



## **NEW JERSEY LAW REVISION COMMISSION**

### **Final Report Relating to Uniform Voidable Transactions Act**

**March 19, 2015**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.  
Please consult the New Jersey statutes in order to determine the law of the State.

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## Executive Summary

The Uniform Law Commission approved and recommended for enactment in all states amendments to the 1984 Uniform Fraudulent Transfer Act (UFTA). The October 2014 amendments are incorporated in the Uniform Voidable Transactions Act. New Jersey adopted the UFTA in 1989 and this Report incorporates the amendments into the existing New Jersey statutes, N.J.S. 25:2-20, et seq. The proposed amendments provide a narrow set of revisions that: (1) renames the Act and recategorizes the transactions governed by these provisions as “voidable” rather than “fraudulent” to more accurately reflect the nature of the transactions and prevent confusion; (2) modifies the definition of insolvency; (3) establishes the burden of proof; (4) creates certain presumptions and defenses; (5) provides guidance on conflict of law issues; and (6) addresses issues involving series organizations.

## Introduction

The Uniform Law Commission (ULC) promulgated the Uniform Fraudulent Transfer Act (UFTA) in 1984.<sup>1</sup> Forty-three states, the District of Columbia, and the U.S. Virgin Islands enacted the uniform law.<sup>2</sup> The UFTA closely resembles its predecessor, the Uniform Fraudulent Conveyance Act of 1918 (UFCA), which remains in effect in both New York and Maryland.<sup>3</sup>

The October 2014 amendments are the first revisions to the UFTA since its inception in 1984.<sup>4</sup> To date, the amendments were enacted in the following states: Georgia, Idaho, Kentucky, Minnesota, New Mexico and North Dakota, and were introduced in California, Colorado, Indiana, Massachusetts, and Nevada.<sup>5</sup>

The amendments do not provide a comprehensive revision of the UFTA, but instead, incorporate narrowly tailored changes that address the following concerns:

(1) Title – the name of the act was changed from the “Uniform Fraudulent Transfer Act” to the “Uniform Voidable Transactions Act;”<sup>6</sup>

(2) Presumption and Burden of Proof:

(i) establishing a “preponderance of evidence” standard for the entire Act;

(ii) providing that “a debtor that is generally not paying [sic] debts as they become due, other than as a result of a bona fide dispute, is presumed to be insolvent”<sup>7</sup> (UVTA § 2(b); proposed N.J.S. 25:2-23b.);

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<sup>1</sup> See UNIF. VOIDABLE TRANSACTIONS, Prefatory Note (2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> UNIF. VOIDABLE TRANSACTIONS, Summary (2014)

<sup>5</sup> See UNIF. VOIDABLE TRANSACTIONS, *Legislative Fact Sheet*, see also UNIF. VOIDABLE TRANSACTIONS, Prefatory Note (2014) (noting that Kentucky was one of the seven states that did not enact the original UFTA).

<sup>6</sup> UNIF. VOIDABLE TRANSACTIONS § 15.

(iii) determining that the creditor has the burden of proving the elements of a voidable transaction claim by a preponderance of the evidence (UVTA § 4(c) and § 5(c); proposed N.J.S. 25:2-26 and 25:2-27);<sup>8</sup>

(iv) creating a “rebuttable presumption of insolvency” from the “general nonpayment of debts as they become due” (UVTA § 2; proposed N.J.S. 25:2-23).<sup>9</sup>

(3) Special Definition for Insolvency of Partnership – removing the requirement that the net worth of a general partner must be included in determining the insolvency of a partnership. (UVTA § 2; proposed N.J.S. 25:2-23).<sup>10</sup>

(4) Defenses - The amendments refine in relatively minor respects several provisions relating to defenses available to a transferee or obligee, as follows:

(i) As originally written, § 8(a) created a complete defense to an action under § 4(a)(1) if the transferee or obligee takes in good faith and for a reasonably equivalent value. § 4(a)(1) renders voidable a transfer made or obligation incurred with actual intent to hinder, delay, or defraud any creditor of the debtor. The amendments add to § 8(a) the further requirement that the reasonably equivalent value must be given to the debtor.<sup>11</sup>

(ii) § 8(b) was derived from Bankruptcy Code §§ 550(a), (b) and creates a defense for a subsequent good-faith transferee and any transferee who takes, in good faith and for value, from such a person. The amendments clarify the meaning of § 8(b) by rewording it to more closely follow the wording of Bankruptcy Code §§ 550(a), (b). Among other things, the amendments make clear that the defense applies to recovery of or from the transferred property or its proceeds, by levy or otherwise, as well as to an action for a money judgment.<sup>12</sup>

(iii) § 8(e)(2) as originally written created a defense to an action under § 4(a)(2) or § 5 to avoid a transfer, if the transfer results from enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. The amendments exclude from that defense acceptance of collateral in full or partial satisfaction of the obligation it secures - a remedy sometimes referred to as “strict foreclosure.”<sup>13</sup>

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<sup>7</sup> *Id.* at § 2(b); *see also* Jay Adkisson, Esq., *The Uniform Voidable Transactions Act and The Shifting of Burdens*, FORBES (2014), available at <http://onforb.es/1xkOugz> (last visited March 19, 2015).

<sup>8</sup> UNIF. VOIDABLE TRANSACTIONS § 4(c), 5(c).

<sup>9</sup> *Id.* at § 2; *see also* Adkisson, *supra* note 8.

<sup>10</sup> UNIF. VOIDABLE TRANSACTIONS, § 2 (2014).

<sup>11</sup> UNIF. VOIDABLE TRANSACTIONS, Prefatory Note (2014).

<sup>12</sup> *Id.*; 11 U.S.C. §§ 550(a), (b) (West 2014) (noting that §§ 550(a), (b) remains substantially unchanged since 1984) (a subsequent good-faith transferee is described as a transferee other than the first).

<sup>13</sup> UNIF. VOIDABLE TRANSACTIONS § 8(b)(1); *see also* Jay Adkisson, Esq., *The Uniform Voidable Transactions Act and Conflict of Laws*, FORBES (2014), available at <http://onforb.es/1nedjt1> (last visited March 19, 2015) (citing Kenneth C. Kettering, *Codifying a Choice of Law Rule for Fraudulent Transfer: A Memorandum to the Uniform Law Commission*, 19 AM. BANKR. INST. L. REV. 319, 334-347 (2008)).

(5) Choice of Law Provision – provides statutory guidance to address conflict of law issues (UVTA § 10; proposed N.J.S. 25-2-32).<sup>14</sup>

(6) Series Organizations - provisions addressing the emergence of series organizations. First created by Delaware statute in 1996, a series organization or series limited liability corporation (LLC) is a singular business entity with internal legal barriers that segregate property, obligations, assets, and liabilities into administrative subunits according to individualized business objectives.<sup>15</sup> Each “series” or “cell” acts like a separate LLC and may, “in its own name:” (i) contract; (ii) hold title to assets (including real, personal and intangible property); (iii) grant liens and security interests; and (iv) sue and be sued.”<sup>16</sup>

Most importantly, a legal firewall quarantines the liabilities of each cell to protect the assets of the other cells or the parent LLC.<sup>17</sup> The UVTA provides a definition for the term “series organization” and allows each “protected series” to be treated as a person for purposes of the Act, even if the entity is not treated as a person for other purposes. (UVTA § 11; this section is not included in the recommendations of the NJLRC).<sup>18</sup>

## Background

The earliest American state statutes addressing debtors who sought to defeat creditors by transferring assets to another party were modeled after the Corpus Juris Civilis, the Roman “Civil Code.”<sup>19</sup> References to English law, particularly the Badges of Fraud, and to a lesser degree the Fraudulent Conveyance Act of 1571, known as the Statute of 13 Elizabeth, were also included in early American statutes.<sup>20</sup>

The Roman Civil Code influenced both English and American laws governing fraudulent transfers, which is significant to the work of the ULC because the Latin word origins underscore

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<sup>14</sup> *Id.* at § 10.

