The Basics of the Utah Uniform Voidable Transaction Act

Langdon T. Owen, Jr.
Cohne Kinghorn, pc
111 East Broadway, 11th Fl.
Salt Lake City, Utah 84111
(801) 363-4300
lowen@cohnekinghorn.com

The Basics of the Utah Uniform Voidable Transaction Act

Table of Contents

1. **Basic Classifications** 2
(a) Creditors 2
(b) Transfers 2
(c) Prohibited Transfers 4
(d) Protection 7
2. **Intent** 8
(a) Future Creditor Planning 8
(b) Badges of Fraud 9
(c) Planner's Problem 10
(d) Disclosure 10
3. **Remedies** 11
4. **Extent of Relief**. 12
(a) Actual Intent Transfer - Good-faith Transferee 12
(b) Voidable Transfer - Money Judgment 12
(c) Voidable Against Good-faith Transferee 12
(d) Not Always Tortious 13
(e) Individuals Acting for Organizations 13
(f) Attorneys' Fees 13
(g) Punitive Damages. 14
(h) Interest. 14
5. **Timing** 14
(a) Limitations 14
(b) Perfectible Transfer 14
(c) Other Transfers 14
(d) Present or Future 14
(e) Disgorgement and Governmental Enforcement. 15
6. **Some Bankruptcy Effects** 15
(a) Transfer Set Aside 15
(b) Other Effects 15
(c) Bankruptcy Crime 15
7. **Some Tax Effects**. 16
(a) Transferee Liability. 16
(b) Tax Settlements. 16
8. **Litigation and Discovery.** 16
9. **Choice of Law**. 17
(a) Characterization of Cause of Action. 17
(b) Selection of Law to Apply. 18
10. **Other Changes**. 18
(a) Electronic Records. 18

(c) Partnerships. 18
(d) Burdens of Proof. 18
(e) Series LLCs. 19
(f) Effective Date. 19

Langdon T. Owen, Jr.
Cohne Kinghorn, pc
(801) 363-4300
lowen@cohnekinghorn.com

The Basics of the Utah Uniform Voidable Transactions Act

Most of the states (approx. 44) plus the District of Columbia and the U.S. Virgin Islands, including Utah (from 1988 through May 17, 2017), have enacted some form of the Uniform Fraudulent Transfer Act (promulgated in 1984). Utah has recently restated and amended the provisions of that Act as part of adopting the Uniform Voidable Transactions Act. Other states (approx. 3) have enacted the earlier Uniform Fraudulent Conveyances Act (promulgated in 1918; used in Utah prior to 1988), while still others have some form of rules based on the Statute of Elizabeth of 1571, 13 Eliz. 1, C.5 of England. One way or the other, all states have some version of a fraudulent or voidable transfer rule which protects, to one extent or another, creditors from certain transfers by a debtor or obligations undertaken by a debtor with the intention or effect of avoiding payment of debts.

The US Bankruptcy Code has its own version. See Bankruptcy Code § 548. In addition, for debts owed to the United States, the government may be entitled to relief under state fraudulent conveyance law or under similar federal rules pursuant to the Federal Debt Collections Procedures Act of 1990, 28 USC §§ 3001-3308. Where taxes are the obligation, state fraudulent conveyance law is, among other methods, used for imposing transferee liability. See Internal Revenue Code § 6901. There is also a state criminal violation for defrauding creditors which may apply in relatively narrow circumstances (*e.g.*, hiding collateral, taking certain obstructive actions or making false statements where proceedings have been or are about to be commenced to administer property for creditors). UCA § 76-6-511. Other theories of recovery for creditors can exist as well in appropriate cases, such as claims that a transferee is a mere nominee of a transferor or claims of alter-ego veil piercing with respect to organizations.

Generally, the civil fraudulent transfer rules provide protection for creditors by making the transfer made or obligation undertaken voidable by certain creditors and by allowing other remedies, as well. Here we will focus on the most recent set of rules, the Uniform Voidable Transaction Act (the “Act”). The Act continues the basic provisions of the former Uniform Fraudulent Transfer Act, but with some changes. The modifications were adopted by the Commissioners for Uniform State Laws in 2014. Since most provisions continue without substantive change, the case law under the prior Fraudulent Transfer Act remains in force, although, as we will see, there are some exceptions. The Official Comments to the Uniform Voidable Transactions Act refine, and in a number of cases extend, the Comments to the Uniform Fraudulent Transfer Act and contain a good discussion of situations in which the rules can apply.

In Utah, our version of the Act is located at UCA §§ 25-6-101 *et seq*. It replaces and re-numbers the former Fraudulent Transfer Act, which had been located at UCA § 25-6-1, *et seq.*

1. **<u>Basic Classifications</u>**. Let's first look at the key classifications of the two major components with which planners will be most concerned: protected creditors and prohibited transfers.

(a) <u>Creditors</u>. The Act essentially divides protected creditors into one of two groups, present or future, depending upon when the claim of the creditor arose in relation to the time of the debtor's prohibited transfer of property or prohibited incurring of an obligation. The grounds required to demonstrate a prohibited transfer or obligation and obtain relief is sometimes different for present and for future creditors. Creditors with claims arising at or before the questioned transfer or obligation can be classed as present creditors, and those with claims arising after the transfer or obligation can be classed as future creditors.

A creditor is a person who has a claim, and a claim is broadly defined as "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." UCA § 25-6-102(3). Threats of divorce are sufficient to make one a creditor. *Bradford v. Bradford*, 993 P.2d 887 (Ut. App. 1999). A trustee in bankruptcy is a creditor with standing under the Act. *Rupp v. Moffo*, 358 P.3d 1060 (Ut. 2015).

(i) <u>Notice or Accrual</u>. The rule used by the *Bradford* court has been referred to as a claim notice theory, under which the actual accrual of a claim is not always necessary. <u>See</u> *Tolle v. Fenley*, 132 P.3d 63 (Ut. App. 2006) (the court used the notice theory and cited to *Bradford*). Although the barred claim argument was not preserved in the lower court and thus was not decided, the *Tolle* case involved a claim (a tort claim relating to a rape) which the claimant continued to discuss with the tortfeasor but which was likely barred by limitations before the transfer, but was resurrected by the claimant's obtaining a default judgment after the intentional fraudulent transfer occurred; the court noted that actual intent fraud can be used to set aside a transfer with respect to a future creditor's claim, such as a resurrected barred claim).

(ii) <u>Claim Barred by Limitations</u>. Although not decided by *Tolle,* it is probably best to assume that even a claim barred by limitations is a claim: it is not fraud or otherwise wrongful to assert it, and it can be used for defensive purposes of recoupment, and so on. It is a claim which has a strong defense against it, but that defense may be waived or not asserted; for purposes of fraudulent transfers, this may be sufficient because the act is remedial and is to be construed in light of its remedial purposes. There are, however, some older cases in other jurisdictions to the contrary, as pointed out in the interesting concurring opinion of Judge William Thorne in *Tolle,* in which he argued that a barred claim should not be a ground for a fraudulent conveyance.

