it is too readily manipulable by debtors. To the extent that a debtor's property is movable, or can be converted into movable property, such as securities or other financial assets, a debtor who wishes to push the boundaries of fraudulent transfer law could simply move his assets to a jurisdiction with a lax fraudulent transfer law before making the dubious transfer. Moreover, the same dynamic that has led states to validate asset protection trusts would create an incentive for states to relax their fraudulent transfer laws, leading to a race to the bottom. The reward to a state that relaxes its fraudulent transfer laws would be the resulting boost to trust and asset-management business in the state. The states that have validated asset protection trusts to date generally have been of low population, so the frustrated creditors who bear the costs of relaxation of the fraudulent transfer laws[113] are largely out-of-state, thus neatly internalizing benefits and externalizing costs to the enacting state.

Conceivably lax fraudulent transfer laws may be a net social good. But that is a decision that would better be made directly and openly than by provoking a race for the bottom among states competing for investment management fees.

If neither party autonomy, nor interest analysis in the style of the *Second Restatement*, nor situs, is desirable as a general choice of law principle for fraudulent transfer, what alternatives are there? One school of thought asserts that

---

[112] There is certainly precedent for this attitude. *See, e.g.*, *Second Restatement*, ch. 9, topic 3, intro. note 66 (noting that the conflicts rules of the *Second Restatement* in cases of assignments for the benefit of creditors, marital property interests, transfers upon death, and trusts, refer to the law of a single state, rather than to the law of the situs of each chattel, because "[i]nterests in a group of chattels will usually be involved in such cases, and it is desirable that a single law should be applied.")

[113] At least at first blush. Who actually are the gainers and losers from lax fraudulent transfer laws? At the margin, gainers are debtors and their transferees who engage in transactions that would otherwise be avoidable. Creditors would not be losers to the extent that they are able to adjust their behavior to correct for the increase in risk posed by the relaxed legal protection (*e.g.*, by requiring credit to be secured, or by charging a higher interest rate to compensate for the increased risks). The losers would be (i) creditors who cannot adjust (notably involuntary creditors—and note that asset protection trusts are often marketed to doctors and other professionals worried about exposure to potential future tort creditors), and (ii) debtors who do not engage in transactions that would otherwise be avoidable (who will have to pay the additional costs of credit demanded by creditors who adjust to the new lax legal regime). One would also expect some overall diminution in the overall availability of credit as well. Federalism—and with it, the power of individual states to relax their fraudulent transfer laws individually—adds another class of gainers, namely the investment managers in the state who gain from movement of assets into the state to take advantage of the relaxation of the law.

fraudulent transfer laws have the purpose of protecting a debtor's unsecured creditors, and so considers that the jurisdiction(s) in which the debtor's creditors are located has the strongest interest, and applies a choice of law rule based on that principle. At least one court, playing one variation on this theme, chose the law of the state in which the debtor had the most creditors.[114] The only published article to consider seriously choice of law for fraudulent transfer in the last four decades recommended allowing each creditor to apply the fraudulent transfer law of the creditor's own jurisdiction (or, as a less desirable alternative, choosing the law most favorable to creditors from among the jurisdictions in which the debtor's creditors are located).[115]

Quite aside from the question, scanted by these authorities, of exactly what jurisdiction counts as the home jurisdiction of a creditor for this purpose (headquarters? incorporation? chief assets? address given on a proof of claim?), there are two disqualifying objections to choosing fraudulent transfer law based on the jurisdiction of the creditor. The first is that it is radically incorrect to view the jurisdiction of the creditor as being the only jurisdiction that has an important interest in avoidance of a transfer. Fraudulent transfer law balances the interests of the debtor's creditors in avoiding a transfer against the interest of the debtor's transferee, against whom the action lies and who bears the burden of disgorging the transferred property or its value if the action is successful. The interest of the debtor's transferee surprisingly often has been forgotten in discourse on fraudulent transfer law, but to ignore that interest is an error that invalidates the discourse.[116] It will not do to say that only the creditors' jurisdiction(s) have a stake in application of fraudulent transfer law, for the transferee's jurisdiction has an equal and opposite stake.[117]