<sup>15</sup> DEL. CODE ANN. tit. 6, § 17-218 (West 2014) (recognizing that the law in Delaware governing series organizations has been a prototype for states acknowledging series organizations, while other states do not expressly provide for series to have such powers and capacities); *see also* Amanda J. Bahena, *Series LLCs: The Asset Protection Dream Machines?*, 35 J. CORP. L. 799, 802 (2010); Larry E. Ribstein & Robert R. Keatinge, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 4:17 (2d ed. 2004).

<sup>16</sup> DEL. CODE ANN. tit. 6, § 18-215(c) (West 2014) (finding that the Delaware statutes governing series organizations have been a prototype for most of the states that recognize series organizations, while other states do not expressly provide for series organizations to have such powers and capacities); Series LLCs and Cell Companies, 75 Fed. Reg. 177, 55699-55702 (Sept. 14, 2010) (to be codified at 26 CFR pt. 301).

<sup>17</sup> Jennifer Avery et al., *Series LLCs: Nuts and Bolts, Benefits and Risks, and the Uncertainties That Remain*, 45 TEX. J. BUS. L. 9, 10 (Fall 2012).

<sup>18</sup> UNIF. VOIDABLE TRANSACTIONS § 11 (noting this section of the uniform act was not included in the NJLRC Final Report); *see also* Jay Adkisson, Esq., *The Uniform Voidable Transactions Act – New Section 11 and Series LLCs*, FORBES (2014), available at <http://onforb.es/1r0LINE> (last visited March 19, 2015).

<sup>19</sup> Jay Adkisson, Esq., *The Uniform Voidable Transactions Act – What’s with the Name Change?*, FORBES (2014), available at <http://onforb.es/1szIHWe> (last visited March 19, 2015).

<sup>20</sup> *Id.*; *see also* Kenneth C. Kettering, *Securitization and its Discontents: The Dynamics of Financial Product Development*, 29 Cardozo L. Rev. 1553, 1585-1590 (2008).

the present need to clarify this area of the law.<sup>21</sup> The phrase “fraudulent transfers” has its root in the Latin word “fraus,” which is most accurately defined as “disadvantage” or “prejudice,” as opposed to “misrepresentation” or common law “fraud,” as it was historically defined.<sup>22</sup>

The ULC Drafting Committee maintains that the translation from Latin to English of the term “fraus” resulted in a misleading description of fraudulent transfers, requiring the creditor to demonstrate the debtor’s intent to misrepresent.<sup>23</sup> The UFCA was modeled after the English Act of 1571 and continued the use of the term “fraud” and the phrase “fraudulent transfers.”<sup>24</sup> The ULC Drafting Committee maintains that “[f]raud is not, and never has been, a necessary element of a claim under the Act.”<sup>25</sup> To the peril of many litigants, confusion arose from the use of the term “fraud” and resulted in judicial decisions that apply the rules for pleading common law fraud to claims involving debtors seeking to thwart their creditors.<sup>26</sup>

The ULC updated the UFCA in 1984, amending the title and the Act by removing the term “conveyance” and replacing it with “transfers,” to reflect the intended scope of the act.<sup>27</sup> The 2014 amendments replace the term “fraudulent” with the term “voidable” to more accurately describe the circumstances addressed by the Act, likewise the term “transfers” replaced “transactions” to include situations where a debt is incurred, as well as those where it is transferred.<sup>28</sup>

The draft Act that follows proposes amendments to N.J.S. 25:2-20, et seq., changing the title, along with the aforementioned revisions, and proposes adding the following new sections to the existing statute: (1) a choice of law provision - N.J.S. 25:2-32; (2) supplementary provisions - N.J.S. 25:2-33; (3) a provision addressing the uniformity of application and construction - N.J.S. 25:2-34; and (4) a section addressing the relation between the Act and electronic signatures in the Global and National Commerce Act - N.J.S. 25:2-35.

The text of the draft Act is as follows:

- Underlined text - language from the Uniform Voidable Transactions Act (UVTA).
- **Shaded** text - language proposed by the New Jersey Law Revision Commission.

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<sup>21</sup> See Jay Adkisson, Esq., *The Uniform Voidable Transactions Act and The Shifting of Burdens*, FORBES (2014), available at <http://onforb.es/1xkOugz> (last visited March 19, 2015).

<sup>22</sup> *Id.*

<sup>23</sup> UVTA, *supra* note 1.

<sup>24</sup> See also Jay Adkisson, Esq., *The Uniform Voidable Transactions Act and The Shifting of Burdens*, FORBES (2014), available at <http://onforb.es/1xkOugz> (last visited March 19, 2015).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (stating that the “[m]ost common example of the ‘fraud’ error is found in the cases that interpret the Federal Rule of Civil Procedure § 9(b) which requires, ‘[i]n alleging fraud...a party must state with particularity the circumstances constituting fraud’. . . Although a fraudulent transfer as we have seen has nothing to do with ‘fraud’ as in the misrepresentational sense”)(finding that “the phrase ‘fraudulent transfers’ contributed to the ‘widespread use of the shorthand terminology’ including the ‘oxymoronic’ term ‘constructive fraud’ to describe recovery under the Act for claims that did not involve fraud”); see also Kettering, *supra* note 21.

<sup>28</sup> Jay Adkisson, Esq., *The Uniform Voidable Transactions Act and The Shifting of Burdens*, FORBES (2014), available at <http://onforb.es/1xkOugz> (last visited March 19, 2015).

## DRAFT

### 25:2-20. Short title

This article ~~shall be,~~ which was formerly known ~~and may be cited~~ as the “Uniform Fraudulent Transfer Act;” shall be known and may be cited as the “Uniform Voidable Transactions Act.”

Source: UVTA Section 15; N.J.S. 25:2-20.

### COMMENT

The Comment to UVTA Section 15 explains that the:

2014 amendments change the short title of the Act from “Uniform Fraudulent Transfer Act” to “Uniform Voidable Transactions Act.” The change of title is not intended to effect any change in the meaning of the Act. The retitling is not motivated by the substantive revisions made by the 2014 amendments, which are relatively minor. Rather, the word “Fraudulent” in the original title, though sanctioned by historical usage, was a misleading description of the Act as it was originally written. Fraud is not, and never has been, a necessary element of a claim for relief under the Act.

The misleading intimation to the contrary in the original title of the Act led to confusion in the courts. The misleading insistence on “fraud” in the original title also contributed to the evolution of widely used shorthand terminology that further tends to distort understanding of the provisions of the Act. Thus, several theories of recovery under the Act that have nothing whatever to do with fraud (or with intent of any sort) came to be widely known by the oxymoronic and confusing shorthand tag “constructive fraud.” [sic][see N.J.S. 25:2-25a.(2), 25:2-27a.]. Likewise, the primordial theory of recovery under the Act, set forth in [sic][ N.J.S. 25:2-25a.(1)], came to be widely known by the shorthand tag “actual fraud.” That shorthand is misleading, because that provision does not in fact require proof of fraudulent intent.

In addition, the word “Transfer” in the original title of the Act was underinclusive, because the Act applies to incurrence of obligations as well as to transfers of property. The Act, like the earlier Uniform Fraudulent Conveyance Act, has never purported to be an exclusive law on the subject of voidable transfers and obligations. See Prefatory Note (1984), ¶5; § 1, Comment 2, ¶6; § 4, Comment 9, ¶1; § 10, Comment 5. It remains the case that the Act is not the exclusive law on the subject of voidable transfers and obligations. The retitling of the Act should not be construed to affect references to the Act in other statutes or international instruments that use the former terminology. *See, e.g.,* Convention on International Interests in Mobile Equipment, art. 30(a)(3), opened for signature Nov. 16, 2001, 49 S. Treaty Doc. No. 108-10 (referring to “any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a ... transfer in fraud of creditors”).