(b) <u>Transfers</u>. A transfer is broadly defined to include "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, creation of a lien or other conveyance." UCA § 25-6-102(16). Also, obligations incurred by a debtor may be prohibited as well as a transfer. <u>See</u> UCA § 25-6-104(1). In Utah, an asset which is fully encumbered is not an asset, based on the definition of "asset" as "property of a debtor, but does not include . . . property *to the extent it is encumbered by a valid lien*." *Rupp v. Moffo*, 358 P.3d 1060 (Ut. 2015), quoting former UCA § 25-6-2(2) (now UCA § 25-6-102(2)(a)) (emphasis added) (rent free use of real property already fully encumbered was not an asset transfer where rents were payable to the secured lender). A transfer requires the recipient to have dominion or control over the asset received. *Wing v. Harrison*, 2004 WL 966298, (D. Utah 2004); *Timothy v. Pia, Anderson, Dorius, Reynard & Moss, LLC*, __ P.3d __, 2018 UT App 31 (Ut. App. 2018) (deposit in law firm trust account insufficient to give firm dominion or control; declines to adopt a good faith test for mere conduit).

(i) Disclaimer. There is an issue whether a disclaimer or renunciation which has, for other purposes, retroactive effect relating back to the transfer (*e.g.*, passage by will or intestacy) to the disclaiming person, is a transfer by the disclaiming person for fraudulent transfer purposes. Most states have found no transfer where the statutory requirements for disclaimer have been met. David B. Young, The Intersection of Bankruptcy and Probate, 49 So. Tex. L. Rev. 351 (2007) at note 254; see: *Dyer v. Eckols*, 808 S.W. 2d 531 (Tex. App. 1991); *Tomkins St. Bank v. Niles*, 537 N.E.2d 274 (Ill. 1989). However, some states treat disclaimers as transfers subject to fraudulent transfer law either by statute or case law. See, *e.g.*, *Stein v. Brown*, 480 N.E.2d 1121 (Ohio 1985) (actual intent to defraud a present or future creditor); *Succession of Neuhauser*, 579 So.2d. 437 (La. 1991); *Kalt v. Youngworth (In re Kalt's Estate),* 108 P.2d 401 (Cal. 1940) (superseded by subsequent statute). An intervening lien or levy prior to disclaimer where the disclaimer would constitute the retroactive dispossession of a creditor's property right if the disclaimer were given effect, could raise an issue of whether a disclaimer otherwise allowable should still be allowed in such circumstances.

1) Bankruptcy. The bankruptcy result will turn on state law. See *In re Sanford*, 369 B.R. 609 (10th Cir. BAP (Wyom.) 2007); *Hoeckes v. U.S. Bank of Boulder*, 476 F.2d 838 (10th Cir. 1973) (applying § 67(d)(2) of former Bankruptcy Act then codified at 11 USC § 107(d)(2)).

2) Federal Taxes. For federal tax purposes, however, separate rules apply to disallow disclaimers. See *Drye v. U.S.*, 528 U.S. 49 (1999) (federal taxes and tax liens).

3) Medicaid. For Medicaid, statutes or case law may well disallow the effect of a disclaimer. See *State v. Murtha*, 427 A.2d 807 (Conn. 1980); *In the matter of Molloy,* 214 A.D.2d 171, 631 N.Y.S. 2d 910 (1995) (failure to pursue an available resource resulted in Medicaid disqualification); *Hinschberger v. Griggs*, 499 N.W.2d 876 (N.D. 1993); *Troy v. Hart*, 697 A.2d 113 (Md. App. 1997); *Tannler v. Wis. Dept. of Health & Soc. Serv*., 564 N.W.2d 735 (Wis. 1997); see also 42 USC § 1396 p (e)(1). However, in one state, the disclaimer did not result in disqualification. *In re the matter of Kirk*, 591 N.W.2d 630 (Iowa 1999).

(ii) Exempt Property. Assets are defined at UCA § 25-6-102(2) to mean property of the debtor, but not property to the extent covered by a valid lien, or to the extent exempt under non-bankruptcy law, or a tenancy in the entirety (*e.g.*, under the law of a state recognizing such a tenancy – Utah does not appear to have such a tenancy) not subject to the claims against only one tenant. Thus, transfers of exempt assets are generally not subject to being set aside as fraudulent transfers. See UCA § 78B-5-501 *et seq*. (exemptions); 31 CFR § 212.1 *et seq*. (federal benefits exempt from garnishment and tracing). Wrongfully taken assets traced to a debtor are not the debtor's and thus not subject to the debtor's exemptions, but in many cases can be recovered from the debtor or a transferee.

However, claims of the federal government for taxes are not limited by state law exemptions from creditors and thus transferee liability under tax law can apply by reason of a fraudulent transfer of assets exempt from other creditor's claims. *Rubenstein v. Com'r*, 134 TC No. 13 (2010) (transferee of condo liable under fraudulent transfer theory for income tax up to the value of the condo; even if generally exempt from creditors under state law, it was not exempt as to the United States). Also, claims by the government for disgorgement of assets (*e.g*., from securities fraud) are not subject to state exemption rules. See *S.E.C. v. Yun*, 208 F. Supp. 2d 1279 (MD Fla. 2002).

(c) Prohibited Transfers. Prohibited transfers can be divided into two key groups, those made with a prohibited intent ("actual intent fraud"), and those which are prohibited without regard to that intent based on some form of test related to insolvency ("constructive fraud").

(i) Intent. The prohibited intent for actual intent voidability (the term "fraud" is not now used here) is the "actual intent to hinder, delay or defraud any creditor of the debtor." UCA § 25-6-202(1). This is generally shown by circumstantial evidence as to certain badges of fraud. Under prior case law, "Actual fraud is never presumed, but instead must be established by clear and convincing evidence." *Territorial Sav. & Loan Ass'n v. Baird*, 781 P.2d 452, 462 (Utah App. 1989). Now, however, a lower burden of proof is specified by the Act. "A creditor making a claim for relief [under the "hinder, delay, or defraud" standard] has the burden of proving the elements of the claim for relief by a preponderance of the evidence." UCA § 25-6-202(3). There is no base requirement of lack of reasonably equivalent value where such an intent exists. A transfer to a good-faith purchaser for reasonably equivalent value, however, will be protected against being voidable. UCA § 25-6-304. However, under a new provision under the Act, the reasonably equivalent value provided in good faith must be given to the debtor. UCA § 25-6-304(1). Unlike the situation for constructive fraud, there is no additional protection for a default lease termination or enforcement of a security interest.