The second objection to reliance on the creditor's jurisdiction is that it is inconsistent with predictability and transparency. A choice of law rule based on counting the number of creditors in each jurisdiction (by head count or by size of claim) deals in facts that will not be knowable to creditors and may not even be readily knowable to the debtor. Even under the most radical version of this approach, which would give each creditor the benefit of his own home jurisdiction's fraudulent transfer law, the law that may apply to avoid a given transfer will be unknowable to the debtor and transferee at the time of the transfer, for fraudulent

---

[114] Hassett v. Far West Fed. Sav. & Loan Ass'n (*In re* O.P.M. Leasing Servs., Inc.), 40 B.R. 380, 395 (Bankr. S.D.N.Y.), *aff'd*, 44 B.R. 1023 (S.D.N.Y. 1984).

[115] Day, *supra* note 77.

[116] Compare David Gray Carlson, *Is Fraudulent Conveyance Law Efficient?*, 9 CARDOZO L. REV. 643 (1987), which demolished earlier law-and-economics analyses of fraudulent transfer doctrine by pointing out that they neglected to take into account the effect of the doctrine on the transferee.

[117] One who considers the choice of law question with asset protection trusts in mind might be tempted to dismiss the transferee—who is the trustee for the debtor—as the thinnest of legal fictions and pooh-pooh the transferee's interest. But fraudulent transfer law also applies to transferees who are quite independent of the debtor and who have powerful and legitimate reasons to rely on the efficacy of the transfers they receive. The charitable organization that receives a donation from a doubtfully-solvent donor, and the acquisition financier, are two examples.

transfer law generally gives standing to challenge a transfer to creditors who become such after the transfer.[118] (Still, predictability and transparency to both creditors and transferee are aspirations that probably cannot be achieved fully under any choice of law rule. Insofar as the choice of law rule turns on facts existing at the time of the challenged transfer, those facts may change between the time at which a creditor extends credit and a later time at which the debtor makes the challenged transfer, and the creditor may not be able to control or predict that change. If the choice of law rule looks to the situs of the property, for example, a creditor could be sure what jurisdiction's law would apply to a transfer of the property if the creditor were interested only in a specific known piece of real estate, but that is not the case as to chattels, still less as to financial assets.)

What, then, is a sound choice of law rule for fraudulent transfer? A useful heuristic is to consider a conflict in which one of the candidate jurisdictions is a foreign nation. There is no reason to view that as an exotic special case, for (as the reporter for the *Second Restatement* noted), "[b]y and large, American courts and writers have not distinguished between international and interstate conflicts for choice-of-law purposes."[119] The *Second Restatement* itself declares that the rules it lays down "apply to cases with elements in one or more States of the United States and are generally applicable to cases with elements in one or more foreign nations."[120] Hence, as a general matter, a court in New York, considering the law to be applied to a given issue in a transaction having contacts with New York and Georgia, cares not whether the Georgia is the one north of Florida or the one north of Turkey; both are equally foreign to New York.

A useful lead, therefore, can be found by making a detour to the emerging law of multinational bankruptcies, in which conflict between different countries' avoidance laws is a basic feature. Scholars have long touted the welfare gains that would follow if the world were to move away from the traditional "grab rule," by which each country assumes jurisdiction over local assets of a multinational debtor and distributes those assets with little heed to courts in other countries in which the debtors' assets are located, and instead move toward a system of universal administration. The unattainable ideal of universalism would be a single forum assuming jurisdiction over the debtor's worldwide assets and distributing them according to a single body of law. The more realistic goal is a modified form of universalism, in which assets in multiple countries are administered (at least in the

---

[118] The UFTA has two operative sections. One of them, section 4, gives standing to a creditor whether the creditor's claim arose before or after the challenged transfer was made, while the other, section 5, gives standing only to a creditor whose claim arose before the challenged transfer was made. Section 4 sets forth the primordial "actual fraud" rule applicable to a transfer made with intent to "hinder, delay or defraud" creditors, as well as two of the three slightly differing statements of the constructive fraud rule. Section 5 sets forth the third of the three statements of the constructive fraud rule and the insider preference rule. The justifiability of the UFTA's differing treatment of creditor standing as to the three overlapping statements of the constructive fraud rule is dubious.