The 2014 amendments also make a correction to the text of the Act that is consonant with the change of the Act’s title. As originally written, the Act inconsistently used different words to denote a transfer or obligation for which the Act provides a remedy: sometimes “voidable”(see original [sic] N.J.S. 25:2-23d.; 25:2-30a., d., e., f, and sometimes “fraudulent” (see original [sic] N.J.S. 25:2-25a., N.J.S. 25:2-7a., b., N.J.S. 25:2-31). The amendments resolve that inconsistency by using “voidable” consistently or deleting the word as unnecessary. No change in meaning is intended. The Act does not address the extent to which a person who facilitates the making of a transfer or the incurrence of an obligation that is voidable under the Act may be subject to liability for that reason, whether under a theory of aiding and abetting, civil conspiracy, or otherwise. The Act leaves that subject to supplementary principles of law. See § 12. Cf. [sic] N.J.S. 25:2-30 8c.(1)(ii) (imposing liability upon, inter alia, “the person for whose benefit the transfer was made”). Other law also governs such matters as (i) the circumstances in which a lawyer who assists a debtor in making a transfer or incurring an obligation that is voidable under the Act violates rules of professional conduct applicable to lawyers, (ii) the circumstances in which

communications between the debtor and the lawyer in respect of such a transfer or obligation are excepted from attorney-client privilege, and (iii) the extent to which criminal sanctions apply to a debtor, transferee, obligee, or person who facilitates the making of a transfer or the incurrence of an obligation that is voidable under the Act.

Neither the retitling of the Act, nor the consistent use of “voidable” in its text . . . effects any change in the meaning of the Act, and those amendments should not be construed to affect any of the foregoing matters.

## **25:2-21. Definitions: A to H**

As used in this article:

“Affiliate” means:

a. A person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities;

(1) as a fiduciary or agent without sole discretionary power to vote the securities;

or

(2) solely to secure a debt, if the person has not in fact exercised the power to vote;

b. a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities;

(1) as a fiduciary or agent without sole discretionary power to vote the securities;

or

(2) solely to secure a debt, if the person has not in fact exercised the power to vote;

c. a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

d. a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

“Asset” means property of a debtor, but the term does not include:

a. Property to the extent it is encumbered by a valid lien;

b. Property to the extent it is generally exempt under nonbankruptcy law; or

c. An interest in property held in tenancy by the entirety to the extent it is not subject to process by a creditor holding a claim against only one tenant.

“Claim”, except as used in “claim for relief” means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

“Creditor” means a person ~~that~~ who has a claim.

“Debt” means liability on a claim.

“Debtor” means a person ~~that~~ who is liable on a claim.

“Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

Source: UVTA Section 1, N.J.S. 25:2-21.

#### COMMENT

The definition of “electronic” is the standard definition of that term used in acts prepared by the Uniform Law Commission as of 2014.

### **25:2-22. Definitions: I to Z**

“Insider” includes:

a. If the debtor is an individual:

- (1) A relative of the debtor or of a general partner of the debtor;
- (2) A partnership in which the debtor is a general partner;
- (3) A general partner in a partnership described in paragraph (2) of subsection a. of this definition; or
- (4) A corporation of which the debtor is a director, officer, or person in control;

b. If the debtor is a corporation:

- (1) A director of the debtor;
- (2) An officer of the debtor;
- (3) A person in control of the debtor;
- (4) A partnership in which the debtor is a general partner;
- (5) A general partner in a partnership described in paragraph (4) of subsection b. of this definition; or
- (6) A relative of a general partner, director, officer, or person in control of the debtor;

c. If the debtor is a partnership:

- (1) A general partner in the debtor;
- (2) A relative of a general partner in, or a general partner of, or a person in control of the debtor;

- (3) Another partnership in which the debtor is a general partner;
  - (4) A general partner in a partnership described in paragraph (3) of subsection c. of this definition; or
  - (5) A person in control of the debtor;
- d. An affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
  - e. A managing agent of the debtor.

“Lien” means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

“Organization” means a person other than an individual.

“Person” means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

“Property” means anything that may be the subject of ownership.

“Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

“Relative” means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

“Sign” means, with present intent to authenticate or adopted a record:

(1) to execute or adopt a tangible symbol; or

(2) to attach to or logically associate with the record an electronic symbol, sound, or process.

“Transfer” means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

“Valid lien” means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

Source: UVTA Section 1; N.J.S. 1:1-2; N.J.S. 25:2-22.

#### COMMENT

Comments to UVTA Section 1 states that:

Section 11 renders a ‘protected series’ of a ‘series organization’ a ‘person’ for purposes of this Act, even though the ‘protected series’ may not qualify as a ‘person’ under. . . this section.

The definition of ‘person’ is taken from N.J.S. 1:1-2

The definition of ‘property’ is derived from Uniform Probate Code § 1-201(33) (1969). Property includes both real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable.

The definition of ‘record’ is the standard definition of that term used in acts prepared by the Uniform Law Commission as of 2014.

The definition of ‘relative’ is derived from Bankruptcy Code § 101(37) (1984) but is explicit in its references to the spouse of a debtor in view of uncertainty as to whether the common law determines degrees of relationship by affinity.

The definition of ‘sign’ is the standard definition of that term used in acts prepared by the Uniform Law Commission as of 2014.

## **25:2-23. Insolvency**

a. A debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater than ~~all~~ the sum of the debtor's assets, ~~at a fair valuation~~.

b. A debtor who is generally not paying ~~his~~ the debtor's debts as they become due other than as a result of a bona fide dispute is presumed to be insolvent. The presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

~~c. A partnership is insolvent under subsection a. of this section if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.~~

~~d.~~ c. Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this article.

~~e.~~ d. Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

Source: UVTA Section 2; N.J.S. 25:2-23.

### **COMMENT**

The Comments to UVTA Section 2 states that:

The 2014 amendments reword subsection (a) in order to eliminate the elegant variation in the original text between “the sum of” debts and “all of” assets, and to make clearer that “fair valuation” applies to debts as well as to assets. No change in meaning is intended.

Financial accounting standards may permit or require fair value measurement of an asset or a debt. The fair value of an asset or a debt for financial accounting purposes may be based on standards that are not appropriate for use in subsection (a). For example, *Fin. Accounting Standards Bd., Accounting Standards Codification ¶¶ 820-10-35-17 to -18 (2014) (formerly Statement of Financial Accounting Standards No. 157: Fair Value Measurement ¶ 15 (2006))* requires for financial accounting purposes that the “fair value” of a liability reflect nonperformance risk (i.e., the risk that the debtor will not pay the liability as and when due). By contrast, proper application of subsection (a) excludes any adjustment to the face amount of a liability on account of nonperformance risk. Such an adjustment would be contrary to the purpose of subsection (a), which is to assess the risk that the debtor will not be able to satisfy its liabilities. Only in unusual circumstances would the “fair valuation” for the purpose of subsection (a) of a liquidated debt be

other than its face amount. Examples of such circumstances include discounting the face amount of a contingent debt to reflect the probability that the contingency will not occur, and discounting the face amount of a non-interest-bearing debt that is due in the future in order to reduce the debt to its present value.

Subsection b. establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. Such general nonpayment is a ground for the filing of an involuntary petition under Bankruptcy Code § 303(h)(1) (1978). See also U.C.C. § 1-201(23) (1962) (defining a person to be “insolvent” who “has ceased to pay his debts in the ordinary course of business”). The 2014 amendments to this Act clarify that general nonpayment of debts does not count nonpayment as a result of a bona fide dispute. That was the intended meaning of the language before 2014, as stated in the official comments, and the cited provisions of the Bankruptcy Code and the Uniform Commercial Code have been similarly clarified. See Bankruptcy Code § 303(h)(1) (2014); U.C.C. § 1-203(b)(23) (2014) (defining “insolvent” to include “having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute”).

## **25:2-24. Value**

a. Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

b. For the purposes of subsection b. of R.S. 25:2-25 and R.S. 25:2-27, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

c. A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

Source: This language is identical to the existing statutory language of N.J.S. 25:2-24.

## **25:2-25. Transfers or obligation ~~fraudulent~~ voidable as to present ~~and~~ or future creditor**

A transfer made or obligation incurred by a debtor is ~~fraudulent~~ voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- a. With actual intent to hinder, delay, or defraud any creditor of the debtor; or
- b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

- (1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) 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 become due.

