

1-1-1985

Multiple Intent, Veil-Piercing, and Burdens and Benefits: Fraudulent Conveyance Law and Multiparty Transactions

Allen J. Littman

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Allen J. Littman, *Multiple Intent, Veil-Piercing, and Burdens and Benefits: Fraudulent Conveyance Law and Multiparty Transactions*, 39 U. Miami L. Rev. 307 (1985)

Available at: <https://repository.law.miami.edu/umlr/vol39/iss2/5>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Multiple Intent, Veil-Piercing, and Burdens and Benefits: Fraudulent Conveyance Law and Multiparty Transactions

ALLEN J. LITTMAN*

I. INTRODUCTION	307
II. THE ACTUAL INTENT REQUIREMENT OF FRAUDULENT CONVEYANCE LAW IN THE MULTIPARTY TRANSACTION CONTEXT	316
III. THE MEASUREMENT OF FAIR CONSIDERATION AND REASONABLY EQUIVALENT VALUE IN MULTIPARTY TRANSACTIONS	325
IV. CONCLUSION	339

I. INTRODUCTION

When an entity borrows funds, the lender will often seek, in addition to a security interest in some or all of the borrower's assets, guaranties from parties that are closely related to the borrower. These guarantors may be individual stockholders of a closely held borrower, corporate stockholders, other entities affiliated with the borrower such as corporations owned by a common stockholder, or even a major supplier of, or purchaser from, the borrower. Often the lender has superior economic strength and successfully demands such guaranties from members of an affiliated corporate group. Further, the lender may insist on obtaining a security interest in some or all of the guarantor's assets in order to obtain priority status over the guarantor's general creditors in the event the guarantor is called on to repay the loan.

The weaker the borrower is financially, the more likely the lender will insist on such guaranties. As a corollary to this premise, the weaker the guarantor is financially, the more likely the lender will demand a security interest in the guarantor's assets. In the event that the guarantor becomes involved in bankruptcy proceedings, the lender could find that the guaranties and related security interests that he required from the borrower's guarantor are unenforceable as fraudulent conveyances under the Bankruptcy Code (Code).¹

* Associate with the firm of Mershon, Sawyer, Johnston, Dunwody & Cole, Miami, Florida; J.D., University of Miami, 1984.

1. See 11 U.S.C. § 548 (1982); see also Conner, *Enforcing Commercial Guaranties in*

Section 548 of the Code permits a trustee in bankruptcy under certain circumstances to "avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor that was made or incurred on or within one year before the date of the filing of the petition."² First, these transfers or obligations may be

Texas: Vanishing Limitations, Remaining Questions, 12 TEX. TECH L. REV. 785 (1981); Coquillette, *Guaranty of and Security for the Debt of a Parent Corporation by a Subsidiary Corporation*, 30 CASE W. RES. 433 (1980). The lender also might have enforcement problems in or out of bankruptcy under general corporate law, on the ground that the guaranty was ultra vires or violated a fiduciary duty. See, e.g., *Malloy v. Korf*, 352 F. Supp. 569 (E.D. Wis. 1972); *Woods Lumber Co. v. Moore*, 183 Cal. 497, 191 P. 905 (1920); *New England Merchants Nat'l Bank v. Lost Valley Corp.*, 119 N.H. 254, 400 A.2d 1178 (1979); Dwyer, *A Legal and Business Examination of the Contractually Supported Investment in Relation to the Corporate Guaranty*, 23 SYRACUSE L. REV. 33 (1972); Everdell & Longstreth, *Some Special Problems Raised by Debt Financing of Corporations Under Common Control*, 17 BUS. LAW. 500 (1962); Kreidmann, *The Corporate Guaranty*, 13 VAND. L. REV. 229 (1959); Note, *Upstream Financing and Use of the Corporate Guaranty*, 53 NOTRE DAME LAW. 840 (1978); Note, *The Corporate Guaranty Revisited: Upstream, Downstream and Beyond — A Statutory Approach*, 32 RUTGERS L. REV. 312 (1979).

Issues also may arise under general contract over guaranty law. See Alces, *The Efficacy of Guaranty Contracts in Sophisticated Commercial Transactions*, 61 N.C.L. REV. 655 (1983). In addition, one commentator has suggested that when a lender is so involved with a guarantor as to be deemed to control or to poorly manage its affairs, its claims could be subordinated under the equitable "Deep Rock" doctrine enunciated in *Taylor v. Standard Gas & Elec. Co.*, 306 U.S. 307 (1939). See Rosenberg, *Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware*, 125 U. PA. L. REV. 235, 236-38 n.2 (1976); see also *Moulded Prods., Inc. v. Barry*, 474 F.2d 220 (8th Cir.), cert. denied, 412 U.S. 940 (1973) (rejecting subordination where lender did not control management of debtor); *International Tel. & Tel. Corp. v. Holten*, 247 F.2d 178 (4th Cir. 1957) (parent corporation's claims subordinated where it controlled subsidiary for its own purposes and without regard to subsidiary's interests); Carroll, *Priorities and Subordination in the Bankruptcy Reform Act of 1978*, 17 HOUS. L. REV. 223, 249 (1980) (discussing equitable subordination of claims); Herzog & Zweibel, *The Equitable Subordination of Claims in Bankruptcy*, 15 VAND. L. REV. 83, 85-88 (1961) (discussing the distinction between subordination and disallowance of claim).

The impact of general corporate and contract law and of equitable subordination principles are beyond the scope of this paper. For a discussion of the relationships between fraudulent conveyance law and equitable subordination, see Clark, *The Duties of the Corporate Debtor to its Creditors*, 90 HARV. L. REV. 505 (1977).

2. 11 U.S.C. § 548(a) (1982). Section 548(a) reads as follows:

- (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor—
- (1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer occurred or such obligation was incurred, indebted; or
 - (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
 - (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

avoided if made with "actual intent to hinder, delay or defraud" present or future creditors.³ Second, even if there is no "actual intent," the transfer may be avoided if the debtor received less than a "reasonably equivalent value in exchange for such transfer or obligation,"⁴ and the debtor either (i) was insolvent when the transfer was made or obligation incurred,⁵ (ii) became insolvent as a result of the transfer or obligation,⁶ (iii) was left with an "unreasonably small capital" for continuing in business,⁷ or (iv) intended to incur, or believed it would incur, debts beyond its ability to repay.⁸

The Bankruptcy Reform Act of 1978 substituted the phrase "less than a reasonably equivalent value" in section 548(a)(2)(A)⁹ for the phrase "without fair consideration" in section 67(d)(2)(a) of the predecessor Bankruptcy Act.¹⁰ "Fair consideration" was given when it was economically equivalent to the property received and was given in good faith.¹¹ If the debtor receives reasonably equivalent value for the property transferred, good faith is no longer required under the Code.¹² The difficulty of defining good faith made it difficult for the courts to apply the standard in a consistent manner.¹³

(ii) was engaged in business, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
 (iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

3. *Id.* § 548(a)(1).

