Practical Guidance

Uniform Voidable Transactions Act (NY)

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This practice note explains New York's Uniform Voidable Transactions Act (UVTA), which replaces New York's Uniform Fraudulent Conveyance Act (UFCA) for transfers occurring on and after April 4, 2020. The older UFCA will continue to govern for transfers that occurred before April 4, 2020.

While the UVTA focuses on "transactions" and the UFCA focuses on "conveyances," these terms are defined broadly in both statutes to include transfers of property and incurrences of obligations (in this note we will mostly use the newer statute's terminology of "transactions"). But while this similarity and others exist between the two, there are very important differences that will affect what claims may be brought and what defenses may be raised in response. Because the UFCA has a six-year statute of limitations and a discovery rule that can extend this limitations period, practitioners will need to keep both statutes in mind for years to come when analyzing whether a transaction is potentially avoidable.

This practice note addresses the UVTA in the following parts:

- Overview of New York's Adoption of UVTA
- Provisions of the UVTA for Avoiding Transactions (Sections 273 and 274)
- Remedies in the UVTA (Section 276)
- Defenses in the UVTA for Avoiding Transactions (Section 277)
- Time Limitations to Bring Claims under the UVTA (Section 278)
- Burdens of Proof for Claims under the UVTA (Sections 271(b), 273(c), and 274(c))
- Choice of Law Issues (Section 279)
- Recovery of Attorneys' Fees (Section 276-A)
- Elimination of Certain Principles from Partnership and Secured Transaction Law
- Miscellaneous Provisions of the UVTA

For related content, see Fraudulent Transfers, Fraudulent Conveyances versus Preference Actions, Safe Harbor Provisions for Financial Contracts, and Fraudulent Transfer State Law Survey Chart. For a template complaint, see Complaint to Avoid and Recover Fraudulent Transfers.

For additional related resources, see Bankruptcy Litigation Resource Kit and Fraud in Bankruptcy Resource Kit.

Overview of New York's Adoption of UVTA

New York practitioners face major changes with the adoption of the UVTA. Because New York never adopted the Uniform Fraudulent Transfer Act (UFTA), first promulgated as a model

statute in 1984 and made largely analogous to the voidable transaction provisions of the 1978 U.S. Bankruptcy Code (Bankruptcy Code), the state never took the opportunity to modernize the over 60-year-old UFCA and consequently failed to bring its voidable transactions laws in line with the voidable transactions provisions of the Bankruptcy Code and most other states. This practice note will highlight some of the more significant changes from New York's UFCA, enacted in 1925 (first promulgated as a model statute in 1918), to the state's recently enacted version of the UVTA, but primarily, it will explain the workings of the UVTA. Thus, unlike most practice commentaries regarding the UVTA, which explain the differences among the UFCA, UFTA, and Bankruptcy Code, on the one hand, and the UVTA on the other, this practice note focuses on the UVTA in the first instance and highlights the major changes from the previous New York law (i.e., the UFCA).

New York's UVTA is modelled after the Uniform Voidable Transactions Act promulgated in 2014 by the Commissioners on Uniform State Laws. It is codified in Article 10 of the Debtor and Creditor Law (DCL), and in particular Sections 270 through 281-a, replacing the sections of the DCL that codified New York's UFCA (Sections 270 through 281). N.Y. Debt. & Cred. Law §§ 270–281-a. Like many commercial law statutes, the UVTA defines its terminology in the first part of the statute (i.e., Sections 270 (many defined terms), 271 (definition of insolvency), and 272 (definition of value)). Most of the defined terms have definitions that are the same as or very similar to those in the Bankruptcy Code.

It is important to note that the statute's application to specific circumstances could be affected by a precise application of a defined term or its interplay with another defined term. For example, "affiliate" is defined very specifically, and that definition ties into the definition of an insider, which in turn affects one of the factors that is considered in determining actual intent to hinder, delay, or defraud a creditor under Section 273(b) (i.e., the factfinder may consider a transferee's insider status in determining actual intent). Similarly, the so-called insider preference provision under Section 274(b) applies only when a transferee is an insider, and because the defined term "insider" includes the defined term "affiliate," an affiliate would be subject to the insider preference provision.

Provisions of the UVTA for Avoiding Transactions (Sections 273 and 274)

Transactions Avoidable by Present or Future Creditors (273)

The first of these two sections, Section 273, describes those types of transactions that may be avoided by a creditor whose claim arose either before or after the transaction in question (i.e., by either a "present" or "future" creditor). Section 274, addressed next, describes transactions that may be avoided only by a present creditor, meaning one who was a creditor at the time of the transaction sought to be avoided.

