1325 AVENUE OF THE AMERICAS ▪ NEW YORK, NEW YORK 10019
TELEPHONE: 212.451.2300 ▪ FACSIMILE: 212.451.2222

Client Alert

January 2020

New York's Uniform Voidable Transactions Act: Clarifying and Modernizing New York's Fraudulent Conveyance Laws

Derived from the Uniform Fraudulent Conveyance Act of 1918, New York's debtor-creditor statutes (the "UFCA") date to 1925. At its core, New York's UFCA is a remedy that allows a creditor to unwind or "claw back" conveyances made by the debtor to third party recipients that unfairly undermine the creditor's ability to recover on its claim.

Since the initial 1925 legislation, commissions have twice adopted model acts meant for states to supersede the UFCA—most recently in 2014. Until now, New York's legislature politely ignored these model acts. However, on December 6, 2019, Governor Cuomo signed legislation that essentially adopts the latest model act, effective for transfers occurring on or after April 4, 2020. Its sweeping changes—which include a shortening of the statute of limitations, the creation of state insider preference actions, and the enlargement of attorneys fee claims—will significantly impact parties affected by this corner of the law.

A. Meaningful Change in Title

To begin with, the term "fraudulent" is no longer present in the statute's title. Until now, the term was a misnomer in many cases. Fraudulent conveyances essentially come in two forms: "actual" fraud, where a debtor conveys its property to hinder, delay or defraud creditors; and "constructive" fraud, where an insolvent debtor conveys its property for less than "fair consideration." The use of the misnomer "fraud" carried the unfortunate stigma that a recipient sued on a constructive fraudulent conveyance superficially appeared to have been accused of fraud even though no fraud was involved, or was sued on actual fraudulent conveyance where the debtor and not the recipient was the one who was accused of fraud.

Also absent from the title is the word "conveyance." Now we have "transaction." A transaction can be comprised of "obligations" incurred as well as "transfers." The new "obligations" incurred provision helps clarify

attorneys

Adam H. Friedman
afriedman@olshanlaw.com
212.451.2216

Jonathan T. Koevary
jkoevary@olshanlaw.com
212.451.2265

practice

Bankruptcy & Financial Restructuring

that the creation of debt is subject to avoidance to the same extent as the transfer of property. "Transfer" is the term used in the Bankruptcy Code and in the intermediate model act—the Uniform Fraudulent Transfer Act—that dates to 1984 (the "UFTA"). For simplicity sake however, this client alert will simply refer to "transfers" with respect to the UVTA.

B. Statute of Limitations Shortened to Four Years from Six and from Two Years to One

Perhaps the most significant change is the shortening of the time periods enumerated in the statute of limitations provisions. Under the UFCA, New York has the longest "look back period" of all states: six years on a constructive fraudulent conveyance. Under the UVTA, a creditor has only four years to bring a claim to avoid a constructive transfer. Likewise, where under the old regime a creditor is allowed two years to bring a claim from discovery of actual fraud, the UVTA limits this time period to one year. These changes bring New York's law more in line with the majority of other states and closer to the look back periods in the Bankruptcy Code.

In addition, the statute of limitations might not be waivable under the UFTA. Where the UFCA incorporates New York's general statutes of limitations from the CPLR, which are affirmative defenses subject to waiver and tolling, Section 278 of the UVTA ("Extinguishment of a claim for relief") provides that a "claim . . . is extinguished" unless the action is brought within the applicable time frame. Because the new statute extinguishes any claim not timely brought, it remains to be seen whether a New York court will allow parties to waive or toll the outside date to bring a claim.

C. Attorneys Fee Provision Broadens

While the UFCA only allows for attorneys fees upon a finding of the intent to defraud, Section 276(a) of the UVTA allows for the award of reasonable attorneys fees in all cases, without regard to any intent to defraud, as an "additional amount required to satisfy the creditors' claim."

D. UVTA Adds Insider Preference Actions

A major addition to the UVTA is the creation of an insider avoidance claim akin to an insider preference on an antecedent debt voidable under the Bankruptcy Code. Under new Section 274(b), "[a] transfer made by a debtor is 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." There is a one year statute of limitations on this type of claim. Unlike in the Bankruptcy Code, however, where the insolvency of the debtor is presumed, under the UVTA the

attorneys

Adam H. Friedman
afriedman@olshanlaw.com
212.451.2216

Jonathan T. Koevary
jkoevary@olshanlaw.com
212.451.2265

practice

Bankruptcy & Financial Restructuring

burden remains on the creditor to prove each element required for an insider avoidance claim—including insolvency—by a preponderance of the evidence.