4. *Id.* § 548(a)(2)(A).

5. *Id.* § 548(a)(2)(B)(i).

6. *Id.*

7. *Id.* § 548(a)(2)(B)(ii).

8. *Id.* § 548(a)(2)(B)(iii).

9. 11 U.S.C. § 548(a)(2)(A) (1982).

10. Bankruptcy Act of 1898, § 67(d)(2)(a), 11 U.S.C. § 107(d)(2)(a) (1976). The term "fair consideration" lives on in § 3 of the Uniform Fraudulent Conveyance Act [hereinafter cited as "UFCA"].

11. Macey, *Preferences and Fraudulent Transfers Under the Bankruptcy Reform Act of 1978*, 28 EMORY L.J. 685, 704 (1979).

12. *Id.*

13. See *In re Richardson*, 23 Bankr. 434, 445-48 (Bankr. D. Utah 1982). Compare *Gilmer v. Woodson*, 332 F.2d 541 (4th Cir. 1964) (\$260,000 deed of trust given to secure notes of debtor totalling \$249,000 received in good faith) with *Bullard v. Aluminum Co. of Am.*, 468 F.2d 11 (7th Cir. 1972) (acceptance of 50 cents on the dollar in full satisfaction of debt with release of judgment against guarantor not made in good faith). Collier suggests that *Bullard* is no longer good law due to the elimination of the good faith requirement. 4 COLLIER ON BANKRUPTCY § 548-103 n. 35 (15th ed. 1984). See generally Rosenberg, *supra* note 1, at 248-52 (enumerating various tests for defining good faith); Note, *The New Bankruptcy Act: A Revision of Section 67d—The Death of a Dilemma*, 7 HOFSTRA L. REV. 537, 541

In addition to the avoidance provisions of section 548, section 544(b) of the Code also permits the trustee to avoid any interest in property or obligation of the debtor that an unsecured creditor may avoid under nonbankruptcy law.¹⁴ Under this provision, the trustee may avoid a transfer under the Uniform Fraudulent Conveyance Act (UFCA),¹⁵ if applicable in the appropriate jurisdiction, or other state fraudulent conveyance law. The provisions of the UFCA generally parallel those of section 548,¹⁶ the most salient difference being the substitution of the concept of "fair consideration" in the UFCA for that of "reasonably equivalent value" in the Code.¹⁷ From the trustee's viewpoint, the main advantage of using the UFCA or other state law is that the "look-back" period during which any conveyance made may be subject to avoidance is increased from one year (under section 548)¹⁸ to a longer period permitted by the state statute of limitations.¹⁹

In the absence of "actual intent" to defraud on the part of the debtor, therefore, the determination of whether a fraudulent transfer has been made rests on whether the debtor was insolvent when the transfer was made and whether the debtor has received "reasonably equivalent value" (or "fair consideration" under the UFCA) for his transfer or obligation. Both insolvency and lack of reasonably equivalent value must be present in this instance for

(1979) (good faith as an element of fair consideration definition).

14. 11 U.S.C. § 544(b) (1982).

15. *Id.* Approximately one-half of the states have enacted the UFCA. See AM. JUR. 2D DESK BOOK 193 (1979).

16. Compare UFCA §§ 4-7 with 11 U.S.C. § 548(a)(1)-(2).

17. Compare UFCA §§ 4-6 with 11 U.S.C. § 548(a)(2)(A). UFCA § 3 defines "fair consideration" as that

given in exchange for such property or obligation, (a) when in exchange for such property or obligation, as a fair equivalent therefore, and in good faith, property is conveyed or an antecedent debt is satisfied, or, (b) when such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

UFCA §3. For a discussion of the significance of the difference in language between UFCA § 3 and § 548 of the Code, see *supra* notes 9-13 and accompanying text.

18. See 11 U.S.C. § 548(a) (1982).

19. An unexpired state statute of limitations applicable to an action for the benefit of a debtor or the bankruptcy estate is extended under the Code to at least two years after entry of an order for relief. 11 U.S.C. § 108(a) (1982). An action under either § 544 or § 548, however, may not be commenced after the two year period has run, or after the bankruptcy case has been closed or dismissed, if earlier. 11 U.S.C. § 546(a); see also Reiley, *Secured Creditors and the Bankruptcy Act of 1978*, 14 U.S.F.L. REV. 341, 363 (1980) (discussing statutes of limitations under § 548).

the trustee to avoid the transfer or obligation.²⁰

In the case where a corporation transfers its property or incurs a debt, it is relatively easy to measure its solvency immediately prior to and immediately after the transfer, once a standard for measuring insolvency is set.²¹ Likewise, it is relatively easy to de-

20. If the transfer is avoided, the trustee may recover the transferred property from the initial transferee and, in some cases, from a subsequent transferee. See 11 U.S.C. § 550(a)-(b) (1982).

21. In order for a transfer or obligation to be declared constructively fraudulent under the Bankruptcy Code or the UFCA, the debtor must be insolvent either immediately before or immediately after the transfer is made or the obligation is incurred. 11 U.S.C. § 548(a)(2)(B)(i) (1982); UFCA § 4; see *supra* note 2 and accompanying text. Alternatively, either of two less stringent tests may be substituted for insolvency. See 11 U.S.C. § 548(a)(2)(B)(ii)-(iii) (1982); *supra* note 2; UFCA §§ 5-6. One court noted that these tests are used normally in "circumstances of obvious potential self-dealing, such as intrafamily transfers." *In re Knox Creations, Inc.*, 474 F. Supp. 567, 572 (E.D. Tenn. 1979), *aff'd in relevant part*, 656 F.2d 230 (6th Cir. 1981).

The Code defines "insolvent," with reference to an entity other than a partnership, as the "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and (ii) [exempt] property." 11 U.S.C. § 101(26)(A) (1982). Under the UFCA, a person is insolvent "when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." UFCA § 2(1)

Under the Code, the test for insolvency is a comparison of the sum of the entity's debts to a fair valuation of all its property. 11 U.S.C. § 101(26)(A) (1982). The District Court of New York distinguished the "bankruptcy test" of insolvency from the "equity test" of insolvency:

The equity test of insolvency equates insolvency with a lack of liquid funds, or the inability to pay one's debts in the ordinary course of business as the debts mature. This test normally has the lower threshold of compliance; it may be met by companies in temporary financial difficulty which are not on the verge of failure. The bankruptcy test of insolvency, on the other hand, focuses on the balance sheet of a company at discrete intervals of time in order to determine whether the company's liabilities exceed its assets; it will typically be met by companies in serious financial difficulty.

United States v. 58th Street Plaza Theatre, Inc., 287 F. Supp. 475, 500 (S.D.N.Y. 1968) (quoting *Kreps v. Commissioner*, 351 F.2d 1, 9 (2d Cir. 1965)).