Under Section 273, a creditor may avoid a transfer or the incurrence of an obligation (i.e., a transaction) from a debtor in one or both of two basic factual situations:

- The transaction was done with "actual intent to hinder, delay or defraud any creditor of the debtor." –or–
- The transaction was done without the debtor receiving "a reasonably equivalent value in exchange" where (1) the debtor was engaged or about to engage in business or a transaction for which its remaining assets were unreasonably small in relation to the business or transaction, or (2) the debtor intended to incur or believed or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as they came due.

N.Y. Debt. & Cred. Law § 273(a). With respect to determining actual intent, the UVTA lists 11 expressly non-exhaustive factors to consider, including whether a transaction involved insiders or was concealed, whether it occurred while the debtor was being sued or threatened with suit, whether it was proximate in time to the incurrence of a substantial debt, and whether similar circumstances existed that would cast suspicion on the transaction. N.Y. Debt. & Cred. Law § 273(b).

With respect to the second method above for avoiding transactions under Section 273, actual intent is immaterial. Claims attacking transactions for reasons other than actual fraudulent intent are sometimes referred to as "constructive fraud" claims, but in reality, they need not involve fraud at all and often do not. A transaction may be avoided if a debtor did not receive a "reasonable equivalent" when one of two financial circumstances also existed, as noted above. The first is sometimes referred to as the undercapitalization test, where following the transaction, the business is left with assets unreasonably small compared to the needs of the business. The other is when the debtor knows—or more likely, reasonably should have known—that the transaction would render the debtor unable to repay its debts as they came due.

Notably, the UVTA implicitly repeals the former UFCA's Section 273-a, which made certain transfers avoidable if made while the debtor was a defendant in an action for money damages and was later unable to satisfy any judgment obtained. Under the former law, the creditor would still have to show there was lack of fair consideration given (under the UFCA that meant a "fair equivalent" in "good faith") but would not have to show any evidence of the debtor being left undercapitalized, or unable to pay its debts, or insolvency, as discussed next. The existence of a pending lawsuit essentially

took the place of meeting one of the financial impairment tests. As noted above, one of the express factors courts should take into account in determining actual intent to defraud is whether the transaction was completed while the debtor was being sued or threatened with suit, so in some sense, that concept was carried over to the UVTA, but in a different form.

Transactions Avoidable by Present Creditors Only (274)

One additional DCL section details circumstances under which a transaction may be avoided. Section 274 provides two additional ways for a creditor who held a claim at the time of a transaction to avoid that transaction, but these options are limited to present creditors.

As with the constructive fraud part of Section 273, the first way to avoid a transaction under Section 274 requires the creditor to prove that the debtor did not receive a reasonably equivalent value for the transfer or obligation. However, instead of having to show undercapitalization or knowing incurrence of unpayable debts, Section 274 requires the creditor to show that the debtor was insolvent at the time of, or became insolvent because of, the transfer or obligation.

The second way Section 274 allows for avoidance by a present creditor may be referred to as the "insider preference" provision because it is somewhat similar to the preference provisions of the Bankruptcy Code. It permits a creditor to avoid a transfer to an insider (an officer, director, or major shareholder) for payment of an antecedent debt, or debt that was incurred prior to the transfer, if at the time of payment the debtor was insolvent, and the insider had reasonable cause to believe that the debtor was insolvent. Under New York case law, the doctrine of insider preferences has existed for decades and is based on a rebuttable presumption that a payment by a debtor while the debtor was insolvent cannot have been made in good faith. This presumption is detrimental, as good faith is an express element of fair consideration, which requires both "fair value" and "good faith." As the UVTA does not use the term fair consideration as the UFCA does, the UVTA's provision essentially codifies New York's common law insider preference doctrine, albeit with slightly different elements.

Remedies in the UVTA (Section 276)

If the court finds that a transaction in question is voidable, Section 276 of the UVTA provides a creditor with certain remedies. Under Section 276, the creditor may seek:

- To avoid the transfer or obligation incurred to the extent necessary to satisfy the creditor's claim
- An attachment against the asset transferred, to the extent available under applicable law
- An injunction against further disposition of the asset transferred, to the extent available under equity principles and the Civil Practice Law and Rules (CPLR)
- The appointment of a receiver to take charge of the asset transferred –and–
- Any other relief the circumstances may require

N.Y. Debt. & Cred. Law § 276(a).