E. Removal of Specific Clauses Providing Independent Causes of Action

The UFCA contains a separate provision—Section 273-A—that provided for an independent cause of action for fraudulent conveyance when made by a defendant or judgment debtor. This provision is a powerful tool for creditors. The new UVTA does not contain such a provision. Instead, the debtor having been sued or threatened to be sued is identified as a potential "badge of fraud" with respect to an actual fraud claim (see below). Likewise, the UVTA no longer includes a special provision concerning partnerships—Section 277 of the UFCA—that provided for the avoidance of transfers of partnership property simply where the partnership was insolvent. Under the UVTA, partnership transfers are simply subject to the same provisions as transfers generally.

F. More Clarity Leaves Less Room for Judge-Made Law

The UFCA contains numerous provisions that were subject to extensive judicial interpretation. Ninety-five years after adoption, courts are still debating and developing issues pertaining to the meaning of "fair consideration," conflict of law, burdens of proof, and available remedies. The UVTA already provides clarity in many of these areas:

i) Reasonably Equivalent Value

Under the UFCA, constructive fraudulent conveyance required a showing that the conveyance was made without "fair consideration." A determination as to whether "fair consideration" was received not only involved an evaluation of the sufficiency of the value exchanged, but also an analysis as to whether the conveyance was made in good faith. The UVTA replaces "fair consideration" with "reasonably equivalent value." "Reasonably equivalent value" is the term found in the Bankruptcy Code and in the UFTA and this term does not take into account intent.

ii) Actual Fraud

While both statutes generally allow for avoidance of conveyances or transfers where the debtor intended to "hinder, delay, or defraud" creditors, now the new UVTA provides examples. Specifically, Section 273(b) of the UVTA lists eleven non-exclusive factors or "badges of fraud" that courts may consider, including whether the transfer was made to an insider, whether the transfer was concealed, whether the debtor was subject to suit, and whether the debtor absconded.

attorneys

Adam H. Friedman
afriedman@olshanlaw.com
212.451.2216

Jonathan T. Koevary
jkoevary@olshanlaw.com
212.451.2265

practice

Bankruptcy & Financial Restructuring

iii) Presumption of Insolvency

Similar to the UFCA, the UVTA defines insolvency for the purposes of a constructive voidable transfer where "at fair valuation, the sum of the debtor's debts is greater than the sum of the debtor's assets." However, under Section 271(b) of the UVTA, insolvency is "presumed" where a debtor is generally not paying the debtor's debts as they become due other than as a result of a bona fide dispute. Notably, the UVTA also carries forward the traditional alternative insolvency tests: a finding of unreasonably small capital, or a determination that the debtor intended or had reason to believe it was about to incur debts beyond the ability of the debtor to pay as they became due.

iv) Foreclosure Sale

Often, a creditor's only available remedy will be to attack the propriety of a secured creditor's foreclosure sale. The UVTA curtails the grounds for attack of a properly executed foreclosure sale. New Section 272(b) provides that reasonably equivalent value is given "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."

v) Burden of Proof

The UVTA also clarifies which parties carry the burden of proof. A creditor making a claim "has the burden of proving the elements of the claim for relief by a preponderance of the evidence." A defendant must prove its defenses (such as taking in good faith and for value) by a preponderance of the evidence.

vi) Available Remedies

Section 276 of the UVTA articulates a nonexhaustive list of remedies available to a creditor: avoidance of the transfer, attachment, and subject to the "applicable principles of equity and in accordance with applicable rules of civil procedure," injunction, the appointment of a receiver, and "any other relief the circumstances may require."

vii) Choice of Law

Choice of law is another murky and heavily litigated issue under the UFCA. The new UVTA provides much needed clarity in this area. Under Section 279(b), a claim for relief 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." Under Section 279(a), a corporate debtor is located

attorneys

Adam H. Friedman
afriedman@olshanlaw.com
212.451.2216

Jonathan T. Koevary
jkoevary@olshanlaw.com
212.451.2265

practice

Bankruptcy & Financial Restructuring

at its place of business—and if there is more than one place of business, then it is located at its chief executive office.

viii) Uniformity

As most states have adopted either the UFTA or the UVTA, the body of relevant case law interpreting the UFCA was in many ways unique to New York. Adoption of the UVTA brings New York in line with other states. Moreover, Section 281 of the UVTA expressly provides that its general purpose is "to make uniform the law . . . among the states enacting it." Parties and courts will now be able to look to and more comfortably apply court opinions from other states to New York's UVTA.

G. Conclusion

We expect the substantive changes and reductions in uncertainty that result from the adoption of the UVTA will alter the landscape of New York State law creditor claims going forward.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys listed below if you would like to discuss further or have questions.

attorneys

Adam H. Friedman
afriedman@olshanlaw.com
212.451.2216

Jonathan T. Koevary
jkoevary@olshanlaw.com
212.451.2265

practice

Bankruptcy & Financial Restructuring