Source: UVTA Section 4(a); N.J.S. 25:2-25.

#### COMMENT

The Comments to UVTA Section 4 states that N.J.S. 25:2-25a.(1):

is derived from § 7 of the Uniform Fraudulent Conveyance Act, which in turn was derived from the Statute of 13 Elizabeth, c. 5 (1571). Factors appropriate for consideration in determining actual intent under [sub][s]ection 4(a)(1) are specified in subsection (b).

By its terms, [sic][N.J.S. 25:2-25 a.(1)] applies to a transaction that “hinders” or “delays” a creditor even if it does not “defraud,” and a transaction to which [sic][N.J.S. 25:2-25 a.(1)] applies need not bear any resemblance to common-law fraud.

Furthermore, the extraordinary standard of proof commonly applied to common-law fraud originated in cases that were thought to involve a special danger that claims might be fabricated. In the earliest such cases, a court of equity was asked to grant relief on claims that were unenforceable at law for failure to comply with the Statute of Frauds, the Statute of Wills or the Parol Evidence Rule. In time, extraordinary proof also came to be required in actions seeking to set aside or alter the terms of written instruments. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 388-89 (1983) and sources cited therein. Those reasons for extraordinary proof do not apply to claims for relief under [sic][N.J.S. 25:2-25 a.(1)].

For similar reasons, a procedural rule that imposes extraordinary pleading requirements on a claim of “fraud,” without further gloss, should not be applied to a claim for relief [sic][N.J.S. 25:2-25 a.(1)]. The elements of a claim for relief under [sic][N.J.S. 25:2-25 a.(1)] are very different from the elements of a claim of common-law fraud. Furthermore, the reasons for such extraordinary pleading requirements do not apply to a claim for relief under [sic][N.J.S. 25:2-25 a.(1)]. Unlike common-law fraud, a claim for relief under [sic][N.J.S. 25:2-25 a.(1)] is not unusually susceptible to abusive use in a “strike suit,” nor is it apt to be of use to a plaintiff seeking to discover unknown wrongs. Likewise, a claim for relief under [sic][N.J.S. 25:2-25 a.(1)] is unlikely to cause significant harm to the defendant’s reputation, for the defendant is the transferee or obligee, and the elements of the claim do not require the defendant to have committed even an arguable wrong.

The phrase “hinder, delay, or defraud” in [sic][N.J.S. 25:2-25 a.(1)], carried forward from the primordial Statute of 13 Elizabeth, is potentially applicable to any transaction that unacceptably contravenes norms of creditors’ rights. N.J.S. 25:2-25 a.(1) is sometimes said to require “actual fraud,” by contrast to [sic][N.J.S. 25:2-25 a.(2)] and [sic][N.J.S. 25:2-27a.], which are said to require “constructive fraud.” That shorthand is highly misleading. Fraud is not a necessary element of a claim for relief under any of those provisions. By its terms, [sic][N.J.S. 25:2-25a.(1)] applies to a transaction that “hinders” or “delays” a creditor, even if it does not “defraud” the creditor. *See, e.g., Shapiro v. Wilgus*, 287 U.S. 348, 354 (1932); *Means v. Dowd*, 128 U.S. 273, 288-89 (1888).

“Hinder, delay, or defraud” is best considered to be a single term of art describing a transaction that unacceptably contravenes norms of creditors’ rights. Such a transaction need not bear any resemblance to common-law fraud. Thus, the Supreme Court held a given transfer voidable because made with intent to “hinder, delay, or defraud” creditors, but emphasized: “We have no thought in so holding to impute to [the debtor] a willingness to participate in conduct known to be fraudulent. . . . [He] acted in the genuine belief that what [he] 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.” *Shapiro v. Wilgus*, 287 U.S. 348, 357 (1932).

Diminution of the assets available to the debtor’s creditors is not necessarily required to

“hinder, delay, or defraud” creditors.

A transaction may “hinder, delay, or defraud” creditors although it neither reduces the assets available to the debtor’s creditors nor involves any potential deception. See, e.g., *Shapiro v. Wilgus*, 287 U.S. 348 (1932) (holding voidable a solvent individual debtor’s conveyance of his assets to a wholly-owned corporation for the purpose of instituting a receivership proceeding not available to an individual). A transaction that does not place an asset entirely beyond the reach of creditors may nevertheless “hinder, delay, or defraud” creditors if it makes the asset more difficult for creditors to reach. Simple exchange by a debtor of an asset for a less liquid asset, or disposition of liquid assets while retaining illiquid assets, may be voidable for that reason.

Overcollateralization of a debt that is made with intent to hinder the debtor’s creditors, by rendering the debtor’s equity in the collateral more difficult for creditors to reach, is similarly voidable. See Cmt. 4. Likewise, it is voidable for a debtor intentionally to hinder creditors by transferring assets to a wholly-owned corporation or other organization, as may be the case if the equity interest in the organization is more difficult to realize upon than the assets (either because the equity interest is less liquid, or because the applicable procedural rules are more demanding).

Under the same principle, [sic][N.J.S. 25:2-25a.(1)] would render voidable an attempt by the owners of a corporation to convert it to a different legal form (e.g., limited liability company or partnership) with intent to hinder the owners’ creditors, as may be the case if an owner’s interest in the alternative organization would be subject only to a charging order, and not to execution (which would typically be available against stock in a corporation).

If such a conversion is done with intent to hinder creditors, it contravenes [sic][N.J.S. 25:2-25a.(1)] regardless of whether it is effected by conveyance of the corporation’s assets to a new entity or by conversion of the corporation to the alternative form. In both cases the owner begins with the stock of the corporation and ends with an ownership interest in the alternative organization, a property right with different attributes. Either is a “transfer” under the designedly sweeping language of § 1(16), which encompasses “every mode...of...parting with an asset or an interest in an asset.”

In [Sic][N.J.S. 25:2-25 a.(1)], the phrase “hinder, delay, or defraud,” like the word “intent,” is a term of art whose words do not have their dictionary meanings. For example, every grant of a security interest “hinders” the debtor’s unsecured creditors in the dictionary sense of that word. Yet it would be absurd to suggest that every grant of a security interest contravenes [sic][N.J.S. 25:2-25 a.(1)]. The line between permissible and impermissible grants cannot coherently be drawn by reference to the debtor’s subjective mental state, for a rational person knows the natural consequences of his actions, and that includes the adverse consequences to unsecured creditors of any grant of a security interest. See, e.g., *Dean v. Davis*, 242 U.S. 438, 444 (1917) (equating an act whose “obviously necessary effect” is to hinder, delay, or defraud creditors with an act intended to hinder, delay, or defraud creditors); *U.S. v. Tabor Court Realty Corp.*, 803 F.3d 1288, 1305 (3rd Cir. 1986) (holding that the trial court’s finding of intent to hinder, delay, or defraud creditors properly followed from its finding that the debtor could have foreseen the effect of its act on its creditors, because “a party is deemed to have intended the natural consequences of his acts”). [Sic][N.J.S. 25:2-25 a.(1)] is the regulatory tool of last resort that restrains debtor ingenuity to decent limits.

[Sic][N.J.S. 25:2-25 b.(2)] is an adaptation of § 6 of the Uniform Fraudulent Conveyance Act, which relates to a debtor that has or will have debts beyond the debtor’s ability to pay as they become due (a condition that is sometimes referred to as “insolvency in the equity sense”). [Sic] N.J.S. 25:2-25 b.(2) carries forward the previous Act’s language capturing a debtor that “intends” or “believes” that the debtor is or will be unable to pay the debtor’s debts as they become due, and adds to that language capturing a debtor that “reasonably should have believed” the same. The added language makes clear that [sic] N.J.S. 25:2-25 b.(2) also captures a debtor that, on the basis

of objective assessment, has or will have debts beyond the debtor's ability to pay as they become due, regardless of the debtor's subjective belief.