(ii) Insolvency-Related Tests. The tests related to insolvency for constructive fraud can be classed in three groups:

1) Classic Insolvency. The following are the classic tests of insolvency and apply to any transfer or obligation lacking reasonably-equivalent value while the debtor is insolvent or (except for insider transfers for antecedent debt) by which the debtor is rendered insolvent under these tests. UCA § 25-6-203(1). A debtor is insolvent where:

- the sum of debtor's debts is greater than all of the debtor's assets at a fair valuation (UCA § 25-6-103(1)) (this takes into account off-balance sheet items); under this insolvency test, assets do not include transfers concealed or removed with actual intent or if the transfer is voidable under the Act (UCA § 25-6-103(3)); or

- the debtor is generally not paying debts as they become due (UCA § 25-6-103(2)(a)) unless this presumption is rebutted. *Wasatch Oil & Gas, LLC v. Reott*, 263 P.3d 391 (Ut. App 2011) (the presumption of insolvency was rebutted by the undisputed testimony that the 'fair value' of all of the assets the debtor exceeded the sum of its debts). The Act adds the condition that the failure to pay is other than a result of a bona fide dispute. The Act also adds a burden of proof on the party against whom the presumption is directed to prove the non-existence of insolvency by a preponderance of the evidence. UCA § 25-6-103(1)(b).

- However, a transfer resulting from a default lease termination or enforcement of a security interest won't be voidable under this test. UCA § 25-6-304(5). The Act adds the caveat that the enforcement of the security interest must be other than the acceptance of the collateral in full or partial satisfaction of the debt it secures. (This is known as a "strict foreclosure.") UCA § 25-6-103(5)(b).

2) Transactional Tests. Also, where the classic tests aren't met, a transfer or obligation without reasonably-equivalent value may be prohibited as constructive fraud under two additional "transactional" tests:

- the debtor's remaining property is unreasonably small for the business or transaction, where the debtor is engaged in a business or transaction (UCA § 25-6-202(1)(b)(i)); or

- the debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due (UCA § 25-6-202(1)(b)(ii)).

- However, a transfer resulting from a default lease termination or enforcement of a security interest (other than by strict foreclosure) won't be voidable under this test. UCA § 25-6-304(5).

3) Insider Debt. A variation in the application of the classic insolvency test occurs with respect to a transfer to an insider, which is a broadly-defined category. See UCA § 25-6-102(8) for a list of some included relationships and see UCA § 25-6-102(1) defining an affiliate and (14) defining a relative. The list of insiders is illustrative only. *Matter of Holloway*, 955 F.2d 1008 (5^{th} Cir. 1992; Tex.). Even an ex-spouse may be an insider under some circumstances based on the actual relationship. See *Morris v. Nance*, 888 P.2d 571(Or.App.1994), *rev'w denied* 898 P.2d 192 (Or. 1995) (ex-spouse was insider, but fraudulent transfer not shown). The Act eliminated some specific descriptions of insiders for limited liability companies, but brings this sort of company back into the general provision through the new definition of "organization" (a person other than an individual). UCA § 25-6-102(10).

Under UCA § 25-6-203(2), where the transfer to the insider is for an antecedent debt (even where there is no lack of reasonably equivalent value), the transfer is fraudulent where:

- the debtor is insolvent (under the classic tests) at the time of the transfer (becoming insolvent as a result of the transfer is not prohibited), and

- the insider had reasonable cause to believe the debtor was insolvent.

- However, to the extent new value is given, the transfer may be protected from being voidable if the new value is given in the ordinary course or in a good-faith effort to rehabilitate the debtor. UCA § 25-6-304(6).

- Also, as under the classic and transactional tests, transfers resulting from default lease terminations or security interest enforcement (other than a strict foreclosure) won't be voidable under this test. UCA § 25-6-304(5).

(iii) Value. Under either the classic or the transactional insolvency-related tests for constructive fraud (other than an insider transfer for antecedent debt) in order to be voidable the transfer or obligation must be made without reasonably-equivalent value received by the debtor. There is no requirement that the transfer or obligation lack reasonably-equivalent value for either actual intent fraud or an insider transfer for an antecedent debt.

- Value includes securing or satisfying an antecedent debt. UCA § 25-6-104(1).

- Value does not include an unperformed promise other than in the ordinary course of the performer's business. UCA § 25-6-104(1).

- A noncollusive foreclosure is reasonably equivalent value. UCA § 25-6-104(2). This also applies under the Bankruptcy Code. *BFP v. Resolution Trust Corp*., 511 U.S. 531, 545 (1994) ("We deem, as the law has always deemed, that a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with.").

- A contributory transfer for an interest in an organization may raise issues of reasonably equivalent value. See *National Loan Investors, L.P. v. Givens*, 952 P.2d 1067 (Ut. 1998).

- Grants of upstream security interests or guarantees or other transactions for the benefit of affiliates can raise serious issues of reasonably equivalent value. See *In re TOUSA, Inc*., 680 F.3d 1298, 1311 (11th Cir. 2012) (liens by subsidiaries to secure parent obligation set aside by subsidiary's creditors under Bankruptcy Code § 548(a)(1)(B) for lack of reasonably equivalent value; indirect benefits to the corporate group were insufficient; the court noted not every transfer that decreases the odds of bankruptcy for a [subsidiary] corporation can be justified). See also *In re Image Worldwide, Ltd.*, 139 F.3d 574, 578 (7th Cir. 1998) ("Generally, a court will not recognize an indirect benefit unless it is 'fairly concrete.'").

- See *Territorial Sav. & Loan Ass'n v. Baird*, 781 P.2d 452, 459-60 (Utah Ct. App. 1989) ("As a general proposition, the assumption of mortgage debt in exchange for the conveyance of property constitutes a fair equivalent 'where the value of the land and the amount of the mortgage are substantially equal.' However, in cases where the value of the property conveyed exceeds the amount of its encumbrances, a creditor may challenge the conveyance for want of adequate consideration due to the disparity. See, *e.g.*, *Peterson v. Wilson*, 88 Cal.App.2d 617, 199 P.2d 757, 763 (1948).").

(iv) Liability Determination. In the insolvency-related tests, particularly in the assets less liabilities test, the valuation of liabilities can be critical but will also be difficult. Off-balance-sheet items are taken into account at fair value. Accounting rules notoriously and grossly understate some items which can be quite large, such as environmental cleanup contingent liabilities, and contamination-related tort liabilities. Similarly, product warranties, guarantees, standby letters of credit, litigation, and similar matters produce contingent liabilities to take into account at fair value.