[119] *Second Restatement* § 10, reporter's note. For a discussion of reverse engineering for domestic use conflicts of law rules originated for international use, see Kettering, *Harmonizing*, *supra* note 4, at 278–83.

[120] *Second Restatement* § 10.

first instance) by local courts, but those courts defer to a proceeding recognized worldwide as being the main proceeding in the case. That main proceeding is the one conducted by the court in the debtor's home jurisdiction.

Though no more than an academic dream for many years, a modified form of universalism has become ascendant. Within the past decade, the European Union has adopted a regulation addressed to the subject of multinational bankruptcy which requires that the debtor's home country take the lead role.[121] The arm of the United Nations concerned with international trade law promulgated a model law that would provide for coordination in the universalist mode in the case of a multinational bankruptcy.[122] The United States enacted that model law in 2005 as chapter 15 of the Bankruptcy Code.

One of the leading academic proponents of universalism, Jay Westbrook, has argued for nearly twenty years that the avoidance law that should be applied to pre-bankruptcy transactions in a multinational bankruptcy conducted in accordance with the universalist paradigm is that of the debtor's home country.[123] He offers two reasons. First, it is the only predictable and transparent rule. Choice of law rules based on the location of the transaction are manipulable and unpredictable. Second, in bankruptcy, avoidance law should be considered together with the priority scheme under which the debtor's assets will be distributed, for the application of avoidance law in bankruptcy is nothing more than a way of feeding that distributional scheme. Insofar as universalism aspires to distribute the debtor's assets in accordance with the priority rules of its home country, it would be inconsistent not to use the home country's avoidance law as well.

At least some of these reasons suggest that a similar choice of law principle should govern application of state fraudulent transfer laws. That is, the law that governs whether a transfer is fraudulent should be the law of the debtor's home jurisdiction at the time of the transfer.

In the first place, this approach satisfies the desiderata noted at the outset. It is a rule that is reasonably transparent and predictable. One who extends credit to a debtor should have little difficulty in ascertaining the fraudulent transfer law to which that debtor is subject; likewise, parties planning to undertake a transaction that may implicate fraudulent transfer law should have little difficulty in ascertaining the law under which the transaction will be judged. Nor does this approach call for applying multiple different fraudulent transfer laws to a single transaction, as would be the case with choice of law rules based on situs (in the case of a transaction involving assets in multiple jurisdictions) or on the location of each of the debtor's creditors.

Furthermore, this approach seems reasonably resistant to manipulation. The situs approach is more or less manipulable, depending on the nature of the property

---

[121] Council Regulation 1346/2000, 2000 O.J. (L. 160) (EC).

[122] U.N. COMM'N ON INT'L TRADE LAW, MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT. U.N. Sales No. E.99.V.3 (1997).

[123] See particularly Westbrook, *supra* note 82, as well as Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499 (1991).

that is transferred. The location of land and fixed assets is not manipulable at all. But financial assets are eminently mobile. By contrast, the debtor's location is equally resistant to manipulation regardless of the nature of the assets.[124]

This is not to say that the debtor's home jurisdiction is immune to manipulation. It is only to say that it is more generally resistant to manipulation than a situs approach. Still, caution is suggested by the fact that since the European Union adopted the previously-noted regulation affording the courts of the debtor's home country the lead role in a multinational bankruptcy, several business organizations have taken action in contemplation of bankruptcy to change, or attempt to change, their home jurisdictions, as a forum-shopping ploy.[125] Similar relocation to shop for favorable fraudulent transfer law would also be an issue under a choice of law principle that selects the law of the debtor's home jurisdiction to govern fraudulent transfer. This risk might be confined to acceptable limits by defining "debtor's home jurisdiction" for this purpose in a relatively sticky manner, making it hard to change lightly. For example, the home jurisdiction of an individual could be tied to domicile at the time of transfer, rather than mere residence.