## **25:2-26. Factors in determining fraudulent intent**

In determining actual intent under subsection a. of N.J.S. 25:2-25 consideration may be given, among other factors, to whether:

- a. The transfer or obligation was to an insider;
- b. The debtor retained possession or control of the property transferred after the transfer;
- c. The transfer or obligation was disclosed or concealed;
- d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- e. The transfer was of substantially all the debtor's assets;
- f. The debtor absconded;
- g. The debtor removed or concealed assets;
- h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- i. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- j. The transfer occurred shortly before or shortly after a substantial debt was incurred; and
- k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

l. A creditor making a claim for relief under N.J.S. 25:2-25 has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

Source: UVTA Section 4b., c.; N.J.S. 25:2-26.

### **COMMENT**

The Comments to UVTA Section 4 states that:

Section [sic][N.J.S. 25:2-25], unlike [sic][N.J.S. 25:2-27], protects creditors of a debtor whose claims arise after as well as before the debtor made or incurred the challenged transfer or obligation. Similarly, there is no requirement in [sic][N.J.S. 25:2-25a.(1)] that the intent referred to be directed at a creditor existing or identified at the time of transfer or incurrence. For example, promptly after the invention in Pennsylvania of the spendthrift trust, the assets and beneficial interest of which are immune from attachment by the beneficiary's creditors, courts held that a debtor's establishment of a spendthrift trust for the debtor's own benefit is a voidable transfer under the Statute of 13 Elizabeth, without regard to whether the transaction is directed at an existing or identified creditor.

Cf. Restatement (Third) of Trusts § 58(2) (2003)(setting forth a substantially similar rule as a matter of trust law). Likewise, for centuries [sic][N.J.S. 25:2-25a.(1)] and its predecessors have been employed to invalidate nonpossessory property interests that are thought to be potentially deceptive, without regard to whether the deception is directed at an existing or identified creditor.

Whether the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor: The wrong addressed by [sic][N.J.S. 25:2-25 b.(11)] is collusive and abusive use of a lienor's superior position to eliminate junior creditors while leaving equity holders in place, perhaps unaffected.

This Act is not an exclusive law on the subject of voidable transfers and obligations. For example, the Uniform Commercial Code supplements or modifies the operation of this Act in numerous ways. Instances include the following:

(a) U.C.C. § 2-402(2) (2014) recognizes the generally prevailing rule that retention of possession of goods by a seller may be voidable, but limits the application of the rule by negating any imputation of voidability from “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.” (Indeed, independently of § 2-402(2), retention of possession of goods in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification should not in itself be considered to “hinder, delay, or defraud” any creditor of the merchant-seller under N.J.S. 25:2-25a.(1).)

(b) Section 2A-308(1) provides a rule analogous to § 2-402(2) for situations in which a lessor retains possession of goods that are subject to a lease contract. Section 2A-308(3) provides that retention of possession of goods by the seller-lessee in a sale-leaseback transaction does not render the transaction voidable by a creditor of the seller-lessee if the buyer bought for value and in good faith.

(c) This Act does not preempt statutes governing bulk transfers, including Article 6 of the Uniform Commercial Code in jurisdictions in which it remains in force.

(d) Section 9-205 precludes treating a security interest in personal property as voidable on account of various enumerated features it may have. Among other things, § 9-205 immunizes a security interest in tangible property from being avoided on account of the secured party not being in possession of the property, notwithstanding the historical skepticism of nonpossessory property interests.

The Comments to UVTA Section 4 further explain that:

This Act operates independently of rules in an organic statute applicable to a business organization that limit distributions by the organization to its equity owners. Compliance with those rules does not insulate such a distribution from being voidable under this Act. It is conceivable that such an organic statute might contain a provision preempting the application of this Act to such distributions. Cf. Model Business Corporation Act § 152 (optional provision added in 1979 preempting the application of “any other statutes of this state with respect to the legality of distributions”; deleted 1984). Such a preemptive statute of course must be respected if applicable, but choice of law considerations may well render it inapplicable.

Subsection l. was added in 2014. Pursuant to subsection l., proof of intent to “hinder, delay, or defraud” a creditor under N.J.S. 25:2-25 a.(1) is sufficient if made by a preponderance of the evidence. That is the standard of proof ordinarily applied in civil actions. Subsection l. thus rejects cases that have imposed an extraordinary standard, typically “clear and convincing evidence,” by analogy to the standard commonly applied to proof of common-law fraud. That analogy is misguided.

Subsection l. allocates to the party making a claim for relief under N.J.S. 25:2-25 the burden of persuasion as to the elements of the claim. Courts should not apply nonstatutory presumptions that reverse that allocation, and should be wary of nonstatutory presumptions that would dilute it. The command of N.J.S. 25:2-34 that this Act is to be applied so as to effectuate its purpose of making uniform the law among states enacting it - applies with particular cogency to nonstatutory presumptions.

Given the elasticity of key terms of this Act (e.g., “hinder, delay, or defraud”) and the potential difficulty of proving others (e.g., the financial condition tests in N.J.S. 25:2-25 a.(2) and N.J.S.

25:2-27, employment of divergent nonstatutory presumptions by enacting jurisdictions may render the law nonuniform as a practical matter. It is not the purpose of subsection l. to forbid employment of any and all nonstatutory presumptions. Indeed, in some instances a judicially crafted presumption applied under this Act or its predecessors has won such favor as to be codified as a separate statutory creation. Examples include the bulk sales laws, the absolute priority rule applicable to reorganizations under Bankruptcy Code § 1129(b)(2)(B)(ii) (2014), and the so-called “constructive fraud” provisions of N.J.S. 25:2-25 a.(2) and N.J.S. 25:2-27a. of this Act itself.

However, subsection l. and N.J.S. 25:2-34 mean, at the least, that a nonstatutory presumption is suspect if it would alter the statutorily-allocated burden of persuasion, would upset the policy of uniformity, or is an unwarranted carrying-forward of obsolescent principles. An example of a nonstatutory presumption that should be rejected for those reasons is a presumption that the transferee bears the burden of persuasion as to the debtor’s compliance with the financial condition tests in N.J.S. 25:2-25 a.(2) and N.J.S. 25:2-27, in an action under those provisions, if the transfer was for less than reasonably equivalent value (or, as another example, if the debtor was merely in debt at the time of the transfer).

### **25:2-27. Transfers fraudulent voidable as to present creditors**

a. A transfer made or obligation incurred by a debtor is fraudulent voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

b. A transfer made by a debtor is fraudulent voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

c. Subject to N.J.S. 25:2-23b., a creditor making a claim for relief under subsection a. or b. has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

Source: UVTA Section 5; N.J.S. 25:2-27.

#### **COMMENT**

Subsection c. was added as a part of the 2014 amendments. All of the following provisions: N.J.S. 25:2-23b., N.J.S. 25:2-26l., N.J.S. 25:2-27c., N.J.S. 25:2-30 g, and N.J.S. 25:2-30h., together provide uniform rules on the burdens and standards of proof relating to the operation of the UVTA.

### **25:2-28. When transfer is made or obligation incurred**

For the purposes of this article:

a. A transfer is made:

(1) With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(2) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this article that is superior to the interest of the transferee;

b. If applicable law permits the transfer to be perfected as provided in subsection a. of this section and the transfer is not so perfected before the commencement of an action for relief under this article, the transfer is deemed made immediately before the commencement of the action;

c. If applicable law does not permit the transfer to be perfected as provided in subsection a. of this section, the transfer is made when it becomes effective between the debtor and the transferee;

d. A transfer is not made until the debtor has acquired rights in the asset transferred;

e. An obligation is incurred:

(1) If oral, when it becomes effective between the parties; or

(2) If evidenced by a writing record, when the ~~writing executed~~ record signed by the obligor is delivered to or for the benefit of the obligee.

Source: UVTA Section 6; N.J.S. 25:2-28.

#### COMMENT

The Comment to UVTA Section 6 states that “[u]nder subsection e., an oral obligation is incurred when it becomes effective between the parties, and later confirmation of the oral obligation by a record does not reset the time of incurrence to that later time.”