By its terms, the insolvency test must be made "on the date that such transfer was made or such obligation was incurred." 11 U.S.C. § 548(a)(2)(B)(i) (1982); see also *John Ownbey, Inc. v. Commissioner*, 645 F.2d 540, 546 (6th Cir. 1981) (transferor must be found insolvent at the time of transfer or immediately thereafter). In the case of an intercorporate guaranty and security interest, the relevant date, at least under the Code, is the date that the principal debtor incurs the liability. 11 U.S.C. § 548(a)(2)(B)(i) (1982). If the principal debtor is receiving advances at various dates, insolvency must be tested at each advance date. See *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 990 (2d Cir. 1981) ("While these obligations existed only because of the system of guarantees, it does not follow that the execution of the guarantees, rather than the creation of contingent liabilities under them, constituted the incurring of the obligations. . . . Even after the guarantees were executed, there could be no liability under them until MHT had actually loaned money"). *But see Rosenberg*, *supra* note 1, at 253 (relevant date is "date on which the obli-

termine whether the transferor has received reasonably equivalent value in exchange for transferring its property or incurring a debt, once the term "reasonably equivalent value" is defined. In a multiparty transaction, such as an upstream guaranty (where a subsidiary guarantees its parent company's debt) or a cross-stream guaranty (where a subsidiary guarantees the debt of a brother-sister company), where a security interest secures the guaranty; however, it is more difficult to determine whether the guarantor has received a reasonably equivalent value, if indeed it has received value at all.²²

gation is incurred or the lien is granted").

Insolvency on the transfer date may be calculated by a procedure known as retrojection, whereby one works backwards through the entries made in the debtor's books, from a date on which the debtor was known to be insolvent to the transfer date. *Seligson v. New York Produce Exchange*, 394 F. Supp. 125 (S.D.N.Y. 1975); see also *Haynes & Hubbard, Inc. v. Stewart*, 387 F.2d 906, 907 n.1 (5th Cir. 1967) (trustee must show absence of radical change in assets or liabilities between retrojection dates); *Hassan v. Middlesex County Nat'l Bank*, 333 F.2d 838, 840 (1st Cir.), cert. denied, 379 U.S. 932 (1964) (using general ledger to show absence of radical change between retrojection dates).

22. The determination of insolvency is also complicated in a multicorporate context. It is well established that liability as a surety, guarantor, or endorser of commercial paper must be included in the computation of total indebtedness for purposes of measuring insolvency. See *In re Ollag Constr. Equip. Corp.*, 578 F.2d 904, 908-09 (2d Cir. 1978); *Syracuse Eng'g Co. v. Haight*, 97 F.2d 573, 576 (2d Cir. 1938); *Udike v. Oakland Motor Car Co.*, 53 F.2d 369, 370-71 (2d Cir. 1931); *Wingert v. Hagerstown Bank*, 41 F.2d 660, 663 (4th Cir.), cert. denied, 282 U.S. 871 (1930); *Huttig Mfg. Co. v. Edwards*, 160 F. 619 (8th Cir. 1908); *In re Bowers*, 215 F. 617, 618 (N.D. Ga. 1914); 2 COLLIER ON BANKRUPTCY 101.26[5] (15th ed. 1980); *Alces*, supra note 1, at 679.

If the guarantor is not insolvent prior to incurring the guaranty obligation, but the inclusion of the contingent obligation as a liability renders him insolvent, then the question arises whether the equally contingent right of subrogation against the principal debtor and rights of contribution against co-guarantors should be included as assets in determining insolvency. Because under the UFCA insolvency is based on "probable liability" on existing debts as they become absolute and matured, only those guaranties on which the guarantor will probably be held liable are to be considered in determining insolvency under the UFCA. See *In re Knox Kreations, Inc.*, 474 F. Supp. 567 (E.D. Tenn. 1979), aff'd in relevant part, 656 F.2d 230 (6th Cir. 1981); *Coquillette*, supra note 1, at 454-55.

Although one commentator has suggested that these contingent assets are essentially valueless, the weight of authority is to the contrary. Compare *Rosenberg*, supra note 1, at 256 ("The notion that the guaranty of a solvent obligor is offset by a contingent asset based on the right of subrogation is simply not realistic; when and if the value of that contingent asset in all likelihood would be discounted severely because it probably would be no longer collectible. Otherwise, the guarantor would not have been called upon to perform.") with *In re Ollag Constr. Equip. Corp.*, 578 F.2d 904, 908 (2d Cir. 1978) and the cases cited therein (citing Judge Learned Hand's observation that subrogation and contribution rights must be valued as assets when determining solvency). These contingent rights should be valued at less than face value to reflect more accurately the probable amount recoverable.

In a very real sense, the insolvency of a guarantor depends on the financial condition of its parent and brother-sister corporations. If assets of the principle debtor secure the creditor's claim against the principal debtor and the principal debtor has collateral from which

The case of *Rubin v. Manufacturers Hanover Trust Co.*²³ illustrates the problem. In *Rubin*, two affiliated debtors were in the business of issuing money orders through sales agents, principally check cashing establishments controlled (but not wholly owned) by the majority stockholders of the debtors. The debtors were dependent on the check cashers for customers. The check cashers were able to handle safely large amounts of money, providing customers with cash with which to buy money orders. Moreover, the sale of money orders by the check cashers reduced the cash outlays required for cashing checks.²⁴

To meet the check casher's cash needs, the majority shareholders guaranteed revolving loan lines that were arranged with Manufacturers Hanover Trust Co. (MHT). The debtors in turn guaranteed the debts of the majority shareholders, securing their guarantees by pledging their MHT bank accounts.²⁵ The guarantees were in place in 1972, over four years before the debtors filed petitions in bankruptcy, but they were renewed with modifications of collateral within the one year period prior to the petitions.²⁶

Subsequent to the default of the check cashers and the stockholders under the loan lines, but prior to the debtors' bankruptcy

the creditor may satisfy the debt, then it would seem that the contingent liability could not render the guarantor solvent. In such a case the "contingent" asset would wholly offset the additional liability. See *In re Ollag Constr. Equip. Corp.*, 578 F.2d 904, 908 (2d Cir. 1978).

If all of the assets of the principal debtor secure the creditor's claim against the principal debtor, but the collateral is insufficient to satisfy the debt, then the guarantor still will not be rendered insolvent if the assets of the principal debtor are sufficient to offset the difference between the liabilities (including contingent liabilities) and assets of the guarantor. If the collateral of the principal debtor does not fully secure the creditor, then in addition to being subrogated to the secured claim against the principal debtor, the guarantor also will share *pari passu* with the principal debtor's unsecured creditors in the noncollateralized assets of the principal debtor. In this case, both the subrogated secured claim and the guarantor's *pari passu* share in noncollateralized assets should be included as offsetting assets in determining the guarantor's insolvency.