As previously noted, the borrowing of this thought from the multinational bankruptcy setting is purely heuristic, and its merits must be tested independently of its operation in that setting. Multinational bankruptcy is too young and experience too scant to make it a reliable source of support; and as noted in part IV, choice of law analysis in that setting is dominated by considerations of bankruptcy law that are inapplicable outside the bankruptcy setting. Furthermore, the second of Westbrook's two justifications for choosing the avoidance law of the debtor's home jurisdiction—namely, the illogic of creating a mismatch between the law governing avoidance and the law governing priority in distribution—has no application to avoidance outside of bankruptcy, as Westbrook himself noted.[126]

In addition, proper implementation of the "debtor's home jurisdiction" concept in a state statute setting forth a rule for choice of fraudulent transfer law must differ in detail from its implementation in enactments pertaining to multinational bankruptcy (which refer to the concept as the debtor's "center of main interests," or "COMI"). One difference is the time at which the "debtor's home jurisdiction" is evaluated. In multinational bankruptcy, the importance of COMI lies primarily in that the debtor's COMI determines which of multiple bankruptcy proceedings in

---

[124] One scholar has argued that the universalist program for administration of multinational bankruptcies is flawed because the location of a debtor's home country is susceptible to uncertainty and manipulation, leading to forum shopping. *See* Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143 (2005). LoPucki employs this as an argument against adoption of the universalist program in the first place. In effect he argues that the prospect of forum-shopping (abetted by a prospective race for the bottom in debtor-oriented substantive law among countries competing for the lead role in multinational bankruptcies) is sufficiently unappetizing as to make it preferable to adhere to the traditional "grab rule" for administration of multinational bankruptcies. This objection is cogent as applied to the universalist program for multinational bankruptcy. But it is unimpressive as applied to the choice of law issue under discussion, for the substantive law of *some* jurisdiction must be chosen. Declining to play the game is not an option.

[125] *See* Alexander, *supra* note 67, at 26 n.160.

[126] Westbrook, *supra* note 82, at 915.

different countries is deemed to be the lead proceeding to which others must defer (to some much-debated extent). For that purpose, the relevant time for determining COMI is at the commencement of the debtor's bankruptcy proceedings. For the purpose of applying a state-law choice of law rule for fraudulent transfer, however, if choice of law is to be determined by the debtor's home jurisdiction, it is difficult to see a practical or sensible alternative to declaring the relevant time for determining the debtor's home jurisdiction to be the time of the transfer.[127]

Another way in which the "debtor's home jurisdiction" concept probably must be implemented differently in this setting than in the law of multinational bankruptcy relates to the exact definition of the "debtor's home jurisdiction." Chapter 15 does not define the term "COMI," apart from a presumption that "in the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual," is its COMI.[128] It has been noted that a certain flexibility in interpreting "COMI" is desirable in light of the function of that term. Thus, Westbrook has stated that "it is hard to resist the proposition that the interpretation of COMI . . . should, to some extent, take account of the likely quality of the substantive [bankruptcy] law of the COMI jurisdiction."[129] Such considerations do not apply (or at least are very much weaker) in respect of a state-law choice of law rule for fraudulent transfer. In that setting the desiderata of predictability, transparency, and resistance to manipulation suggest that the concept of "debtor's home jurisdiction" ought to be defined in a hard-edged way. Of course different hard-edged definitions are possible, and their respective merits in this setting would have to be evaluated. For example, UCC Article 9 establishes hard-edged rules to define the "debtor's home jurisdiction" for the purpose of its choice of law rules for perfection and priority, but "debtor's home jurisdiction" is defined to mean for some domestic organizations the jurisdiction of the chief executive office,[130] and for others the jurisdiction of organization;[131] for foreign organizations the baseline rule is the jurisdiction of the chief executive office, but for some the District of Columbia is arbitrarily designated.[132] (Of course the particular definitional choices made in UCC Article 9 are no sensible model for the present project, for they were driven by the role that Article 9's choice of law rules play in

---

[127] Westbrook, who seems to be the only earlier commentator to refer to this point in print, did no more than note it and refrained from discussing it. Westbrook, *supra* note 82, at 904 n.27. Tying determination of the choice of law rule to circumstances at the time of the transfer has the drawback of reducing predictability and transparency to previous creditors (who are the creditors most worthy of protection) because the creditors cannot be sure that the relevant circumstances will not change between the time the creditor extends credit and the later time of the transfer. The only way to avoid that problem would be to tie the determination of the relevant circumstances to the time at which the creditor became a creditor.