### 25:2-29. Remedies of creditors

a. In an action for relief against a transfer or obligation under this article, a creditor, subject to the limitations in N.J.S. 25:2-30, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) An attachment or other provisional remedy against the asset transferred or other property of the transferee if available under applicable law in accordance with the procedure prescribed by Chapter 26 of Title 2A of the New Jersey Statutes and by Rule 4:60 et seq. of the Rules Governing the Courts of the State of New Jersey;

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure;:

(a) An injunction against further disposition by the debtor or transferee, or both, of the asset transferred or of other property;

(b) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(c) Any other relief the circumstances may require.

b. If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

Source: UVTA § 7; N.J.S. 25:2-29.

## COMMENT

The Comment to UVTA Section 7 provides that when a transfer or obligation is voidable under N.J.S. 25:2-25, N.J.S. 25:2-26 or N.J.S. 25:2-27, "the basic remedy provided by [sic][UVTA] is its avoidance under subsection (a)(1).

The Comment to UVTA Section 7 further explains that:

'Avoidance' is a term of art in this Act, for it does not mean that the transfer or obligation is simply rendered void. It has long been established that a transfer avoided by a creditor under this Act or its predecessors is nevertheless valid as between the debtor and the transferee.

For example, in the case of a transfer of property worth \$100 by Debtor to Transferee, held voidable in a suit by Creditor-1 who is owed \$80 by Debtor, 'avoidance' of the transfer leaves the \$20 surplus with Transferee. Debtor is not entitled to recover the surplus. Nor is Debtor's Creditor-2 entitled to pursue the surplus by reason of Creditor-1's action (though Creditor-2 may be entitled to bring its own avoidance action to pursue the surplus). The foregoing principle is embedded in the language of subsection (a)(1), which prescribes 'avoidance' only 'to the extent necessary to satisfy the creditor's claim.' Section 9(a) of the Uniform Fraudulent Conveyance Act was similarly limited. See, 1 G. Glenn, *Fraudulent Conveyances and Preferences* § 114, at 225 (Rev. ed. 1940).

The transferee's mental state is irrelevant to the foregoing, but a good faith transferee may also be afforded protection by § 8. It follows that "avoidance" of an obligation under subsection (a)(1) likewise should not mean its cancellation, but rather a remedy that recognizes the existence of the obligation and the superiority of the plaintiff creditor's interest over the obligee's interest. Ordinarily that should mean subordination of the obligation to the plaintiff creditor's claim against the debtor. That would entail disgorgement by the obligee of any payments received or receivable on the obligation, to the extent necessary to satisfy the plaintiff creditor's claim, with the obligee being subrogated to the plaintiff creditor when the latter's claim is paid. Of course, if the obligation is unenforceable for reasons other than contravention of this Act, contravention of this Act does not render the obligation enforceable.

This Comment relates to the meaning of subsection (a)(1). If this Act is invoked in a bankruptcy proceeding, the remedial entitlements provided by the Bankruptcy Code may differ from those provided by this Act.

### **25:2-30. Defenses, liability and protection of transferee**

a. A transfer or obligation is not voidable under subsection a. of N.J.S. 25:2-29 against a person who took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee.

b. To the extent a transfer is avoidable in an action by a creditor under the following rules apply:

~~b.~~ (1) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under paragraph (1) of subsection a. of N.J.S. 25:2-29, the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection c. of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(~~1~~) (2) The first transferee of the asset or the person for whose benefit the transfer was made; or

(~~2~~) (3) Any subsequent transferee other than

(i) a good-faith transferee who took for value; or

(ii) from any subsequent transferee an immediate or mediate good-faith transferee of a person described in subsection (i).

c. If the judgment under subsection b. of this section is based upon the value of the asset transferred, the judgment shall be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

d. Recovery pursuant N.J.S. 25:2-29 of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person described in subsection 2(i) or (ii).

~~e.~~ e. Notwithstanding voidability of a transfer or an obligation under this article, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

- (1) A lien on or a right to retain ~~any~~ an interest in the asset transferred;
- (2) Enforcement of ~~any~~ an obligation incurred; or
- (3) A reduction in the amount of the liability on the judgment.

~~e.~~ f. A transfer is not voidable under subsection b. of N.J.S. 25:2-25 or N.J.S. 25:2-27 if the transfer results from:

- (1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or
- (2) Enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code, N.J.S. 12A:9-101 et seq., other than acceptance of collateral in full or partial satisfaction of the obligation it secures.

~~f.~~ g. A transfer is not voidable under subsection b. of N.J.S. 25:2-27:

- (1) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless, except to the extent the new value was secured by a valid lien;
- (2) If made in the ordinary course of business or financial affairs of the debtor and the insider; or
- (3) If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

h. The following rules determine the burden of proving matters referred to in this section:

- (1) A party that seeks to invoke subsections (a), (e), (f), or (g) has the burden of proving the applicability of that subsection.
- (2) Except as otherwise provided in paragraphs (3) and (4), the creditor has the burden of proving each applicable element of subsection (b) or (c).
- (3) The transferee has the burden of proving the applicability to the transferee of subsection (b)(3)(i) or (ii).
- (4) A party that seeks adjustment under subsection (c) has the burden of proving the adjustment.

i. The standard of proof required to establish matters referred to in this section is preponderance of the evidence.

Source: UVTA Section 8; N.J.S. 25:2-30.

#### COMMENT

The Comment to UVTA Section 8 states that:

A transfer of property by the transferee of a voidable transfer might, on appropriate facts, be avoidable for reasons independent of the original voidable transfer. In such a case the subsequent transferee may be entitled to a defense under N.J.S. 25:2-30b. to an action based on the original voidable transfer, but that defense would not apply to an action based on the subsequent transfer that is independently voidable. For example, suppose that X transfers property to Y in a transfer voidable under this Act, and that Y later transfers the property to Z, who is a good-faith transferee for value. In general, C-1, a creditor of X, would have the right to a money judgment against Y pursuant to [sic] N.J.S. 25:2-30b., but C-1 could not recover under this Act from Z, who would be protected by N.J.S. 25:2-30b.(3)(i). However, it might be the case that Y's transfer to Z is independently voidable as to Y's creditors (including C-1, as creditor of Y by dint of its rights under this Act). Such might be the case if, for example, the value received by Y in exchange for the transfer is not reasonably equivalent and Y is in financial distress, or if Y made the transfer with intent to hinder, delay, or defraud any of its creditors. In such a case creditors of Y may pursue remedies against Z with respect to that independently voidable transfer, and the defense afforded to Z by N.J.S. 25:2-30b.(3)(i) would not apply to that action. Of course choice of law must be considered in such a situation: the jurisdiction whose law governs the voidability of the original transfer from X to Y and the consequent liability of Y and subsequent transferees need not be the same as the jurisdiction whose law governs the voidability of the independently voidable transfer from Y to Z and the consequent liability of Z and subsequent transferees.

Subsection [sic] f.2 protects a transferee that acquires a debtor's interest in an asset as a result of the enforcement by a secured party (which may but need not be the transferee) of rights pursuant to and in compliance with the provisions of Part 6 of Article 9 of the Uniform Commercial Code. Cf. *Calaiaro v. Pittsburgh Nat'l Bank* (In re Ewing), 33 B.R. 288, 9 C.B.C.2d 526, CCH B.L.R. ¶ 69,460 (Bankr. W.D.Pa. 1983) (sale of pledged stock held subject to avoidance under § 548 of the Bankruptcy Code), rev'd, 36 B.R. 476 (W.D.Pa. 1984) (transfer held not voidable because deemed to have occurred more than one year before bankruptcy petition filed).

