

Memorandum in Support

BUSINESS LAW SECTION AND ITS COMMITTEE ON BANKRUPTCY

BLS #3

November 25, 2019

S. 4236
A. 5622

By: Senator Hoylman
By: M. of A. Weinstein

Senate Committee: Judiciary
Assembly Committee: Codes
Effective Date: 120 days after it shall have become a law.

AN ACT to amend the debtor and creditor law, the civil practice law and rules, the estates, powers and trusts law and the workers' compensation law, in relation to enacting the "uniform voidable transactions act"; and to repeal certain provisions of the debtor and creditor law relating to fraudulent conveyances.

LAW & SECTION REFERRED TO: Article 10 of the debtor and creditor law, sections 5205 and 5519 of the civil practice law and rules, section 7-3.1 of the estates, powers and trusts law, and section 50 of the workers' compensation law.

THE BUSINESS LAW SECTION AND ITS BANKRUPTCY COMMITTEE SUPPORT THIS LEGISLATION

Sections 280 – 291 of the New York Debtor & Creditor Law address the avoidance of so-called fraudulent transfers, which generally speaking are transfers made while a transferor is insolvent and for which it receives less than fair consideration. They include both transfers intended to actually defraud creditors and those that are simply deemed constructively fraudulent as a result of certain hallmarks surrounding the transfer.

Forty-four states, but not New York, have now adopted the Uniform Voidable Transfer Act (“UVTA”), which was previously known as the Uniform Fraudulent Transfer Act (“UFTA”) but was renamed in 2014 in recognition of the fact that the act applies to transfers, many of which are not “fraudulent” as we understand that term under the common law.

In addition to the majority of the other states, the UVTA has been endorsed by the American Bar Association. The New York City Bar Association (“NYCBA”) endorsed adoption of what is now the UVTA in 2006 and as recently as March 2019. In 2007, and again in 2011, the Business Law Section and the Committee on Bankruptcy recommended adoption of what is now known as the UVTA to the New York Legislature.

Bill no. A5622 has now passed the Legislature. Accordingly, the Bankruptcy Committee of the NYSBA's Business Law Section recommends that the UVTA be adopted, for the reasons set forth below.

The June 25, 2011 Final Report of the NYSBA's Task Force on New York Law in International Matters summarized succinctly the reasons why the UVTA should be adopted, as did the NYCBA's Committees on Commercial and Uniform State Laws and Bankruptcy and Corporate Reorganizations City Bar's March 2019 Report on Legislation. Much of those reports are reproduced here.

If adopted, the UVTA would replace sections 280 – 291 of the New York Debtor & Creditor Law, the language of which has become archaic and conflicts with the laws of most other states and the U.S. Bankruptcy Code's sections dealing with fraudulent transfers.

Specifically, the NYCBA has argued:

that the [UVTA] is better suited to today's complex business transactions than the aging UFCA [Uniform Fraudulent Conveyance Act] presently in force in New York [...] New York's enactment of a fraudulent transfer statute based on the [UVTA] would promote uniformity among the states and, in so doing, create a more predictable, and therefore more favorable, business environment.

Uniformity is exceptionally desirable because choice of law issues arising with regard to fraudulent transfers are unusually uncertain and ambiguous. In addition, such enactment would promote uniformity with the Bankruptcy Code and, in so doing, enhance predictability by reducing the likelihood that a transaction would be treated differently for this purpose before and after the commencement of a bankruptcy case.

By enacting the UVTA in New York, the Legislature would modernize New York's fraudulent conveyance laws and make New York law consistent with that of the vast majority of other states and the Bankruptcy Code. The result would be a welcome simplification of the law and an increase in certainty for debtors and creditors.

Further, the NYSBA agrees with the New York City Bar that the UVTA: (a) normalizes the statute of limitations; (b) clarifies when the transferor's financial condition and the value of the consideration provided by the transferee are to be measured and when the statute of limitations begins to run; (c) streamlines the degree to which a transferor's financial extremis may render a transfer for less than reasonably equivalent value susceptible to avoidance on the basis of constructive fraud; (d) provides heightened scrutiny for potential disgorgement of transfers to insiders of the debtor-transferor by synthesizing the definition of "insider" with that set forth in the U.S. Bankruptcy Code; (e) expands the remedies available to creditors of a debtor who has

made a voidable transfer; and (f) clarifies the defenses available to transferees in general and strengthens the defenses available to those who receive transfers in good faith.

Adopting the UVTA would bring New York into conformity with most other states' voidable transfer laws and help to make its Debtor & Creditor laws more consistent with the U.S. Bankruptcy Code. Ensuring predictability and uniformity will enable New York to continue to be the nation's preeminent business center and will help to stem the tide of businesses organizing elsewhere. For the reasons set forth above, there are several overarching reasons to support adoption of the UVTA and seemingly none that support remaining tethered to fraudulent conveyance laws that have their genesis in laws adopted almost 100 years ago in 1925. Business has evolved exponentially since the early twentieth century and there is no legitimate reason that New York should remain (along with Maryland) the only state to continue to operate under such antiquated laws. Not adopting the UVTA will lead to unnecessary confusion among debtors, creditors, and good faith transferees and, at worst, allow abuses among those who would seize upon New York's outlier voidable transfer laws. Conversely, adopting the UVTA will bring New York's definitions of voidable transfers in line with twenty-first century parlance (i.e., from "fraudulent" to "voidable"), as well normalize its laws with those of the overwhelming majority of other state (and federal) laws regarding choice of law, the definition of insolvency, and the determination of the appropriate burdens of proof for parties to alleged voidable transfer transactions.

For the foregoing reasons, the NYSBA's Business Law Section and its Bankruptcy Committee **SUPPORTS** this legislation.