Defenses in the UVTA for Avoiding Transactions (Section 277)

Section 277 of the UVTA provides certain defenses to transferees and obligees. Under Section 277(a), and regarding actual fraudulent transfers under Section 273, a creditor may not avoid transactions (1) where the transferee or obligee received the transfer or obligation in good faith and the debtor received a reasonably equivalent value, or (2) where the transferee is a subsequent transferee or obligee of such initial transferee or obligee. Under Section 277(b), a creditor may also not avoid a transaction against a subsequent transferee of an asset by the initial transferee, even though that initial transferee may not have a defense under Section 277(a), so long as such subsequent transferee gave value and in good faith. Unlike under Section 277(a), the subsequent transferee's new value need not have been received by the debtor. This subsequent transferee defense is meant to protect an innocent (i.e., good faith) transferee who parts with value to, or on behalf of, the initial transferee. Notably, as with the UFCA, all is not lost for initial transferees who cannot prove reasonably equivalent value and who seek to assert a Section 277(a) defense. To the extent the initial transferees can prove good faith, under Section 277(d), they are entitled to keep the value they are able to prove they gave to the debtor, whether in the form of a lien or a right to retain an interest in the asset transferred, enforcement of the obligation incurred, or a reduction in the amount of liability in the judgment.

Section 277(a) is a departure from the UFCA, as the good faith inquiry is now a defense, as opposed to an element of the constructive fraudulent transfer claim that the plaintiff must prove under the old UFCA. Regarding constructive transfers, the UVTA replaces the fair consideration standard with the reasonably equivalent value standard. Under the reasonably equivalent value standard, there is no good faith requirement. The result is that the burden of proof on the issue of good faith has shifted from the plaintiff to the defendant under the UVTA.

Certain other constructive fraud transactions are also excluded from avoidance under Section 277(e): transfers that result from the termination of a lease upon default of a debtor, and transfers resulting from the enforcement of a security interest under the Uniform Commercial Code (UCC), except for strict foreclosures. In the first scenario, the debtor defaults on a lease, and the lessor terminates the lease pursuant to the lease's terms and applicable law. Section 277(e) prevents the debtor from attempting to avoid the termination of the lease. This is the case even if the lease has below-market rent (i.e., is rent stabilized), and absent the default, the defaulting lessee might have been able to assign the lease on its terms or in the context of a bankruptcy case. The UFCA had no express exception for the termination of leases. In the second scenario, the finality of non-collusive real property foreclosure sales established under Section 272(b) is extended to personal property. Where the transfer in question occurs pursuant to the enforcement of a security interest in personal property under the UCC, it may not be avoided. For both exceptions, all bets are off for actual fraudulent intent claims, and intentionally fraudulent transactions involving the termination of leases and the enforcement of UCC security interests may be avoided. For example, transfers resulting from collusive lease defaults and collusive foreclosures are voidable and do not meet these exceptions.

Section 277(f) provides defenses to transfers avoided as insider preferences, as discussed above, and prevents avoidance of transfers:

- To the extent the insider provided new value to the debtor after the transfer was made, unless that new value was secured by a valid lien
- Where the transfer was made in the ordinary course of business or financial affairs of the debtor and the insider –and–
- Where the transfer secures both an antecedent debt and "present value" if made in an attempt to rehabilitate the debtor and on account of an antecedent debt

N.Y. Debt. & Cred. Law § 277(f). The transfer contemplated with the third defense, sometimes referred to as a roll-up, is the only one without a comparable Bankruptcy Code preference defense. In a roll-up, in exchange for a new advance or other value given to the debtor, the insider receives collateral securing both the new value and the preexisting indebtedness. If the roll-up is a true rehabilitation effort, the transfer will not be vulnerable to avoidance. Notably, to determine whether the transfer was in good faith, courts may consider the relative amounts of present value and antecedent debt that are secured and the likelihood of success of the rehabilitation effort. Practitioners should also note that the UVTA does not offer a contemporaneous exchange for new value defense for insider preferences. This means, for example, that a substitution of collateral by an insider may be voidable under the UVTA. For information on the Bankruptcy Code preference defenses, see Calculating Preference Defenses.

Time Limitations to Bring Claims under the UVTA (Section 278)

The UVTA differs in two important ways from the UFCA with respect to the time limits within which a claim for relief may be brought: the nature of the limitations provision, and the time by which the claim must be brought.