The global requirement of Article 9 that the secured party enforce its rights in good faith, and the further requirement of Article 9 that certain remedies be conducted in a commercially reasonable manner, provide substantial protection to the other creditors of the debtor. See U.C.C. §§ 1-304, 9-607(b), 9-610(b) (2014). The exemption afforded by subsection [sic](f)(2) does not extend to acceptance of collateral in full or partial satisfaction of the obligations it secures. That remedy, contemplated by U.C.C. §§ 9-620–9-622 (2014), is sometimes referred to as “strict foreclosure.” An exemption for strict foreclosure is inappropriate because compliance with the rules of Article 9 relating to strict foreclosure may not sufficiently protect the interests of the debtor's other creditors if the debtor does not act to protect equity the debtor may have in the asset.

### 25:2-31. Extinguishment of cause of action

A ~~cause of action~~ claim for relief with respect to a ~~fraudulent~~ voidable transfer or obligation under this article is extinguished unless action is brought:

a. Under subsection a. of N.J.S.25:2-25, ~~within~~ not later than four years after the transfer ~~was~~ is made or the obligation ~~was~~ is incurred or, if later, ~~within~~ not later than one year after the transfer or obligation ~~was~~ is discovered by the claimant;

b. Under subsection b. of N.J.S.25:2-25 or subsection a. of N.J.S.25:2-27, within not later than four years after the transfer was is made or the obligation was is incurred; or

c. Under subsection b. of N.J.S.25:2-27, within not later than one year after the transfer was is made or the obligation was is incurred.

Source: UVTA Section 9; N.J.S. 25:2-31.

#### COMMENT

The Comment to UVTA Section 9 states that:

Subsection (a) provides that the four-year period ordinarily applicable to a claim for relief under § 4(a)(1) is extended to “one year after the transfer or obligation was or could reasonably have been discovered by the claimant.” Antecedents to that “discovery rule” have long existed in common law and in other statutes, and courts may take different approaches to filling out the meaning of subsection (a) by reference to such precedents. Thus, subsection (a) literally starts the one-year period when the transfer was or could reasonably have been discovered by the claimant, but cases applying subsection (a) have held that the period starts only when the transfer and its wrongful nature were or could reasonably have been discovered.

A recurring situation to which that distinction maybe relevant is Spouse X’s transfer of assets beyond the reach of creditors, made in anticipation of divorcing Spouse Y after the four-year period has elapsed and made for the purpose of thwarting Spouse Y’s economic interests in the divorce. Spouse Y may well know of the transfer long before Spouse Y learns its wrongful purpose. Of course, even if the period specified in subsection (a) is held to have lapsed in a given case, law other than this Act might allow the transferred assets to be considered in making a division of assets in the ensuing divorce case.

### **25:2-32. Governing Law**

a. In this section, the following rules determine a debtor’s location:

(1) A debtor who is an individual is located at the individual’s principal residence.

(2) A debtor that is an organization and has only one place of business is located at its place of business.

(3) A debtor that is an organization and has more than one place of business is located at its chief executive office.

b. A claim in the nature of a claim under this article is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.

Source: New Section - The language is identical to the ULC source, UVTA Section 10.

#### COMMENT

This provision was added by the 2014 amendments to create a “simple and predictable choice of law rule applicable to claims for relief of the nature governed by the Act.” The Comment to UVTA Section 10 further explains that this section:

provides that a claim for relief in the nature of a claim for relief under the Act is governed by the local law of the jurisdiction in which the debtor is “located” at the time the challenged transfer is made or the challenged obligation is incurred. “Local” law means the substantive law of the referenced jurisdiction, and not its choice of law rules. Section 6 determines the time at which a transfer is made or obligation is incurred for purposes of the Act, including this section. Section 10 applies equally to a candidate jurisdiction that is a sister state and to a candidate jurisdiction that is a foreign nation.

Basing choice of law on the location of the debtor is analogous to the rule set forth in U.C.C. § 9-301 (2014), which provides that the priority of a security interest in intangible property is generally governed by the local law of the jurisdiction in which the debtor is located.

The analogy is apt, because the substantive rules of this Act are a species of priority rule, in that they determine the circumstances in which a debtor's creditors, rather than the debtor's transferee, have superior rights in property transferred by the debtor. In keeping with that analogy, the definition of the debtor's "location" in subsection (a) is identical to the baseline definition of that term in U.C.C. § 9-307(b) (2014). Subsection (a) does not include any of the exceptions to the baseline definition that are set forth in Article 9 of the Uniform Commercial Code, such as U.C.C. § 9-307(e) (2014) (providing that the location of a domestic corporation or other "registered organization" is its jurisdiction of organization), and U.C.C. § 9-307(c) (2014) (providing in effect that if the baseline definition would locate a debtor in a jurisdiction that lacks an Article 9-style filing system, then the debtor is instead located in the District of Columbia).

Those exceptions are not included in subsection (a) because their primary purpose relates to the operation of Article 9's perfection rules, which have no analogue in this Act.

The choice of law rule set forth [sic][N.J.S. 25:2-32b.] applies to any claim for relief in the nature of a claim for relief under this Act—in other words, any claim for relief sufficiently similar to a claim for relief under this Act as to warrant the application of this Act's choice of law rule.

'This Act' of course refers to the enactment of this Act that is in force in the jurisdiction whose enactment of § 10(b) is being applied. Section 10(b) could not properly have been written to apply merely to "a claim for relief under this Act," for such a formulation would presuppose the applicability of the substantive provisions of this Act as in force in that jurisdiction. If a question should arise as to whether a given claim for relief is sufficiently similar to a claim for relief under this Act that [sic][N.J.S. 25:2-32b.] should apply to it, the answer is left to judicial determination.

As used in subsection a., the terms "principal residence," "place of business," and "chief executive office" are to be evaluated on the basis of authentic and sustained activity, not on the basis of manipulations employed to establish a location artificially (e.g., by such means as establishing a notional "chief executive office" by use of straw-man officers or directors in a jurisdiction in which creditors' rights are substantially debased, or establishing a notional "principal residence" for a short term in such a jurisdiction for the purpose of making an asset transfer while there). Notwithstanding the adaptation of subsection (a) from U.C.C. § 9-307(b) (2014), the foregoing terms need not necessarily have the same meanings in both statutes. Debtors are likely to have greater incentive and ability to employ "asset tourism" for the purpose of seeking to evade the substantive rules of this Act than for the purpose of seeking to manipulate the perfection and priority rules of secured transactions law. Interpretation and application of this Act should so recognize.

The Comment to UVTA Section 10 also states that:

'[l]ocation' under this Act is completely independent from the concept of "center of main interests" ("COMI"), as that term is used in Chapter 15 of the Bankruptcy Code. Chapter 15, which applies to transnational insolvency proceedings, requires United States courts to defer in various ways to a foreign proceeding in the jurisdiction of the debtor's COMI. Those consequences are quite different from the consequences of "location" under this Act. Furthermore, if the debtor is an organization, the debtor's jurisdiction of organization has no bearing on the debtor's "location" under subsection (a), by contrast to the presumption in Bankruptcy Code § 1516(c) (2014) that the jurisdiction in which the debtor has its registered office (i.e., its jurisdiction of organization) is its COMI.

[sic][N.J.S. 25:2-32b.] determines the governing law only for a claim for relief in the nature of a claim for relief under this Act. Furthermore, this Act, like the earlier Uniform Fraudulent Conveyance Act, has never purported to be an exclusive law on the subject of voidable transfers and obligations.

Accordingly, the choice of law rule set forth in this [sic][N.J.S. 25:2-32] is by no means applicable to all assertions that a transfer was made or an obligation incurred in contravention of law.

For example, suppose that the principal residence of Spouse X is State A and the principal residence of Spouse Y is State B. Spouse Y, anticipating a future divorce, transfers assets to Transferee for the purpose of thwarting X's economic interests in the divorce. Later a divorce action between X and Y is properly brought in the courts of State A, which has enacted this Act. Law other than this Act (presumably the family law of State A) will govern such matters as the classification of the transferred property as marital or separate and the remedies available against Y for wrongful dissipation of assets, such as awarding a larger share of marital property to X or imposing a lien on the separate property of Y. The choice of law rule set forth in § 10 does not apply to those matters, for they do not involve a claim for relief in the nature of a claim for relief under this Act. However, if Transferee is subject to personal jurisdiction in State A and X brings an action in State A against Transferee seeking avoidance of the transfer, or a money judgment against Transferee in lieu of avoidance, on the ground that the transfer had been made by Y with intent to hinder, delay, or defraud X, the choice of law rule set forth in [sic]N.J.S. 25:2-32] would apply to that action, and as a result that action would be governed by the voidable transfer law of State B.