These types of liabilities are not easily valued, but the concept is that there is a market value which can be paid to a knowledgeable third party to assume the liability, taking into account the uncertainties and probabilities of the potential loss, such as its occurrence, timing, and amount. See, *e.g., In re Apex Automotive Warehouse, L.P.*, 238 B.R. 758 (Bkr. N.D. Ill. 1999) (likelihood contingency will come to pass and reduction to present value); *Matter of Xonics Photochemica, Inc*., 841 F.2d 198 (7th Cir. 1988). Beginning in 2009, certain business combinations will result in "fair value" accounting of contractual contingencies and "more likely than not" noncontractual contingencies. Statement 141R of the FASB (2007).

(d) Protection. Both present and future creditors are generally protected against both actual intent fraud and transactional test constructive fraud. Thus, for example, if a transfer is fraudulent when made under the intent test and the debtor rehabilitates itself financially, the transfer is still voidable as to future creditors. See *In re Schwarzkopf*, 626 F.3d 1032 (9th Cir. 2010). Classic insolvency test constructive fraud (both basic and insider debt versions) applies only to present creditors.

The relationships between these key categories (and their Utah limitation periods; other states may have somewhat different limitations periods) are summarized in this chart:

Type of Creditor	Type of Fraudulent Transfer	
	Actual Intent	Constructive
Present	§ 202(1)(a) (no value test) (4 yrs of transaction or, if later, 1 year of discovery) – good-faith transferee for value protection	transactional tests (lack of value) § 202(1)(b)(i) and (ii) (4 years of transaction) – lease termination and security interest enforcement protection
		classic tests (lack of value) (is or becomes insolvent) § 203(1) (4 years of transaction) – lease termination and security interest enforcement protection
		insider antecedent debt (no value test) (is insolvent & cause to believe) § 203(2) (1 year after the transaction) – new value protection – lease termination and security interest enforcement protection
Future	§ 202(1)(a) (no value test) (4 yrs of transaction or, if later, 1 year of discovery) – good-faith transferee for value protection	transactional tests (lack of value) § 202(1)(b)(i) and (ii) (4 years of transaction) – lease termination and security interest enforcement protection

2. **Intent**. A number of factors are applied in determining whether the debtor had the requisite prohibited actual intent. This is generally most important to future creditors who cannot rely on the classic insolvency tests for constructive fraud and where the transactional tests may not be met or may not apply.

(a) Future Creditor Planning. Where there is an actual intent to hinder, delay, or defraud a present creditor, a future creditor will also be protected from the transfer or obligation involved, and vice versa; such an intent as to "any creditor" triggers the fraudulent conveyance provisions. However, where there is no such intent as to a present creditor, does asset protection planning show an intent to hinder, delay, or defraud future creditors? Does it make a difference in finding or not finding such intent that a creditor's claim could have been reasonably foreseen or that it was not or could not have been foreseen? The foreseeability of a claim does appear to make a difference.

Some cases include: *First National Bank in Kearney v. Bunn*, 195 Neb. 829, 241 N.W. 2d 127 (1976) (requiring proof that the transaction "was made to defraud subsequent creditors whose debts were in contemplation at the time"); *Hurlbert v. Shackelton*, 560 So. 2d 1276 (Fla. Ct. App. 1990) (although the distinction between probable and possible future creditors was not the relevant inquiry, a claimant still needs to show actual fraudulent intent). See also: *Klien v. Klien*, 112 N.Y.S. 2d 546 (1952) (transfer by grantor without present creditors who "feared for future dangers, real or imaginative" was "no more than insurance against possible disaster"); *Cram v. Cram*, 262 Mass. 509, 106 N.E. 337 (1928) (requiring intent "to contract debts in the future and avoid payment of them because of the transfer of his property"); *In re Heller Inter Vivos Trust*, 161 Misc. 2d 369, 613 N.Y.S. 2d 809 (N.Y. Sur. 1994) (approval of severing trust for "purpose of limiting liability to nonexistent but possible future creditors"); *Riechers v. Riechers*, 679 N.Y.S. 2d 233, 178 Misc. 2d 170 (1998) (no cause to set aside trust "established for the legitimate purpose of protecting family assets for the benefit of the Riechers family members"); but see: *Altman v. Finkel*, 52 N.Y.S. 2d 634, 268 A.D. 666 (1st Dept. 1945), *aff'd* 295 N.Y. 651, 64 N.E. 2d 715 (1945) (finds the actual intent with respect to a future creditor where there was an actual intent to conceal assets from present and future creditors through an alter-ego corporation). Also compare *In re Levine*, 40 B.R. 76 (Bnkr. S.D. Fla. 1984) (mortgage payment toward exempt homestead was permissible prebankruptcy planning) with *In re Reed*, 700 F.2d 986 (5th Cir. 1983) (mortgage payment toward exempt homestead was made with actual intent to hinder, delay, or defraud creditors).

Tax and estate planning motives for transactions also may be very significant to help defeat a claim of actual intent hinder, delay, or defraud future creditors. See, *In re Earle*, 307 B.R. 276 (Bnkr. S.D. Ala. 2002); *In re Mart*, 88 B.R. 436 (Bnkr. S.D. Fla. 1988).

(b) Badges of Fraud. Common law courts have long looked to various objective circumstances which tend to demonstrate a fraudulent intention as to which direct proof is seldom available. The Act actually lists a number of these "badges of fraud" which may be considered, along with others. See *Selvage v. J.J. Johnson & Assoc.*, 910 P.2d 1252 (Ut. 1996); *Tolle v. Fenley*, 132 P.3d 63 (Ut. App. 2006); see also *In re Mueller*, 867 F.2d 568, 570 (10th Cir. 1989). UCA § 25-6-202(2) describes the following badges; those which appear to me to be the very most important are noted "key":

- transaction with insider
- debtor retains possession and control
- transaction concealed and not disclosed (key)
- debtor sued or threatened with suit (key)
- transfer substantially all assets
- debtor absconded
- debtor removed or concealed assets
- consideration was less than reasonably-equivalent value (key)

- debtor insolvent, or soon becomes insolvent (key)
- transaction shortly before or shortly after substantial debt incurred
- transfer essential business assets to lienor who transfers them to an insider.

Of these badges, and others, since the list is not exclusive, all are significant but none is by itself determinative. "Proof of any one or more of the [badges] may be relevant as to the Debtor's actual intent but does not create a presumption." Comment (6) to Uniform Act § 4.