The limitations period is now contained in Section 278 rather than CPLR Section 213(8). The wording of Section 278 is that a "claim for relief with respect to a transfer or obligation under this article is extinguished unless the action is brought [within the applicable time period]." N.Y. Debt. & Cred. Law § 278. This type of provision is known as a statute of repose. CPLR Section 213(8) governing the UFCA, on the other hand, reads in terms of the time within which an action may be brought, which is a statute of limitations. A statute of limitations is an affirmative defense that may be waived if not asserted and it is subject to equitable tolling (i.e., in cases where a party attempts to conceal a transaction). In contrast, a statute of repose establishes a time period as an element of a claim, and the claim is extinguished once the period has run. A statute of repose is not subject to equitable tolling. See California Public Employees' Retirement System v. ANZ Securities, Inc., 137 S. Ct. 2042, 2051 (2017).

Practitioners should be mindful of issues surrounding whether a statute of repose can be tolled or extended by an agreement between the parties. Case law continues to develop around the country in this area, and practitioners should consider the risks absent controlling precedent in their jurisdiction. New York does not yet have definitive case law on this point. Practitioners should also be careful not to refer incorrectly to the statute of repose by using a form for a statute of limitations tolling. They may want to consider wording an agreement such that the party who can take advantage of the extinguishment agrees that the timeliness element of the cause of action has been established by agreement, perhaps with a contractual indemnity provision in favor of the other party in the event that the cause of action is nevertheless extinguished.

In addition to the change in the nature of the limitations period, the UVTA reduces the time period for bringing an action as compared with the UFCA. The UFCA has a six-year statute of limitations, which is relatively long compared

to the four-year statute of limitations in the UFTA and the two-year period in the Bankruptcy Code. The time limit in New York's UVTA is generally four years. One exception is that for actual fraud claims, the four-year period could be extended by a one-year discovery rule. Thus, an intentional fraud action must be brought within four years or "not later than one year after the transfer or obligation was or could reasonably have been discovered." N.Y. Debt. & Cred. Law § 278(a). Second, even though insolvency-related claims under Section 274 must be brought within four years, the insider preference claim must be brought within one year, which is the same period that the Bankruptcy Code allows for bringing preference claims against insiders.

Burdens of Proof for Claims under the UVTA (Sections 271(b), 273(c), and 274(c))

Under New York's UFCA, burdens of proof were not codified, but rather left to varying case law and as a result, the law became less than clear. Presumptions were developed, or burdens were shifted as to an element of a cause of action once a plaintiff proved another element or a particular fact. For instance, for an intrafamily transfer, the burden of demonstrating fair consideration shifts to the transferee, see, e.g., Domino Media, Inc. v. Kranis, 9 F. Supp. 2d 374, 387 (S.D.N.Y. 1998), affirmed 173 F.3d 843 (2d Cir. 1999), and for a transfer without fair consideration, the burden of proving solvency shifts to the transferee, see, e.g., In re Corcoran, 246 B.R. 152, 163 (S.D.N.Y. 2000) and In re Flutie New York Corp., 310 B.R. 31, 54 (Bankr. S.D.N.Y. 2004).

The UVTA clarified the burdens of proof and included one presumption as follows:

Section 273(c) states that a creditor making a claim under the section has the burden of proving the elements of the claim by a preponderance of the evidence. Section 274(c) reads the same but prefaces the language with the words "subject to section 271(b)," which provides for a presumption that a debtor generally not paying its debts as they become due is presumed to be insolvent. The presumption is rebuttable–Section 271(b) continues by explaining that the presumption imposes on the party asserting solvency the burden of proving solvency is more probable than insolvency.

Choice of Law Issues (Section 279)

The UFCA did not include a choice of law provision, and as a result, New York courts used tort principles and a common law multifactor test to determine the applicable law of the jurisdiction with the greatest interest in the transaction, often the place of "injury." This approach created uncertainty for practitioners bringing or defending fraudulent conveyance claims. In contrast, the UVTA provides clarity: Section 279 applies the law of the place where the debtor is located at the time of the transaction. For the purposes of this section, an individual is located at the individual's principal residence, and an organization is located at its place of business or its chief executive office if it has more than one place of business.