The same analysis holds true with respect to rights of contribution against co-guarantors and, to a lesser degree, to nonguaranteeing brother-sister corporations. See *Wingert v. Hagerstown Bank*, 41 F.2d 660 (4th Cir.), *cert. denied*, 282 U.S. 871 (1930). The parent company's equity in a solvent nonguaranteeing subsidiary is an asset of the parent by virtue of its ownership of the stock and is thus subject to the guarantor's right of subrogation or contribution.

With respect to intercorporate guarantees, the law of subrogation and contribution leads to the recognition of the interdependent nature of a corporate family in the determination of insolvency of one member of the family. The issue of interdependence, however, becomes more acute in the determination of "reasonably equivalent value."

23. 661 F.2d 979 (2d Cir. 1981).

24. *Id.* at 981-82.

25. *Id.* at 983.

26. *Id.* at 983-84.

petitions, MHT seized the debtors' bank accounts at MHT and applied the funds toward the debts of the check cashers. The trustees in bankruptcy sought to avoid the transactions as fraudulent conveyances, arguing that no consideration passed to the debtors, because the loans were made to the check cashers. MHT claimed that the debtors received fair consideration, because the loans allowed the check cashers to settle their accounts with the debtors more quickly.²⁷ According to MHT, the loans increased the "float" from which one of the debtors derived its profits, thereby conferring an "indirect benefit" on the debtors.²⁸ The debtors benefitted from the increase in remittances "trickling down" from the check cashers.²⁹ The trial court agreed with MHT that the debtors had received an indirect benefit from MHT's loans to the check cashers by virtue of the "identity of interest" between the check cashers and the money order sellers. The enterprises were, in effect, "one ball of wax."³⁰ Thus, the fair consideration requirement of the fraudulent conveyance provision of the Bankruptcy Act was satisfied.

The Second Circuit vacated and remanded the judgment of the trial court with instructions to quantify the indirect benefits to the debtors from the loan advances and to compare these benefits with the obligations assumed by the debtors under the guaranties.³¹ The court noted that where a conveyance is made for security, the Bankruptcy Act requires that the antecedent debt or present advance be "not disproportionately small as compared with the value of the property or obligation given by the bankrupt to secure it."³²

The *Rubin* decision represents a step away from the traditional corporate formalism approach and a refinement of the concept of third-party consideration. Under the first approach, courts have "pierced the corporate veil" and found consideration running to a related entity to be "reasonably equivalent value" or "fair consideration" to another based on the relationship between the guarantor and the borrower. Under the second approach, the focus is on whether the borrower's guarantor received an indirect benefit

27. *Id.* at 992.

28. *Id.*

29. *Id.* The loans increased the amount of funds available to redeem the debtors' money orders. *Id.*

30. *Id.* at 988.

31. *Id.* at 993.

32. *Id.*; Bankruptcy Act, ch. 541, 30 Stat. 544, 564 (1898) (current version at 11 U.S.C. § 107(d) (1982)).

from the transaction. *Rubin* adopts the second approach; yet, the court focussed on the amount of indirect benefits flowing to the guarantors. The *Rubin* analysis ignores certain unquantifiable benefits recognized under the identity of interest approach—such as the ability to settle accounts more expeditiously.³³ Additionally, expected benefits that may be quantifiable but are not expected to accrue for some time are disregarded. The focus is on the proportionate quantified benefit that the debtor actually received.

This analysis would be problematical for many multicorporate organizations. For example, the borrower may be organized as a holding company owning all of the shares of stock in operating subsidiaries, while the subsidiaries hold title to almost all of the tangible assets of the consolidated group. To control the growth of the various operating subsidiaries, to allocate resources among the subsidiaries for the benefit of the group as a whole, and to obtain loans and capital at a favorable cost (in theory at least, to maximize the net present value of the entire firm as reflected in the market price of its stock), the parent company may hold all or most of the long-term debt of the group. This can occur even if the parent company carries on operations in its own name as well. Alternatively, the parent company may organize an essentially “assetless” subsidiary for the sole purpose of holding the long-term debt of the corporate group. In this case, the assets of the debt-holding subsidiary will consist of the amounts receivable from the other companies of the group.

In either instance, the amount of debt capital needed by a particular subsidiary for its optimum financial operation may vary due to factors such as the nature and size of its business operations and corresponding risks, the return on investment needed by the parent company and the corporate group, the quality of assets owned by the subsidiary, the amount of equity capital advanced by the parent, and the subsidiary's optimum capitalization. Thus, although the amount of debt capital used by such an operating subsidiary may vary according to the value of the subsidiary's assets alone, other factors may contribute to such variance.

When a parent company borrows funds on behalf of its corporate group, it may pass the funds to its subsidiaries in a manner relatively disproportionate to each subsidiary's assets. The security interests in the subsidiary's assets are likely to be disproportionate to the amount of debt actually utilized by each operating subsidi-

33. 661 F.2d at 992.

ary. Likewise, in a workout situation, both the lender and the debtor may have a genuine desire to rearrange positively the debtor's finances to satisfy all of its creditors. The lender requires some hedge against the high risk nature of such a loan, usually in the form of guaranties from affiliated companies and security interests in the assets of these affiliates. Under these conditions, a parent company may be unable to obtain financing to rescue a floundering operating subsidiary, if to do so would require that other operating subsidiaries guaranty the debt and encumber their assets. At a minimum, the uncertainty of enforcement of the intercorporate guaranties and security interests may raise the cost of funds and doom some attempted workouts.

This article will examine this problem in the light of the various modes that courts use to address these multiparty transactions. First, efforts to apply the actual intent aspect of fraudulent conveyance law to three-sided transactions will be discussed. Next, techniques used by the courts to measure fair consideration and reasonably equivalent value in these transactions will be analyzed in view of the putative purpose of the pertinent statutes and the conflicts in the relevant case law. Finally, an objective test will be proposed to increase predictability of outcome.

II. THE ACTUAL INTENT REQUIREMENT OF FRAUDULENT CONVEYANCE LAW IN THE MULTIPARTY TRANSACTION CONTEXT

The issue of proper application of fraudulent conveyance law to multiparty transactions is not new. This issue has arisen in the context of the "actual intent" branch of fraudulent conveyance law, the branch from which the constructive fraud concepts of "fair consideration" and "reasonably equivalent value" developed.³⁴

34. The first fraudulent conveyance statute, the Statute of 13 Elizabeth, voided conveyances made with the intent to delay, hinder or defraud creditors. The Statute declared void "conveyances . . . contrived of malice, fraud . . . or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others." 13 Eliz., ch. 5 (1570). Under the Statute, the voided transfer was forfeited to the Crown, with one-half recoverable in court by the wronged creditors. Both transferors and transferees convicted under the Statute were imprisoned for six months. *Id.* Early in the Statute's life, however, courts held that a creditor could proceed directly against the property. See *Mannocke's Case*, 73 Eng. Rep. 661 (1571). Amazingly, with the exception of the penal provisions, this Statute has survived in much the same form as UFCA § 7 and Bankruptcy Code § 548(a)(1). See 11 U.S.C. § 548(a)(1) (1982); UFCA § 7 (1978).