### **25:2-34 33. Supplementary provisions**

Unless displaced by the provisions of this article, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

Source: New Section - The language is identical to the ULC source, UVTA Section 12.

#### **COMMENT**

The Comments to Section 12 state that:

this section is derived from §11 of the Uniform Fraudulent Conveyance Act and Uniform Commercial Code § 1-103 (1984) (later § 1-103(b) (2014)). The section adds a reference to “laches” in recognition of the particular appropriateness of the application of this equitable doctrine to an untimely action to avoid a transfer under this Act. See *Louis Dreyfus Corp. v. Butler*, 496 F.2d 806, 808 (6th Cir. 1974)(action to avoid transfers to debtor’s wife when debtor was engaged in speculative business held to be barred by laches or applicable statutes of limitations); *Cooch v. Grier*, 30 Del.Ch. 255, 265-66, 59 A.2d 282, 287-88 (1948)(action under the Uniform Fraudulent Conveyance Act held barred by laches when the creditor was chargeable with inexcusable delay and the defendant was prejudiced by the delay).

### **25:2-35 34. Uniformity of application and construction**

This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

Source: New Section - The language is identical to the ULC source, UVTA Section 13.

### **25:2-36 35. Relation to Electronic Signatures in Global and National Commerce Act**

This article modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede

Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Source: New Section - The language is identical to the ULC source, UVTA Section 14.

### **25:2-37 36. Laws repealed**

The following are repealed:

R.S. 25:2-7 through R.S. 25:2-19 inclusive.

N.J.S. 14A:14-10 through N.J.S. 14A:14-12 inclusive.

### **25:2-38 37. Effective Date**

This amendments to this article will take effect . . .

#### **NOTE regarding Section 11 of the Uniform Act:**

“Section 11. Application to Series Organizations” of the UVTA was omitted from this Final Report. As discussed in the Introduction of this Report, the series organization or series limited liability corporation (LLC) was first created by Delaware statute in 1996.<sup>29</sup> A series LLC is a singular business entity with internal legal barriers that segregate property, obligations, assets, and liabilities into administrative subunits according to individualized business objectives.<sup>30</sup> Each “series” or “cell” acts like a separate LLC and may, “in its own name,” contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, sue and be sued.”<sup>31</sup> Most importantly, a legal firewall quarantines the liabilities of each cell to protect the assets of the other cells or the parent LLC. The UVTA provides a definition for series organizations and allows each “protected series” to be treated as a person for purposes of the Act, even if the entity is not treated as a person for other purposes.

New Jersey law does not yet recognize series LLCs and commenters asserted that while it may be wise to include the provision in advance of state recognition, it is prudent, given the nature of this business form, to forego inclusion of the provision at this time. Other commenters found that the uniform provision, particularly the definition in subsection (2), generates more questions than it answers.

During an ongoing dialogue with one of the reporters to the ULC drafting committee, Staff was cautioned against restructuring Section 11 or revising the definition in subsection (2). Changes to this provision may pose an undesirable obstacle to uniformity and may hinder efforts to address this emerging business entity. Staff was advised that omitting the section is preferred, to allow the business form to be addressed at a later date, if it becomes a recognized business entity.

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<sup>29</sup> DEL. CODE ANN. tit. 6, § 18-215 (2014) series provisions for statutory trusts, DEL. CODE ANN. tit. 12, § 3804 (2014);

<sup>30</sup> *Id.*; see Amanda J. Bahena, *Series LLCs: The Asset Protection Dream Machines?*, 35 J. CORP. L. 799, 802 (2010); LARRY E. RIBSTEIN & ROBERT R. KEATINGE, *RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES* § 4:17 (2d ed. 2004).

<sup>31</sup> DEL. CODE ANN. tit. 6, § 18-215(c) (2014). Although this is the law in Delaware, which has been a prototype for some states, several other states do not expressly provide for series to have such powers and capacities. Series LLCs and Cell Companies, 75 Fed. Reg. 55699, 55702 (proposed Sept. 14, 2010) (part 3(A) of the Background Information); Jennifer Avery et al., *Series LLCs: Nuts and Bolts, Benefits and Risks, and the Uncertainties That Remain*, 45 TEX. J. BUS. L. 9, 10 (Fall 2012).

The option to defer adoption of Section 11 is being considered by other jurisdictions that introduced the UVTA. The ULC published a report entitled Series of Unincorporated Business Entities Act (“SUBE”) which had its first reading in July 2014.<sup>32</sup> In light of these recent developments and the comments received, the Commission omitted the Application to Series Organizations provision from this Final Report.

The Commission presents the text of Section 11 of the UVTA for consideration by the Legislature:

## **Section 11. Application to Series Organization**

### a. In this section:

(1) “Protected series” means an arrangement, however denominated, created by a series organization that, pursuant to the law under which the series organization is organized, has the characteristics set forth in paragraph (2).

(2) “Series organization” means an organization that, pursuant to the law under which it is organized, has the following characteristics:

(i) The organic record of the organization provides for creation by the organization of one or more protected series, however denominated, with respect to specified property of the organization, and for records to be maintained for each protected series that identify the property of or associated with the protected series.

(ii) Debt incurred or existing with respect to the activities of, or property of or associated with, a particular protected series is enforceable against the property of or associated with the protected series only, and not against the property of or associated with the organization or other protected series of the organization.

(iii) Debt incurred or existing with respect to the activities or property of the organization is enforceable against the property of the organization only, and not against the property of or associated with a protected series of the organization.

b. A series organization and each protected series of the organization is a separate person for purposes of this article, even if for other purposes a protected series is not a person separate from the organization or other protected series of the organization.

Source: The language is identical to the ULC source, UVTA Section 11.

The ULC Comments to Section 11 provides that:

This section, added in 2014, accommodates developments in business organization statutes exemplified by the Uniform Statutory Trust Entity Act §§ 401-404 (2009) and Del. Code Ann. tit. 6, § 18-215 (2012) (pertaining to Delaware limited liability companies). The definition of “series

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<sup>32</sup> SERIES OF UNINCORPORATED BUSINESS ENTITIES ACT 1, *available at* [http://www.uniformlaws.org/shared/docs/Series%20of%20Unincorporated%20Business%20Entities/2014am\\_subea\\_draft.pdf](http://www.uniformlaws.org/shared/docs/Series%20of%20Unincorporated%20Business%20Entities/2014am_subea_draft.pdf). (noting that although a number of issues are yet to be resolved, the preliminary notes and the draft statutory language already total thirty-seven pages).

organization” in subsection (a)(2) is adapted from §§ 401-402 of the Uniform Statutory Trust Entity Act. If the statute under which an organization is organized permits it to divide its assets and debts among “protected series” (however denominated), such that assets and debts of, or associated with, each “protected series” are separated in accordance with subsections (a)(2)(ii) and (iii), and if the organization does so, then the provisions of this Act apply to each “protected series” as if it were a legal entity, regardless of whether it is considered to be a legal entity for other purposes. The conditions referred to in subsections (a)(2)(ii) and (iii) are satisfied if the law under which the organization is organized so provides. It does not matter whether the separation of assets and debts described in subsections (a)(2)(ii) and (iii) would be respected by another jurisdiction in which the organization does business, or would be given effect by the Bankruptcy Code in the bankruptcy of the organization. An organization may be a “series organization” having “protected series,” as those terms are used in this section, even though the statute under which the organization is organized uses different terminology. This section uses the term “protected series,” which is not used in either the Uniform Statutory Trust Entity Act or the Delaware provisions cited above, to emphasize that the application of this section does not depend upon the terminology used by the applicable statute.

The addition of this section to the Act does not imply any judgment about the desirability of legislation enabling the creation of protected series.