(c) Planner's Problem. In planning transactions for a person who does not have significant present debts, perhaps through spousal or other gifts or through transfers through trusts or business organizations, the planner can often feel relatively confident that no intent to hinder, delay, or defraud a present creditor exists (there are no creditors), that classic insolvency affecting a present creditor does not exist (the CPA tells us so), and possibly also feel at least somewhat assured that the transactional tests affecting present or future creditors won't likely be violated (capital within general norms; no unusual transactions on the horizon; has typical insurance, etc.). The same level of confidence may not be possible as to the risk of a hindsight finding of actual intent to hinder, delay, or defraud a future creditor. The cases on foreseeability cited above are helpful, but a prudent planner will want more–to cancel out as many badges of fraud as possible. Some ideas on how to help accomplish this in appropriate situations include advising the transferor to:

- use third-party independent trustees not under the thumb of the transferor,
- avoid unusual or excessive retained rights and powers,
- if consideration is involved, retain documentation of the reasonableness of values,
- retain documentation of solvency and of assets and income sufficient to meet obligations now and later,
- make no efforts to conceal the transaction but to take affirmative steps to disclose it where possible (see *Schreyer v. Scott*, 134 US 405 (1890)).

(d) Disclosure. Disclosure is a helpful, proactive way to help prevent trouble. The client should:

- record deeds,
- file financing statements,
- register trusts,

- show asset protection trusts in financial statement footnotes, or at least do not reflect on financial statements any assets which are not subject to creditor claims,

- post notices of the actual owner of business assets,

- file appropriate tax returns and reports,

- do not overvalue assets in financial or other reports.

Future creditors on notice that an asset is not available cannot reasonably rely on the asset when extending credit because "future creditors give credit to their debtor on the basis of what he has, and not on the basis of what he once had." See *Schofield v. Cleveland Trust Co.*, 135 Ohio St. 328, 332, 21 N.E. 2d 119, 121-122 (1939). Thus, as to at least some creditors, where such disclosures have been made, the policy argument can be raised that their own negligence caused their loss, not any debtor misconduct. See John E. Sullivan III, The Often Overlooked Role of Disclosure in Asset Protection Planning, p. 367, Ch. 19 of Bove, ed., Asset Protection Strategies, ABA 2002.

Tort claims raise different policy concerns where the claimant likely will not have had a chance to check a debtor's assets before the claim arose; this may make such an argument about a creditor's own negligence ineffective for such creditors. However, disclosure will still tend to show (to one degree or another) that there was no intent of the debtor to hide the transaction and thus be relevant and quite helpful in defending against a claim of knowing fraud.

3. **Remedies**. A fraudulent transfer is not void (unlike actual common law fraud), but is voidable. *Baldwin v. Burton*, 850 P. 2d 1188 (Ut. 1993). The remedies described in the Act are not exclusive and such other remedies as constructive trusts or damages for unjust enrichment may be available in appropriate cases. See generally, *e.g.*, as to unjust enrichment, *Berrett v. Stevens*, 690 P.2d 553, 557 (Ut. 1984); *Concrete Products Co. v. Salt Lake County*, 734 P.2d 910, 911 (Ut. 1987); *Alpha Partners, Inc. v. Transamerica Investment Management*, LLC, 153 P.3d 714, 723 (Ut. Ct. App. 2006), and as to constructive trusts, Restatement (First) of Restitution § 160 (American Law Institute 1937), *D'Elia v. Rice Development, Inc.*, 147 P.3d 515 (Ut. App. 2006) (constructive trust used in a different circumstance), and *In re Estate Partners, Ltd*., 320 B.R. 295 (Bnkr. WD Pa. 2005) (constructive trust for fraudulent transfer). Damage recovery for unjust enrichment would be the benefit conferred on the defendant. *Bailey-Allen Co. v. Kurzet*, 876 P.2d 421, 425-26 (Ut. Ct. App. 1994). Subject to protecting some good-faith transfers or obligations (under UCA § 25-6-304), the Act at UCA § 25-6-303 describes the alternative remedies as including:

- avoid the transfer or obligation to the extent necessary to satisfy the claim,

- use a provisional remedy, such as attachment or receivership, against the transferred asset or other assets of the transferee,

- enjoin further disposition of the asset by the debtor or transferee or of other assets of the transferee, or other such relief as required,

- where the creditor has a judgment, the court may order execution against the transferred asset or its proceeds. See *Jensen v. Eames*, 519 P.2d 236 (Ut. 1974) (judgment creditor may litigate question of fraudulent conveyance in garnishment proceeding, creditor's bill in equity, or execution proceeding); *Rappleye v. Rappleye*, 99 P.3d 348 (Ut. App. 2004) (writ of garnishment under divorce decree an appropriate proceeding).

4. **Extent of Relief**. The creditor obtains no more relief than the creditor would have had without the occurrence of the fraudulent conveyance. *Marine Midland Bank v. Markoff*, 508 N.Y.S. 2d 17 (1986). See *Brockbank v. Brockbank*, 32 P.3d 990 (Ut. App. 2001) (ex-wife as a foreclosing creditor could not control the equity of redemption, and its transfer would not be wrongful as to the ex-wife who, in any event, accepted the proceeds from the transfer of the right of redemption and applied them to the debt). Some courts have, however, under an "any other relief" provision, allowed damages for the additional costs created by the fraudulent transfer. See *Hansard Constr. Corp. v. Rite Aid of Florida, Inc.*, 783 So. 2d 307 (Fla. 4th DCA 2001); *Profeta v. Lomardo*, 600 N.E. 2d 360 (Ohio App. 1991).

(a) Actual Intent Transfer - Good-faith Transferee. A transfer made with actual intent will not be set aside as against a good-faith transferee or obligee for value or a subsequent transferee or obligee. Act UCA § 25-6-304. Even where the transferee seeks a preference from the debtor (i.e., payment ahead of other creditors of same class), this action by the transferee may not be sufficient to show lack of good faith. *Butler v. Wilkinson*, 740 P.2d 1244 (Ut. 1987). But actual notice of a wrongful transfer is not required, rather constructive notice to the purchaser may be sufficient to defeat the purchaser's claim. *Meyer v. General American Corp.*, 569 P.2d 1094 (Ut. 1977).

(b) Voidable Transfer - Money Judgment. If the transfer is voidable, the creditor may obtain judgment for the value of the asset transferred or if less, the amount to satisfy the creditor's claim. The judgment may be against the first transferee or any immediate or mediate transferee from the first transferee, except for a good-faith transferee for value or transferee subsequent to a good-faith transferee for value. UCA § 25-6-304(2). Recovery under the avoidance provision (UCA § 25-6-303(1)(a)) or under the judgment execution provision (UCA § 25-6-303(2)) is available only against transferees and immediate or mediate transferees who are not protected by the good faith transferee for value rules. This is to clarify that the good faith for value defense relates to avoidance and execution as well as to a money judgment.