As the case law developed, this provision became closely associated with the concept of "badges of fraud," because difficulties in proving intent risked nullifying the Statute. The first use of these "badges" came in *Twyne's Case*, 76 Eng. Rep. 809 (1601), in which a debtor owing two creditors secretly deeded all of his chattels in satisfaction of one debt during the

Because the requirements for actual constructive fraud are mutually independent, actual intent to delay, hinder, or defraud may be found even if a reasonable equivalent value is exchanged.³⁵ Such actual intent on the debtor's part, however, is not shown merely because funds to repay a creditor are procured by the debtor's actual fraud against a third party. As long as the creditor does not participate in the fraud, the requisite actual intent is lacking.³⁶ Of course, even if no fraudulent transfer has occurred, the bankruptcy trustee still could avoid the transfer under the preference provisions of the Code, if applicable.³⁷

Under certain conditions, however, a transfer of a security interest to a creditor for fair consideration or reasonably equivalent

pendency of a suit brought by the other creditor. The court found the nature of the transfer, the fact that all of the debtor's personalty had been gifted, the donor's remaining in possession of the property, and the last minute nature of the transfer, to be "badges of fraud," and voided the transfer. Similar "badges of fraud" have been identified in a modern context. See, e.g., *Philco Fin. Corp. v. Pearson*, 335 F. Supp. 33 (N.D. Miss. 1971).

Professor Clark has examined *Twyne's Case* from two different perspectives. From one perspective, the case involved nothing more than a preference of one antecedent debt over another, albeit a secret one. As such, according to Clark's analysis, the transfer violated the debtor-creditor moral ideal of "Evenhandedness," that is, treating all creditors equally. From another perspective, the transferor and transferee conspired to defraud the other creditor of his claim by agreeing secretly to satisfy the transferee's claim for a greater share than "Evenhandedness" would allow. In return for this preference, the transferee permitted the debtor to remain in possession of certain of the chattels. Under this view, actual intent to defraud was present (evidenced by the "badges"); the parties violated the debtor-creditor moral ideal of "Truth" by making it appear that there had been no transfer. See Clark, *The Duties of the Corporate Debtor to Its Creditors*, 90 HARV. L. REV. 505, 508-14 (1977).

Clark identified two other moral precepts of fraudulent conveyance law — "Respect" and "Nonhinderance." "Respect" refers to the principle of meeting legal obligations to creditors prior to distributing assets to shareholders, self, family, or those with greater bargaining power. "Nonhinderance," which has always been codified and afforded equal status with "defrauding" in fraudulent conveyance law, refers to those actions that do not quite meet the stricter standard of fraud but simply serve to slow down creditors in obtaining judicial process over the debtor's assets. *Id.*

35. See *In re Cushman Bakery*, 526 F.2d 23, 31 nn.9, 11 (1st Cir. 1975), cert. denied sub nom. *Agger v. Seaboard Allied Mining Corp.*, 425 U.S. 937 (1976).

36. *Nicklaus v. Peoples Bank & Trust Co.*, 258 F. Supp. 482 (E.D. Ark. 1965), aff'd per curiam, 369 F.2d 683 (8th Cir. 1966).

37. 11 U.S.C. § 547 (1982). A preference is a transfer of property made: (1) to or for the benefit of a creditor, *id.* § 547(b)(1); (2) for or on account of an antecedent debt, *id.* § 547(b)(2); (3) made while the debtor is insolvent, *id.* § 547(b)(3); (4) made within 90 days prior to the date of the bankruptcy petition, unless the transferee is an "insider" (as defined in § 101(25)) with reasonable cause to believe the debtor was insolvent at the time of the transfer, in which case the period is extended to one year, *id.* § 547(b)(4); and (5) the transfer allows the creditors to receive more than he would have received under Chapter 7 liquidation, *id.* § 547(b)(5). The preference provision is only effective against transfers of the debtor's property. Unlike the fraudulent transfer provision of the Code, 11 U.S.C. § 548, by which transfers of property and incurrences of obligations may be avoided, obligations are not avoidable under § 547.

value that is used to prefer other creditors may be deemed a fraudulent transfer. In *Dean v. Davis*,³⁸ an insolvent debtor, Jones, mortgaged virtually all his property to his brother-in-law, Dean, in return for a loan of \$1,600. Dean advanced the funds by repurchasing notes with forged indorsements from the bank at which Jones had discounted them, thereby enabling Jones to avoid criminal prosecution. Dean had knowledge not only of the use of the borrowed funds but also of the fact of Jones's insolvency.³⁹ A few days later, Jones defaulted on the loan to Dean, and Dean took possession of the property. Unsecured creditors filed an involuntary petition in bankruptcy against Jones, and the trustee claimed that the mortgage conveyed to Dean was a preference and a fraudulent transfer.⁴⁰

The Supreme Court found that the mortgage was not a preference to Dean, because it was not given for an antecedent debt.⁴¹ The Court did find that Jones transferred the mortgage with actual intent to delay, hinder, or defraud his creditors. Even though he had received equivalent value in return. The Court identified those instances in which the giving of a security interest to secure an advance might be deemed an instance of actual fraud:

Making a mortgage to secure an advance with which the insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay, or defraud creditors. The mortgage may be made in the expectation that thereby the debtor will extricate himself from a particular difficulty and be enabled to promote the interest of all other creditors by continuing his business But where the advance is made to enable the debtor to make a preferential payment with bankruptcy in contemplation, the transaction presents an element upon which fraud may be predicated.⁴²

At the time of *Dean*, section 67e of the 1898 Bankruptcy Act provided an exception for "purchasers in good faith and for a present fair consideration."⁴³ Dean could not qualify as a good faith pur-

38. 242 U.S. 438 (1917).

39. *Id.* at 442-45.

40. *Id.* at 443.

41. *Id.*; see *supra* note 32.

42. *Dean*, 242 U.S. at 444.

43. Bankruptcy Act, ch. 541, 30 Stat. 544, 564 (1898). The current Bankruptcy Code has retained this "saving provision" in slightly modified form:

Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer of obligation that takes for value and in good faith has a lien on

chaser, because he knew of Jones's insolvency and of Jones's intent to defraud his creditors.⁴⁴ Instead, Dean actively participated in Jones's plan. Although on its facts *Dean* can be read as holding that a transferee who knows of the debtor's actual intent to delay, hinder, or defraud creditors—or who, with such knowledge, actively and knowingly participates in the debtor's scheme—shares the debtor's actual intent, the case does not actually go that far.