Recovery of Attorneys' Fees (Section 276-A)

The UVTA permits attorneys' fee awards to creditors in any avoidance action where the underlying claim entitles it to those fees. Contrarily, under the UFCA, attorneys' fees could only be awarded where a fraudulent conveyance was intentional. The UVTA directs the court to fix reasonable attorneys' fees incurred by the creditor as an additional amount required to satisfy their claim. The provision's scope includes judgment creditors who have been awarded fees by court order or agreement or who brought claims under statutes waiving attorneys' fees.

The creditor is granted judgment for the fixed amount against the debtor and (subject to the previously discussed exceptions in Section 277) against any transferee against whom relief is ordered. The amount must be fixed without regard to any agreement, express or implied, between the creditor or their representative, and their attorney, regarding compensation. Because the UFCA only permitted attorneys' fees for transfers that were intentionally fraudulent, the UVTA introduces additional opportunities for creditors to recover attorneys' fees in these avoidance actions.

Elimination of Certain Principles from Partnership and Secured Transaction Law

The UFCA rendered per se voidable every transaction with a partner of an insolvent partnership. The effect was that courts could not give any regard to the value provided by partners. See, e.g., In re Dewey & Leboeuf LLP (Jacobs v. Altorelli), 518 B.R. 766 (Bankr. S.D.N.Y. 2014). The UVTA removes this provision, and every partnership is subject to the same provisions as every other entity. The special definition for partnership insolvencies is also eliminated.

Miscellaneous Provisions of the UVTA

Practitioners should review the entire text of DCL Sections 270 through 281-a when faced with a possible transaction avoidance issue, including several not discussed in this practice note, such as Section 275, which establishes when a transfer is made or obligation incurred (it may depend upon, among other things, perfection of an interest in transferred property), Sections 271 and 272 on the definitions of insolvency and value, respectively, and Section 276 on remedies, including provisional remedies, available to a creditor pursuing an avoidance action.

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Camille Bent partners with clients to help them achieve their goals using a detail-oriented and analytical approach toward the most effective and efficient solution. She focuses her practice in the areas of business bankruptcy and restructuring. Camille advises debtors, creditors and other interested parties in transactions and in litigation arising out of corporate insolvencies.

Camille counsels clients on a broad range of insolvency-related matters, including cases under Chapter 11 and 7 of the U.S. Bankruptcy Code. She has significant experience in intercreditor disputes and defending parties in fraudulent transfer and preference litigation.

Camille is an active and engaged professional in the bankruptcy industry. She is a frequent author and speaker for the American Bankruptcy Institute, the National Conferences of Bankruptcy Judges and the New York City Bar Association (NYCBA). She serves on the NYCBA's Bankruptcy & Corporate Reorganization Committee and has led its Voidable Transactions Subcommittee. She previously served at the local and international levels of the International Women's Insolvency and Restructuring Confederation. Camille is also actively involved in the workplace as the Co-Chair of the New York office's Inclusion and Diversity Committee, leading programming and other initiatives that support the office's diversity, inclusion and equity goals.

Camille has been recognized for her work with the coveted Law360 Rising Star award in 2021 and American Bankruptcy Institute's "40 Under 40" Emerging Leaders in Insolvency Practice award in 2019.

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Tom is the Treasurer of the New York City Bar Association. He is also the former Chair and currently a member of the Committee on Bankruptcy and Corporate Reorganization of the City Bar. Tom is also the former Chair and currently a member of the Chapter 11 Lawyers' Advisory Committee of the Eastern District of New York Bankruptcy Court, which was established by the Court as a liaison between the Bankruptcy Judges of the District and its Bankruptcy Bar.

Over the course of the last decade, Tom has represented parties involved in some of the most notable bankruptcy cases including most recently, Borders, Boston Generating, Frontier Communications, Hostess, Lehman Brothers, Lyondell, Patriot Coal, Sears, Sizmek, SunEdison, Tribune, Vitamin World, Westinghouse and Windstream to name a few. Additionally, Tom has experience with bankruptcy cases of manufacturers, importers, retailers and service companies in a wide array of industries, including aviation, construction, electronics, energy, fashion, finance, foreign companies (Chapter 15 cases), healthcare, manufacturing, not-for-profit, real estate, retail, software, and telecommunications. Tom has also served as a court-appointed examiner and mediator in numerous cases pending in the Southern and Eastern Districts of New York and the District of Delaware. He has mediated dozens of preference and fraudulent conveyance lawsuits and claims objections, as well as several contentious legal battles involving creditors and/or creditors' committees and chapter 11 debtors over plans of reorganization.

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