(c) Voidable Against Good-faith Transferee. Where a transfer is voidable against a good-faith transferee or obligee, such a transferee or obligee is, to the extent of value given, entitled to a lien on the property transferred, enforcement of the obligation incurred, or reduction in the liability on the judgment against such transferee or obligee. UCA § 25-6-304(4). This would apply to a transferee who took under a transfer subject to one of the constructive fraud insolvency-related tests because the good-faith transferee for value protection only applies to the actual intent test. UCA § 25-6-304(1). Under the insolvency-related tests (other than an insider with antecedent debt), the transferee or obligee would have given less than reasonably-equivalent value, and such value as they have given gets this protection. The insider may have given reasonably-equivalent value in good faith and nevertheless have the transaction concerning the antecedent debt voided; presumably, such an insider will still at least remain a creditor, be subject to a shorter statute of limitations, and may obtain protection to the extent new value is paid.

(d) Not Always Tortious. The fraudulent conveyance, taken alone, is not generally illegal or tortious, at least outside a bankruptcy crime context. *Mack v. Newton*, 737 F.2d 1343 (5th Cir. 1984) (distinguishes "actual fraud" from "actual intent to hinder, delay, or defraud," states that making or receiving a fraudulent conveyance is not necessarily illegal or wrongful, and notes that the act affects title to an innocent transferee, as well as someone participating in a fraud); *Elliott v. Glashon*, 390 F. 2d 514 (9th Cir. 1967); *U.S. v. Franklin National Bank*, 376 F. Supp. 378 (S.D.N.Y. 1973). See also *Bankfirst v. UBS Paine Webber, Inc.*, 842 So.2d 155 (Fla. Dist. Ct. App. 2003); *Reynolds v. Schrock*, 142 P.3d 1062 (Or. 2006) (no aiding and abetting a breach of fiduciary duty liability for attorney who does not exceed attorney-client relationship). See *Timothy v. Pia, Anderson, Dorius, Reynard & Moss, LLC*, __ P.3d __, 2018 UT App 31 (Ut. App. 2018) (finding no fraudulent transfer as predicate to civil conspiracy where law firm received debtor's funds in trust account since firm did not have dominion or control over funds to make it a first transferee under Fraudulent Transfer Act; no common law fraud or aiding and abetting claim had been raised).

(e) Individuals Acting for Organizations. Also, individuals acting for corporations or other organizations which make or receive fraudulent transfers might be held liable. See *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158 (2d Cir. 1993) (under New York Debtor and Creditor Law, attorney liable for masterminding judgment debtor's fraudulent transfer; part of transferred assets used to pay legal fees). However, a number of courts have refused to extend liability to corporate agents as "aiding or abetting," as "conspirators," as "accessories," or as "personal participants," at least where the agent was not actually fraudulent and did not personally benefit. Compare *DFS Secured Healthcare Receivables Trust v. Caregivers Great Lakes, Inc.*, 384 F.3d 338 (7th Cir. 2004 (Indiana law)) (officer of a "first transferee" found by jury to be acting with "malice, fraud, gross negligence, or oppressiveness" may be responsible as a personal participant under common law rule); with such cases as *Lowell Staats Mining Co. v. Phila. Elect. Co.*, 878 F.2d 1271 (10th Cir. 1989) (Colo. law) (res judicata on claim against corporation eliminates a separate claim against director for fraudulent transfer, because the director is in privity with the corporation and "participation" was for corporation, not personally); *Mack v. Newton, supra.*; *Kondracky v. Crystal Restoration, Inc.*, 791 A.2d 482, 483 (R.I. 2002); *Freeman v. First Union Nat'l Bank*, 865 So.2d 1272 (Fla. 2004).

(f) Attorneys' Fees. Attorneys' fees are not provided by the statute itself, but may be recovered as consequential damages under the "third party litigation" exception to the rule denying attorneys' fees, but only if the litigation over the fraudulent conveyance was foreseeable on account of the original breach of contract by the defendant making the fraudulent conveyance, not just from the subsequent wrongful conduct itself. *Gardiner v. York*, 153 P.3d

791 (Utah App. 2006) (also discussing foreseeability and consequential damages in this context); *Macris & Associates v. Neways Inc*., 60 P.3d 1176 (Ut. App. 2002) (third party litigation exception to general denial of legal fees applied in fraudulent transfer case).

(g) Punitive Damages. It may be possible to prove a case for punitive damages in some situations. See UCA § 78-18-1(1)(a) (willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others)

(h) Interest. Interest on the set aside transfer may be appropriate. *In re Indep. Clearing House Co.*, 77 B.R. 843, 876 (D. Utah 1987) (the bankruptcy court did not abuse its discretion in awarding prejudgment interest from the date of commencement of the adversary proceeding). See also, *In re Furr's Supermarkets, Inc.*, 373 B.R. 691, 709 (B.A.P. 10th Cir. 2007) ("nothing inequitable or punitive in requiring [recipient] to pay interest for the use of those monies" in preference recovery case).

5. **Timing**. When a transfer occurs will make a difference for determining limitations periods and for determining present or future creditor status.

(a) Limitations. UCA § 25-6-305 provides limitations periods for actions under the Act. Utah's periods are shown in the chart above; they are basically one year for an insider with antecedent debt and four years from the transfer for the other tests with the period for actual intent fraud including an additional one year from discovery rule. The periods run from the date of the transaction, or with respect to actual intent fraud, from discovery (if longer). Fraudulent concealment may extend the limitation period. See *Rappleye v. Rappleye*, 99 P.3d 348 (Ut. App. 2004) (fraudulent concealment tolled statute; recording quitclaim deed insufficient to put ex-wife creditor on notice); *Selvage v. J.J. Johnson & Associates*, 910 P.2d 1252, 1260 (Utah App. 1996) (UCA § 25-6-10(3) a statute of limitation, and not one of repose). There is a special, shorter, limitation period which could apply to a Utah asset protection trust meeting certain conditions. UCA § 25-6-502(9).

(b) Perfectible Transfer. However, it is important to note that the time does not commence to run until perfection as to a perfectible transaction because the transfer is not deemed to have yet occurred. UCA § 25-6-302(1). "The premise is that if the law prescribes a mode for making the transfer a matter of public record or notice, it is not deemed to be made for any purpose under the Act until it has become such a matter of record or notice." Prefatory Note by Commissioners to the Act. Without such perfection, the transfer will be treated as occurring immediately before the filing of the bankruptcy or of the case under the Act. UCA § 25-6-302(2); Bankruptcy Code § 548(d)(1).

(c) Other Transfers. Otherwise, a transfer is made when it becomes effective between the debtor and transferee, but not before the debtor has acquired rights in the asset. UCA § 25-6-302(3) and (4); Bankruptcy Code § 548(d)(1).

(d) Present or Future. Failure to properly perfect can, in addition to pushing out limitations periods, make a creditor a present creditor (not needing to prove actual intent fraud) when the creditor might otherwise have been a future creditor. These rules again point to the importance of perfection and disclosure.