[128] Bankruptcy Code § 1516(c).

[129] Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019, 1030 (2007).

[130] U.C.C. §§ 9-301, 9-307(b)(3) (2010). Article 9 uses the term "location," rather than "home jurisdiction."

[131] U.C.C. §§ 9-102(a)(70), 9-307(e) (2010).

[132] U.C.C. §§ 9-307(b), 9-307(c) (2010).

framing Article 9's public filing scheme, a consideration that has no parallel in the present setting.)

It is encouraging that a comparable proposal has been advanced by one commentator as the proper choice of law rule for avoidance actions to be adopted by member states of the European Union (whose current choice of law rules on the subject for the most part appear to be even murkier, if that is possible, than American law on the subject).[133]

Although a survey would be necessary to supply numbers, my impression is that codification of a rule selecting fraudulent transfer law on the basis of the debtor's home jurisdiction at the time of the transfer would not be radical, in the sense that it would not have changed the outcome of too many of the reported cases that have applied the free-floating *Second Restatement* methodology that prevails today. It is not even clear how often such a rule would have lead to a different outcome in cases that applied the situs rule, for many reported cases applying the situs rule simply repeat it perfunctorily, without attention to any other fact, and the debtor's home jurisdiction may well have been the same as the situs. Still, there are prominent exceptions, in which such a rule would have resulted in application of the fraudulent transfer law of a jurisdiction different from that chosen by the court.[134]

Precedent for progressing from a choice of law rule determined by situs of the property transferred, as per the *First Restatement*, to a rule determined by the debtor's home jurisdiction, as suggested above, can be found in the history of bulk sales law. Bulk sales law is a branch of fraudulent transfer. Although bulk sales have come to be regulated by statutes dedicated to such transactions, historically they were regulated only under the primordial rule of fraudulent transfer law. It is therefore noteworthy that the UCC's original codification of bulk sales law, in Article 6, based choice of law on the situs principle.[135] The 1989 revision of Article 6, by contrast, bases choice of law on the "debtor's home jurisdiction" principle, with a tweak for foreign entities.[136] Moreover, the drafters of the *First Restatement* themselves reserved judgment on whether choice of law for fraudulent

---

[133] Alexander, *supra* note 67, at 29 (recommending that member states of the European Union adopt, by legislation or through judicial action, a choice of law rule for fraudulent transfers that "should generally point to the debtor's COMI at the time of the relevant transaction, absent special circumstances, such as a transaction made from an establishment or a bundle of relationships fully located abroad").

[134] Two examples are *RCA Corp. v. Tucker*, 696 F. Supp. 845 (E.D.N.Y. 1988), discussed *supra* at note 65, and *James v. Powell*, 225 N.E.2d 741 (N.Y. 1967), discussed *supra* at note 89.

[135] U.C.C. § 6-102(4) (1962) (only "bulk transfers of goods located within this state" are subject to a state's enactment of former Article 6).

[136] U.C.C. § 6-103(1)(b) (1989) ("[T]his Article applies to a bulk sale if: . . . on the date of the bulk-sale agreement the seller is located in this state or, if the seller is located in a jurisdiction that is not a part of the United States, the seller's major executive office in the United States is in this state."); *id.* at § 6-103(2) ("A seller is deemed to be located at his [or her] place of business. If a seller has more than one place of business, the seller is deemed located at his [or her] chief executive office.")

transfer should be based on the "debtor's home jurisdiction" principle in at least some circumstances.[137]

As noted at the outset of this part V.B, the foregoing discussion of the desirable choice of law rule addresses a fraudulent transfer of the kind most familiar today, namely a transfer of property for less than reasonably equivalent value (*i.e.*, which diminishes the debtor's net worth). Transfers of other kinds may also qualify as fraudulent.[138] For example:

> (a) One kind of fraudulent transfer that does not diminish the debtor's net worth is a transfer that has a potential for deceiving persons who deal with the debtor. Illustrations include (i) the "vendor-in-possession" doctrine that prevails in many states, which provides that a seller's retention of possession of a good after selling it is or may be fraudulent as against purchasers from and creditors of the seller, and (ii) the historical antipathy of courts toward secret liens.
>
> (b) Another kind of fraudulent transfer that does not diminish the debtor's net worth is a transfer that distorts debtor-creditor law in an undesirable way. Illustrations include (i) a transfer made for the purpose of manipulating the applicability of different bodies of insolvency law (as in the case of a transfer of property by a distressed debtor not eligible for relief under chapter 11 of the Bankruptcy Code to an entity that is eligible, which is sometimes called "new debtor syndrome"), (ii) disposition of property of one type in exchange for property of a less liquid type, for the purpose of making creditors' recovery more difficult, and (iii) gross overcollateralization, which likewise complicates recovery by unsecured creditors who may seek to realize on the debtor's equity in such collateral.
>
> (c) A third kind of fraudulent transfer that does not diminish the debtor's net worth is an insider preference.[139]

It is doubtful that a single choice of law rule can properly be applied to all of these different kinds of fraudulent transfer. That is particularly evident with respect to transfers that are deemed fraudulent because of their potential to deceive. The UCC has effectively codified the situs rule for choice of fraudulent transfer law in the context of the vendor-in-possession doctrine, in a provision of UCC Article 2 that creates a limited exception to that doctrine.[140] The situs rule has a powerful

---

[137] *First Restatement* § 256, caveat (expressing no opinion as to whether, for chattels, the governing law should be that of the jurisdiction where "the entire unit is managed," in the case of a conveyance of "an aggregate unit made up of a number of units, themselves aggregates"); *id.* § 257 cmt. c.

[138] For a more detailed discussion of the application of fraudulent transfer law to transfers that do not diminish the debtor's net worth, see Kettering, *Discontents*, *supra* note 3, at 1585–1622.

[139] It is of course possible to reconceptualize debt owed to an insider as equity, and under such a conceptualization an insider preference does diminish the debtor's net worth. But the insider preference rule does not depend on such reconceptualization; it applies even if the debt does not qualify for reconceptualization under the doctrine of equitable subordination, which is the direct legal implementation of that concept.

[140] U.C.C. § 2-402(2) (2010) reads as follows:

appeal in that setting, for in that setting it is difficult to say that expectations should be focused on anything other than the good in question.

———

As a basis for discussion, therefore, I propose the following two pronged rule: (a) the debtor's home jurisdiction (defined as jurisdiction of the chief executive office for an organization and jurisdiction of domicile for an individual) at the time of the transfer determines the fraudulent transfer law that applies to a constructively fraudulent transfer, while (b) choice of law is left to other law (which typically will be common law) in the case of actual fraud. Avoiding codification of a rule for actual fraud seems prudent, given the manifold aspects that actual fraud has been deemed to take.[141] Furthermore, the structuring of commercial transactions to comply with fraudulent transfer law has been more troubled by the constructive fraud rules than by the actual fraud rule, so predictability is less needed with respect to actual fraud than constructive fraud.

Every constructive fraud claim is potentially a claim of actual fraud as well, and so leaving the whole realm of actual fraud to an undefined choice of law regime would severely undercut the predictability and transparency of the rule applicable to constructive fraud. Accordingly, the foregoing rule should be qualified to provide that the "debtor's home jurisdiction" principle also applies to a claim based on actual fraud if the claim involves a transfer for less than reasonably equivalent value.

The same choice of law principle applied to constructive fraud claims could logically be applied to insider preference claims. The reasons that support the former also apply to the latter; moreover, the insider preference rule is historically a

---

> A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

For a case applying this provision, see *Proyectos Electronicos, S.A. v. Alper*, 37 B.R. 931 (E.D. Pa. 1983).