The conclusions of the *Dean* Court were twofold. First, an insolvent debtor who gives a mortgage with the intent to hinder, delay, or defraud certain of his creditors by preferring other ones has made a fraudulent conveyance. The requisite intent would be found where the preferential transfer was made in contemplation of bankruptcy. Second, a creditor who receives such a mortgage with knowledge of the debtor's fraudulent intent and insolvency did not act in good faith, and was therefore not entitled to keep the mortgage even if he has given an equivalent value.⁴⁵

Recognizing that all preferences hinder and delay creditors, the Second Circuit in *Irving Trust Co. v. Chase National Bank*⁴⁶ relied on case law prior to *Dean* to reject an attempt to expand *Dean* to a situation where only one transfer had taken place—a preferential transfer.⁴⁷ The *Irving* court confined application of the

any interest transferred, or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

11 U.S.C. § 548(c) (1982).

The prior Bankruptcy Act provided that:

a transfer made or an obligation incurred . . . which is fraudulent . . . shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value. . . . [S]uch purchaser . . . who without actual fraudulent intent has given a consideration less than fair . . . for such transfer, lien, or obligation, may retain the property, lien or obligation as security for repayment.

11 U.S.C. § 107(d)(6) (1976) (repealed 1979); see also *In re Peoria Braumeister Co.*, 138 F.2d 520 (7th Cir. 1943) (mortgagee allowed secured claim of \$1,900 against debtor, where mortgage of \$3,000 had been given to secure loan of \$2,500, of which \$600 had been subsequently repaid, and where no actual fraudulent intent was found on part of mortgagee). See generally Rosenberg, *supra* note 1, at 260-62 (discussing the "savings provision").

The Code tightens the standard a creditor must meet to partially save a transfer. Under the Code, the absence of actual fraudulent intent does not protect those transferees not in good faith. Because Dean "lacked the saving good faith," *Dean v. Davis*, 242 U.S. 438, 445 (1917), he would not have been a protected transferee under § 548(c) of the Code, had it been in force at the time.

44. *Dean*, 242 U.S. at 445.

45. *Id.* at 443-45.

46. 65 F.2d 409 (2d Cir. 1933).

47. The court relied on *Van Iderstine v. National Discount Co.*, 227 U.S. 575 (1913), where the Court held that a conveyance was not fraudulent if the secured party has no

Dean decision to "situations where the grantee is privy to the grantor's purpose to use the consideration preferentially."⁴⁸ The expansive codification of *Dean* by the 1938 Chandler Act⁴⁹ and its 1952 recodification in section 107(d)(3) suggests⁵⁰ that this interpretation may have expanded *Dean* beyond its intended bounds. Because the codification of *Dean* discouraged many lenders from making good faith loans to financially distressed as well as insolvent debtors, Congress deleted the substance of section 107(d)(3) from the current Code.⁵¹

The *Dean* doctrine, however, has survived its elimination from the United States Code. In *In re American Properties, Inc.*,⁵² a corporate debtor, American, arranged a scheme to refinance the \$135,000 unsecured debt of its insolvent sister company to First National Bank. The debtor's sole business activity was holding title to real property on behalf of the operating companies of the corporate group. The sister company was one of these operating

knowledge of the debtor's fraudulent intent, even though he may know that the debtor intends to prefer other creditors. See also *Coder v. Arts*, 213 U.S. 223 (1909)(difference between a preference and a fraudulent transfer lies in motive of debtor).

48. 65 F.2d at 411.

49. The applicable portion of the Chandler Act, ch. 575, 52 Stat. 840, 875-76 (1938) (codified as amended at 11 U.S.C. § 107(d)(3)(Supp. 1949)), provided that transfers and obligations made or incurred by a debtor within four months prior to a petition in bankruptcy were fraudulent if made or incurred with the debtor's intent to use the consideration obtained to effect a voidable preference. The fact of the creditor's knowledge of the debtor's intent, however, remained uncodedified.

50. Act of July 7, 1952, ch. 579, § 21(f), 66 Stat. 427, 428 (codified as amended at 11 U.S.C. § 107(d)(3) (1976)). This codification removed the requirement that the preference be voidable but retained the requirement that the enabling transfer be made by the debtor "with intent to use the consideration obtained for such transfer or obligation to enable any creditor of such debtor to obtain a greater percentage of his debt than some other creditor of the same class." *Id.* The 1952 amendment also added the explicit requirement that the transferee or obligee know of the debtor's intended use of the proceeds at the time of the transfer or obligation. *Id.*; see also *Nicklaus v. Peoples Bank & Trust Co.*, 258 F. Supp. 482, 486 (E.D. Ark. 1965), *aff'd per curiam*, 369 F.2d 683 (8th Cir. 1966) (preferential payments to creditors do not of themselves constitute fraudulent conveyances); H.R. REP. NO. 2320, 82d Cong., 2d Sess., reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1960, 1974-75.

51. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, Pt. I, H.R. Doc. No. 137, 93d Cong., 1st Sess. 1, 211-12 (1973); Cook, *Fraudulent Transfer Liability Under the Bankruptcy Code*, 17 HOUS. L. REV. 263, 263-65 (1980); see also Hagedorn, *The Survival and Enforcement of the Secured Claim Under the Bankruptcy Reform Act of 1978*, 54 AM. BANKR. L.J. 1, 8 (1980) (arguing that the *Dean v. Davis* rule eliminated to encourage creditors to assist near-insolvent debtors); Lake, *Representing Secured Creditors under the Bankruptcy Code*, 37 BUS. LAW. 1153, 1168 (1982) (Code "eliminated supposed codification of *Dean v. Davis*"); Macey, *supra* note 11, at 707 ("The Code's elimination of section 67(d)(3), however, will not overrule *Dean v. Davis*, which remains good law.")

52. 14 Bankr. 637 (Bankr. D. Kan. 1981).

companies.⁵³ The debtor borrowed approximately \$211,500 from the bank, granting a mortgage on real property to the bank in exchange. On the same day, the bank transferred \$75,000 to the debtor "to satisfy an obligation of its existing secured creditor."⁵⁴ About one week later, the bank advanced approximately \$136,500 to the joint checking account shared by the debtor and its insolvent sister company. American used this sum to repay the unsecured loan of the sister company.⁵⁵

The court found that the president of the debtor, Coleman, who was also the president of the corporate parent and vice-president of the sister corporation, and who had arranged the transaction with the bank, did not "have a conscious intent to hinder, delay or defraud creditors."⁵⁶ Expressly invoking *Dean*, however, the court held that the president had caused American Properties to intentionally enter into the transaction with full knowledge that its creditors thereby would be hindered and delayed. This, the court said, was "'actual intent' to hinder, delay or defraud creditors within the meaning of § 548(a)(1)."⁵⁷ Because the bank, like *Dean*, knew of and cooperated in the debtor's fraudulent purpose, the facts fell within the ambit of the *Dean* rationale. Although in *Dean* one creditor was substituted for another (*Dean* for the bank), and here one debtor was substituted for another, the results were the same: a secured claim was substituted for an unsecured claim. Therefore, the two cases could not be distinguished on that ground.⁵⁸

Dean may be distinguished from *American Properties* on other grounds. *Dean* made it clear that a mortgage given to secure a loan, where the company uses the proceeds to pay an antecedent debt, is not necessarily a fraudulent conveyance.⁵⁹ If the mortgage is given to extricate the debtor from financial difficulties and to enable the debtor to "promote the interest of all other creditors by continuing his business,"⁶⁰ the debtor may lack the requisite intent and "the lender . . . may be acting in perfect 'good faith.'"⁶¹ Fraudulent intent was manifested in *Dean* by the fact that the

53. *Id.* at 638-39.