(e) Disgorgement and Governmental Enforcement. Governmental disgorgement actions where wrongfully obtained assets are traced, are not subject to statutes of limitation. State and federal agencies use disgorgement remedies regularly including by securities law enforcement agencies, like the SEC and CFTC, and by other agencies as well, such as the FTC.

6. **Some Bankruptcy Effects**. There are some variations on the theme of fraudulent conveyances applicable in bankruptcy proceedings.

(a) Transfer Set Aside. The trustee in bankruptcy can set aside certain fraudulent conveyances. Bankruptcy Code § 548. This section includes fraudulent transfers (defined similarly as under the Act) made within two years prior to the filing of the bankruptcy petition. Under Bankruptcy Code § 548(e) asset protection trusts and similar devices termed "self-settled trust or similar device" may be set aside if the transfer is within a 10-year look-back period from the petition and is made with actual intent to hinder, delay, or defraud present or future creditors. (Query: Why would not a charitable remainder trust, qualified personal residence trust, retained life estate, or annuity, all of which provide for distributions to the transferor, be covered?)

The trustee in bankruptcy may also use its "strong-arm" powers under Bankruptcy Code § 544 to set aside transfers voidable under state law, including fraudulent transfers, where there are unsecured creditors who could do so. This provides the trustee the longer state law limitations period. Further, where the IRS is an unsecured creditor, most cases hold that the 10 years from assessment IRS limitation on collection (IRC § 6502) can apply where a return has been filed and where no return has been filed (or a fraudulent return has been filed) the unlimited assessment period under IRC § 6501(c)(1), (3) means that that transfers can be set aside without a time limitation. *In re Kaiser*, 525 B.R. 697 (Bnkr. ND Ill. 2014) (unlimited period used); *In re Behrends,* 2017 WL 4513071 (Bnkr. D Colo. 2017) (10 year period used; cites majority cases).

Whether a disclaimer will be effective under Bankruptcy Code § 548 or the strong arm provision of Bankruptcy Code § 544, will in both cases turn an applicable state law. See *In re Sanford*, 369 B.R. 609 (10th Cir. BAP (Wyom.) 2007) (under § 548 there would be no transfer for fraudulent conveyance purposes where state law disclaimer relation back applied).

(b) Other Effects. Also, a fraudulent transfer may deny a debtor a discharge under Bankruptcy Code § 727, and if it constitutes a continuing concealment of a retained interest, the two-year period won't limit the discharge denial. *Thibodeaux v. Oliver (In re Oliver)*, 819 F.2d 550 (5th Cir. 1987); *In re Hymas*, 2010 WL 3932042 (Bnkrtcy D. Id. 2010) (discharge denied under BC § 727(a)(2) based on distressed debtor's transfers to Nevada LLCs and LPs to hinder delay or defraud creditors). *Husky International Electronics, Inc v. Ritz*, 136 S.Ct. 1581 (2016) (the term "actual fraud," as used in the discharge exception, encompasses forms of fraud, like fraudulent conveyance schemes, even without a false representation). Moreover, the homestead exclusion can be reduced by the amount of nonexempt assets transferred into the homestead within 10 years of the petition with actual intent to hinder, delay, or defraud creditors. Bankruptcy Code § 522(o). See *In re Maronde*, 332 B.R. 593 (D. Minn. 2005).

(c) Bankruptcy Crime. The fraudulent transfer which is set aside as being within two years of the petition may well constitute a violation of the bankruptcy crime provision 18 USC § 152(7) (". . . in contemplation of a case under Title 11 . . . or with intent to defeat the provisions of Title 11, knowingly and fraudulently transfers . . .") (see *Burchinal v. U. S.*, 342 F.2d 982, *cert denied* 382 U.S. 843 (10th Cir. 1965)), and even such a conveyance made prior to the two-year period may also be a violation, since the criminal rule is not limited to two years prior to the filing of the petition. *U. S. v. West*, 22 F.3d 586, *cert. denied* 513 U. S. 1020 (5th Cir. 1994). As long as the intent to defraud a bankruptcy court is present, the crime can be complete, even if there never are any bankruptcy proceedings. *Burke v. Dowling*, 944 F. Supp. 1036 (E.D. N.Y. 1995). Punishment for violation is a fine, five years imprisonment, or both. Also, such a fraudulent transfer in violation of this section can be a crime on which a RICO racketeering claim can be predicated. *Cadle Co. v. Flanagan*, 271 F. Supp. 2d 379 (D. Conn. 2003). Bankruptcy fraud, or any kind of criminal fraud, for that matter, by a foreign national can cause deportation. At least some crimes (*e.g.*, fraud) can lead to the deportation of foreign nationals under 8 USC § 1101(a)(43)(M)(i) and 8 USC § 1227(a)(2)(A)(iii).

7. **Some Tax Effects**. Fraudulent conveyances can create some adverse tax results.

(a) Transferee Liability. Under IRC § 6901, the transferee of a fraudulent conveyance may be liable for the taxes of the transferor. The liability can be the amount of tax shown on the transferor's return or for the amount of any deficiency or underpayment. IRC § 6901(b). Where the liability is in equity under IRC § 6901, as under state law fraudulent conveyance law, the liability is up to the value of the property received. *Phillips v. Com'r*, 283 U.S. 589 (1931); see also *Denton v. Com'r*, 21 TC 295 (1953). Interest is also recoverable if allowable under state law. See *Stone v. Com'r*, 50 TCM 683 (1985); see also *Voss v. Wiseman*, 234 F2d 237 (10th Cir. 1956) (interest runs from date of notice if the fraud is constructive fraud rather than actual, but using federal law rather than state law). In some courts the limit of the value of the property received (IRC § 6324, estate and gift tax lien provision) may not apply to interest because transferee liability is not a tax but an independent liability. See *Baptiste v. Com'r*, 29 F.3d 1533 (11th Cir. 1994) (no limit on interest) and see the opposite result for the taxpayer's brother in *Baptiste v. Com'r*, 29 F.3d 433 (8th Cir. 1994) *cert. denied*, 513 U.S. 1190 (1995) (maximum on tax and interest is the value received). See also *U.S. v. MacIntyre*, 109 AFTR 2d ¶ 2012-868 (DC Tex. 2012) (following the 11th Circuit case of *Baptiste*); *Poinier v. Com'r*, 858 F2d 917 (3d Cir. 1988) (interest limited to value of gift).

The Service can also assert against transferees the theories that the transferee is a mere nominee of the transferor (see *Oxford Capital v. U.S.*, 211 F.3d 280 (5th Cir. 2000)) or that an organization is an alter ego of the owner (see *Servo Kinetics, Inc. v. Tokyo Precision Instruments Co. Ltd.*, 475 F.3d 783 (6th Cir. 2007)).