[141] It should be kept in mind that the shorthand phrase "actual fraud," and indeed the very name of the Uniform Fraudulent Transfer Act, are somewhat misleading in that they refer exclusively to fraud. The primordial rule of fraudulent transfer law applies to any transfer made with intent to "hinder, delay, *or* defraud" the transferor's creditors, and that disjunctive language has long been held to apply to transactions that are untainted by fraud. Thus, for instance, *Shapiro v. Wilgus*, 287 U.S. 348 (1932), held that a transfer of assets by an individual to his wholly-owned corporation for the purpose of instituting a receivership proceeding that would not have been available to him as an individual was a fraudulent transfer. The court observed:

> We have no thought in so holding to impute to counsel for the debtor or even to his client a willingness to participate in conduct known to be fraudulent. The candor with which the plan has been unfolded goes far to satisfy us, without more, that they acted in the genuine belief that what they planned was fair and lawful. Genuine the belief was, but mistaken it was also. Conduct and purpose have a quality imprinted on them by the law.

Id. at 357; *see generally* Kettering, *Discontents*, *supra* note 3, at 1585–1622.

spinoff from the constructive fraud rules. Arguably there is less need to codify a choice of law rule for insider preferences, however. The need for predictability and transparency may be less acute for insider preferences, which by definition are transactions between a debtor and its insider, than it is for constructive fraud claims, which can arise in arm's length transactions.

It might be contended that the foregoing choice of law rules should be accompanied by an escape hatch permitting a court to apply different substantive law (presumably the law of the forum) in the event that the law designated by the foregoing rules would conflict with a fundamental public policy of the forum. That would allow a court to ignore the fraudulent transfer law of the debtor's jurisdiction if the debtor were located in an asset haven in which that law was unreasonably debased. The desirability of such an escape hatch is dependent upon the ease with which the foregoing choice of law rules can be manipulated by the debtor. Absent easy manipulability, if a creditor knowingly chooses to deal with a debtor who is located in an asset haven with a much debased fraudulent transfer law, there is no obvious reason why the creditor (at least if voluntary) should be given the benefit of some other jurisdiction's more robust law. Such an escape hatch would erode the predictability and transparency that is the object of codifying a choice of law rule in the first place. There is certainly precedent for choice of law rules without such an escape hatch. The choice of law rules applicable to secured transactions under Article 9 of the UCC are an example.[142] Nor is that example remote, for Article 9 can be viewed as one big exception to the rules of fraudulent transfer law (which historically condemned all nonpossessory interests in personal property, due to their potential for deceiving other creditors of and purchasers from the debtor).[143]

POSTSCRIPT

At its meeting in July 2011 the Committee on Scope and Program of the Uniform Law Commission took the first step in acting on the proposal made in this paper, by directing that a study committee be formed to consider and make recommendations concerning the desirability of drafting a uniform act on choice of law for fraudulent transfer. As of this writing the outcome of that project is unknowable.

---

[142] U.C.C. § 1-301 (2010) (choice of law rule applicable to attachment of a security interest); *id.* §§ 9-301 – 9-307 (choice of law rules applicable to perfection and priority of a security interest).

[143] This is the conventional view of the history of secured transactions law. *See* 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY §§ 2.1-2.2 (1965). One scholar has argued that this overstates the extent to which courts invalidated nonpossessory liens absent statutory validation. *See* George Lee Flint, Jr., *Secured Transactions History: The Fraudulent Myth*, 29 N.M. L. REV. 363 (1999). There is no doubt that courts have often used fraudulent transfer law to invalidate nonpossessory property interests absent statutory validation, and for the present purpose it is unimportant just how sweepingly they have done so. Moreover, fraudulent transfer law unquestionably was applied to secured transactions in which the debtor was permitted to use proceeds of collateral, per *Benedict v. Ratner*, 268 U.S. 353 (1925), until the UCC validated such transactions. U.C.C. § 9-205 (2010).

Publication of this paper serves three purposes. One is to provide a data point for anyone who is interested in studying the workings of the Uniform Law Commission as it carries out its mission of identifying niches in the legal firmament that should be filled with uniform laws, and filling them. Another is to make available this paper's analysis of prevailing doctrine on choice of law for fraudulent transfer. Most importantly, it offers to judges a way to resolve that choice of law issue, whether or not a uniform law on the subject is ultimately promulgated. There is little or nothing to prevent a court from following the approach to choice of law for fraudulent transfer set forth in this paper, if the court finds it sensible. Indeed, there are few subjects on which judges have been more receptive to suggestions from the academic community than choice of law. Perhaps the suggestion made in this paper will prove to be one of the fruitful ones.