54. *Id.* at 643.

55. *Id.* at 640.

56. *Id.*

57. *Id.* at 643.

58. *Id.* at 642-43.

59. See *supra* text accompanying note 36.

60. *Dean*, 242 U.S. at 444.

61. *Id.*

debtor's notes to Dean, the creditor, were overdue when the bank recorded the mortgage. The mortgage, executed on the due date of the first of four notes, had been backdated to the date of the making of the first note.⁶² Coupled with the fact of the debtor's earlier oral promise to mortgage his property to Dean,⁶³ these facts manifest a secret lien on the debtor's assets during the period between the making of the notes to Dean and the recording of the mortgage. Alternatively, the execution and recording of the mortgage were only a device to transfer all the debtor's personalty to Dean. However the *Dean* transfer is viewed, the evident "badges of fraud" are sufficient to infer actual intent to delay, hinder, or defraud creditors.

The *American Properties* court's express finding that the debtor lacked any "conscious intent to hinder, delay, or defraud creditors,"⁶⁴ ought to have foreclosed any finding of actual intent to defraud. Lack of "conscious intent" to defraud subsumed a finding that no "badges of fraud" were present, because existence of "badges of fraud" would have been evidence from which the court have inferred requisite intent.

The intent test fashioned in *American Properties* is over-inclusive. It requires a finding of intent to enter into the transaction plus the knowledge that harm would come to creditors—the equivalent of "actual intent" within the meaning of section 548(a)(1).⁶⁵ The test effectively elevates a preference to the status of a fraudulent conveyance, because any debtor could easily be charged with knowledge that a preferential transfer would hinder or delay his creditors.⁶⁶ Wholesale reclassification of preferential transfers as fraudulent ones would undercut the statutory policies behind sections 547 and 548 of the Bankruptcy Code.

The court in *American Properties* appears to have adopted the "intent" test to resolve its uncertainty as to whose intent was

62. *Id.* at 442.

63. *Id.*

64. 14 Bankr. at 640.

65. *Id.* at 643.

66. *Cf. Dean*, 242 U.S. at 444 (1917) ("A transaction may be invalid both as a preference and as a fraudulent transfer. It may be invalid only as a preference or only as a fraudulent transfer."); *Van Iderstine v. National Discount Co.*, 227 U.S. 575, 582 (1913) ("There is no necessary connection between the intent to defraud and that to prefer . . . But [the] two purposes are not of the same quality, . . . and one may exist without the other."); *Coder v. Arts*, 213 U.S. 223, 241 (1909) ("A consideration of the provisions of the bankruptcy law as to preferences and [fraudulent] conveyances, shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other.").

relevant. The fact that the president of the debtor controlled the sister company as well complicates the analysis. As the representative of the sister company, Coleman could not be said to have had any intent to hinder, delay, or defraud its creditors, because the transaction improved their position. As representative of the debtor company, Coleman could logically be said to have the requisite intent, but it might have been awkward to ascribe a dual intent to one individual. Further, as president of the parent corporation, Coleman's intent was simply to buy more time for the companies as a whole.⁶⁷

The fact that, in cases such as *American Properties*, the companies themselves are difficult to distinguish further complicates the identification of relevant intent. First, the two sister companies shared a joint checking account, so the companies were not financially independent. Second, the debtor's sole function was to hold real estate for the other corporations. Accordingly, because both companies were under common control, economic reality dictated that the operating sister company use the real estate in its operations. Thus, the companies could not operate independently. Third, given the symbiotic relationship between the two companies and the commingling of assets in the bank, it must have appeared to outsiders as if the companies were operated as one entity.

In this context of integrated corporations and multiple intents, the actual intent analysis necessarily distorts the economic reality of the transaction. The economic interests of an integrated entity such as the companies in *American Properties* are intertwined, and the strands of intent may not be separated without distorting the analysis.

American Properties illustrates both the power of the *Dean* doctrine to undo financing arrangements and its weakness in the context of wholly-owned companies. By eliminating the codification of *Dean* from the bankruptcy statutes, Congress intended to curtail the expansion of the doctrine and to facilitate, or at least not impede, loans made in good faith to financially troubled companies.⁶⁸ Expanding the doctrine to apply not only where one creditor has been substituted for another but also where one debtor has been substituted for another, would frustrate Congressional intent to facilitate loan workouts. Moreover, as we have seen, difficulties

67. By adopting the "intent" that it did, the court avoided the question of dual (or triple) intent. See *In re American Properties, Inc.*, 14 Bankr. at 643.

68. See *supra* note 50 and accompanying text.

with the interest analysis in a multicorporate context distorts the *Dean* doctrine.

Treating the entities in accordance with economic reality yields a clearer analysis with respect to actual intent. Under this analysis, the companies' intent as a whole is the relevant intent.⁶⁹ It was Coleman, as controller of all the entities, who in fact, was identified as the one lacking "a conscious intent to hinder, delay or defraud creditors."⁷⁰

Once the intent of the entity as a whole is accepted as controlling, the court's finding that Coleman had "a well founded belief that extending repayment of the debt of . . . [the insolvent sister company] would help weather the [financial] storm"⁷¹ faced by the parent company and a group of subsidiary companies places the case squarely within the exception specified in *Dean*.⁷² Knowledge

69. Cf. *In re Health Gourmet, Inc.*, 29 Bankr. 673 (Bankr. D. Mass. 1983). Rubin was the sole officer of the debtor and owned fifty percent of its stock. Rubin overdrew his personal account at a credit union in advancing funds to the debtor. The credit union and Rubin arranged for the debtor to execute a note to the credit union, co-signed by Rubin and backed by a security interest in the debtor's assets. In return, the credit union cleared Rubin's overdraft. The debtor had also received the benefit of the advanced funds. An involuntary petition in bankruptcy followed more than 90 days after the transaction but within one year. On a motion for summary judgment on the issue whether the credit union's claim against the debtor would be accorded secured status, the court, citing *American Properties*, held that the existence of Rubin's actual intent to harm creditors of the debtor was a factual issue precluding summary judgment. *Id.*, at 676.

The two cases, however, may be distinguished. Rubin received an individual benefit from the pledge of corporate assets. This individual benefit accrued to him alone and not to either the debtor or the other 50% stockholder of the debtor. In *American Properties*, the benefit accrued to the debtor in the continued viability of an entity upon which the debtor was dependent. *American Properties* depended on the operating corporation to generate cash to service the mortgage of the real property used by the operating corporation. In *Health Gourmet*, an inference of Rubin's intent, as officer of the debtor, to hinder, delay, or defraud creditors is entirely consistent with Rubin's intent to benefit himself. Thus, where the entities are not financially interdependent—in this case, Rubin and the debtor—there is little chance that contradictory intents will complicate an "actual intent" analysis.