(b) Tax Settlements. Some courts allow the Service great discretion in denying offers in compromise even where there is not a clear fraudulent transfer, under a nominee ownership theory. See *Dalton v. Com'r,* 682 F.3d 149 (1st Cir. 2012) (Service discretion to deny offer in compromise upheld in case of transfer 11 years old to taxpayer's parents who then used assets to establish trust for benefit of taxpayer's children) *rev'g* the opposite finding of the Tax Court in *Dalton v. Com'r,* 135 TC 393 (2010).

8. **Litigation and Discovery.** Under the Act, a creditor with a claim (broadly defined as described above) may use a number of the remedies of the Act prior to judgment (such as injunctions and provisional remedies). Under Rule 18 of the federal and many state Rules of Civil Procedure, plaintiffs may join "in a single action . . . a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff without first having obtained judgment establishing the claim for money." See Utah Rules of Civil Procedure 18(b). Further, plaintiff may be entitled to discovery under federal Rule 26(b)(1) as to any nonprivileged matter "relevant to the subject matter involved in the pending action" even if not admissible if calculated to lead to the discovery of admissible evidence. The subject matter is "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340 351 (1978). Thus, a claim for money could give rise to early discovery into possible fraudulent conveyances to be added as claims in the case. The particularity in pleading standard of URCP 9(c) may apply. See *The Armer Texas Trust v. Brazell,* 397 P.3d 604, 2017 (Ut. App. 2017) (suggesting, where issue not preserved for appeal, that the appellant did not show the trial court erred in applying the rule); but see, *Wing v. Horn*, No. 2:09-CV-00342, 2009 WL 2843342, at *3 (D. Utah Aug. 28, 2009) (the rule only applies to actual intent fraud, not constructive fraudulent transfers based on insolvency).

9. **Choice of Law**. Several states may be involved where there is a fraudulent transfer. Transfers may cross state lines, injured creditors could be located anywhere, and so on. Which state's law applies? The law to apply could determine such important, even determinative, issues as limitations periods; one state may have a three-year period and another a four-year period. Under the Act the choice of law is simpler than under the former Uniform Fraudulent Transfer Act which did not provide a statutory rule. Under the Act, a claim for relief in the nature of a voidable transaction (i.e., a fraudulent conveyance or fraudulent transfer under traditional terminology or a similar matter), is governed by the law in which the debtor is located when the transfer is made or obligation incurred. An individual is located at his or her principal residence. An organization is located at its place of business, or, if more than one, at its chief executive office. UCA § 25-6-402. The choice of law was not a simple analysis under the prior Uniform Fraudulent Transfer Act (still applicable in many jurisdictions). Which state's choice of law rule prevails can thus also be very important. The following relates to the analysis under the Uniform Fraudulent Transfer Act.

(a) Characterization of Cause of Action. The cause of action must first be characterized under the law of the forum. *Waddoups v. Amalgamated Sugar Co.*, 54 P.3d 1054, 1060 (Ut. 2002). Some bankruptcy courts use federal law to characterize the claim. See *In re Cyrus II P'ship,* 413 B.R. 609, 621 (Bankr. S.D. Tex. 2008) (action sounds in tort under federal choice of law rules). For state law claims, absent an overriding federal interest, state conflicts of law rules are applied by federal courts. *Terry v. June*, 420 F. Supp. 2d 493, 500-502 (W.D. Va. 2006). It seems likely the claim will be characterized as a tort claim in many states. *ASARCO LLC v. Americas Min. Corp*., 382 B.R. 49, 62 (S.D. Tex. 2007) on reconsideration in part *sub nom*. *ASARCO LLC v. Americas Mining Corp*., 396 B.R. 278 (S.D. Tex. 2008) (applying the most significant relationship test as in any tort action under Texas law). Other characterization choices may include property, equity, or contract, but most courts appear to favor a tort characterization.

(b) Selection of Law to Apply. The law applicable to the sort of claim so characterized then must be selected. Utah follows the most significant relationship rule of Restatement (Second) of Conflict of Laws § 145 (1971), as do many states. Under the Restatement rule, contacts to be taken into account to determine the law applicable to an issue in tort include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. These contacts are evaluated according to their relative importance with respect to the particular issue. For example, in the *ASARCO* case cited above, at p. 64, the court concluded, "After considering the relationship of the parties with various jurisdictions including Delaware, New Jersey, Arizona, New York, Peru, and even Mexico, the Court finds the most significant relationship among the parties, considering the particular nature of this tort, is the parties' relationship with Delaware." This was because the key players were incorporated there and the other factors led to many jurisdictions.

10. **Other Changes**. The Act makes some other changes to Utah's voidable transaction rules.

(a) Electronic Records. Electronic records and signatures are expressly recognized. UCA §§ 25-6-102(7), (13), (15), and 25-6-407.

(b) Person and Organization. A new definition of "organization" is added, and is a person other than an individual. This definition is useful in applying the new choice of law rule. The definition of person is modified and includes individuals, estates, trusts, business or nonprofit entities, government agencies, or other legal or commercial entities. UCA § 25-6-102(10) and (11).

(c) Partnerships. The special rule by which the assets of general partners in a partnership were taken into account in measuring the insolvency of a partnership has been removed. Former UCA § 25-6-3(3). This change was made because personal guarantees are not taken into account in other circumstances.

(d) Burdens of Proof. As noted above, the burden of proof on creditors seeking to void a transaction under the standard of actual intent to hinder, delay, or defraud present or future creditors (UCA § 25-6-202) or under the insolvency standards as to present creditors, is now in both cases by a preponderance of the evidence. UCA §§ 25-6-202(3) and 25-6-203(3). (In the past, actual intent fraud required proof by clear and convincing evidence. See

Territorial Sav. & Loan Ass'n v. Baird, 781 P. 2d 452, 462 (UT App. 1989); *Bradford v. Bradford*, 993 P. 2d 887 (UT App. 1999).)

The person with the burden of proof in proving the application of a number of exceptions to avoidance, obtaining judgment against immediate or mediate transferees, or seeking adjustments has been explicitly specified and the nature of the burden has been clarified by stating that the burden is by a preponderance of the evidence. UCA § 25-6-304(9) and (10).

(e) Series LLCs. A new provision has been added to define and deal with series organizations. It treats each protected series as a separate person for purposes of the voidable transaction act even if for other purposes it is not separate from the organization or from other series for other purposes. UCA § 25-6-403.

(f) Effective Date. The new Act applies to transfers made or obligations incurred, or causes of action accrued, on or after May 9, 2017. UCA § 25-6-406. When a transfer is made or obligation is incurred is determined under UCA § 25-6-302. (That timing, in some cases, is tied to perfection or lack of perfection as to a good faith purchaser for value. Thus, for example, a transfer that could be perfected under the law (e.g., recording a deed) but is not, is deemed to occur immediately before bringing the action for relief against the voidable transaction.)