70. The *American Properties* court found that:

James Coleman willingly entered into this transaction. He believed it to be overly complicated but wished to receive the fresh cash of \$75,000 and obtain an extension on the repayment of Coleman Nebraska's [the insolvent sister corporation] debt to FNB. He was not concerned with the methodology by which the fresh cash and extension were obtained. He was aware that Coleman Nebraska did not have the present ability to pay its \$136,499.63 obligation and was aware that the transaction could adversely affect American creditors He did not, however, have a conscious intent to hinder, delay or defraud creditors though factually such a result can be drawn.

14 Bankr. at 640.

71. *Id.* at 643.

72. See *supra* text accompanying note 56; see also *Coder v. Arts*, 213 U.S. 223, 244 (1909) ("[I]t may be that . . . [he], though including in the conveyance a large amount of his

that harm could come to creditors, when accompanied by a belief that the transfer would serve to rehabilitate the debtor and thus insure full repayment of all creditors, actually evidences that the debtor entered into the transaction without actual intent to delay, hinder, or defraud creditors.⁷³

III. THE MEASUREMENT OF FAIR CONSIDERATION AND REASONABLY EQUIVALENT VALUE IN MULTIPARTY TRANSACTIONS

In the area of constructive fraud, the courts have used different analyses to determine whether fair consideration or reasonably equivalent value was received. One technique the courts have employed is the traditional corporate "veil-piercing" doctrine. Under this theory, when an "identity of interest" exists between the debtor and the benefited third party, the benefit conferred upon the third party may be treated as fair consideration to the debtor. In effect, when a court finds that two companies, or a company and its stockholders, are factually inseparable, the court will pierce the corporate veil and treat both entities as one for the purposes of the transaction.

The simplest example of identity of interest occurs where

property, acted in good faith, with a view to preserving his estate and enabling him to meet his indebtedness.").

73. This is not to say that the transaction was not constructively fraudulent. If the debtor was insolvent when the transfer was made or obligation incurred, became insolvent as a result of the transfer or obligation, was left with an unreasonably small capital, or intended or believed it would incur unpayable debts, then the transfer could have been avoided as constructively fraudulent. See 11 U.S.C. § 548(a)(2) (1982). This is so, because however the entities involved in the transaction are viewed, reasonably equivalent value was not received in exchange for the transfer of the security interest by the debtor. If the debtor and its related companies are viewed as independent entities, the debtor transferred a security interest worth approximately \$211,500 in exchange for \$75,000 in cash and a claim of approximately \$136,500 against its insolvent sister, clearly worth substantially less than \$136,500. If the debtor and its related companies are viewed as one integrated entity, the analysis changes somewhat, but the result is the same. The entities received \$211,500 in cash plus satisfaction of the insolvent sister's unsecured debt of \$136,500, a total substantially less than \$345,000. The entities transferred to the bank cash of \$135,000 plus a real property mortgage worth \$210,000, a total of \$345,000. See *infra* notes 74-101 and accompanying text.

A "constructive fraud" analysis, although arriving at the same result, would have avoided the pitfalls of actual intent. Because the court did not consider this route, it made no findings on the issue of the debtor's insolvency, unreasonably small capital, or inability to pay future debts. It is submitted that, had the court found that neither insolvency nor its functional substitutes existed with respect to the debtor, the court would have been correct in holding for the bank, because it could be said that the transaction did not damage any creditor.

funds of multiple entities are commingled in one bank account.⁷⁴ Identity of interest will be found where the debtor's chief stockholder and the debtor are factually inseparable. In *Mayo v. Pioneer Bank & Trust Co.*,⁷⁵ the sole stockholder of Twin City Construction Company borrowed \$50,000 from a bank and deposited it in Twin City's account. This deposit enabled Twin City to obtain a performance bond that would not otherwise have been obtainable. After obtaining the bond, Twin City repaid the bank. The Fifth Circuit held that Twin City should be disregarded as a separate legal entity, because the stockholder either had ignored the corporation as a separate entity or had used the corporate fiction as an instrument of deceit.⁷⁶ The fact that the bonding company had suffered injury due to the owner's fraud was not sufficient to allow the bankruptcy trustee to recover from the bank, which had acted in good faith.⁷⁷

The corporate form also will be ignored for fraudulent conveyance purposes, just as in general corporate "veil piercing" cases when the court deems the subsidiary to be an instrumentality of its parent.⁷⁸ On the other hand, when two entities separately exist

74. See, e.g., *McNellis v. Raymond*, 287 F. Supp. 232 (N.D.N.Y. 1968), modified on other grounds, 420 F.2d 51 (2d Cir. 1970); *In re Royal Crown Bottlers, Inc.*, 23 Bankr. 28 (Bankr. N.D. Ala. 1982).

75. 270 F.2d 823 (5th Cir. 1959), cert. denied, 362 U.S. 962 (1960).

76. *Id.* at 830.

77. *Id.* at 833. The court found that the actions of Twin City and its owner may have defeated creditors was an incidental effect, insufficient to satisfy the requirement of actual intent. *Id.* at 831. This result seems anomalous until one realizes that if the surety paid Twin City's creditors on the performance bond, it would have a right of subrogation against Twin City and probably could have "pierced the veil" to sue the owner.

78. See *Fish v. East*, 114 F.2d 177, 191 (10th Cir. 1940) (listing ten factors to determine whether a subsidiary is an instrumentality); *Biggs v. United States Nat'l Bank*, 11 Bankr. 524 (Bankr. D. Neb. 1980); cf. *Markow v. Alcock*, 356 F.2d 194, 198 (5th Cir. 1966) (creditors not permitted to apply assets of solvent company to claims against insolvent company despite common ownership, where corporations were located in different cities, maintained different books and records, and were engaged in different lines of business).

Disregard of the corporate fiction also can result in substantive consolidation of bankruptcy cases, if both related entities commence bankruptcy proceedings. See *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845 (2d Cir. 1966) (debtor corporations consolidated and assets and liabilities merged for liquidation where operated as a single unit with little or no attention paid to formalities, corporations had substantially the same officers and directors, shifted funds back and forth, pooled funds, and paid one another's debts, and where expense of disentangling corporate finances was too great); *In re Clark Supply Co.*, 172 F.2d 248 (7th Cir. 1949) (corporations consolidated where owners undercapitalized debtor and transferred assets to other corporation); *Stone v. Eacho*, 127 F.2d 284 (4th Cir. 1942) (where creditors of subsidiary relied on parent's credit, not subsidiary's, and subsidiary was run as division of parent, the corporate entity of the subsidiary was disregarded and the assets of both companies pooled for their creditors). One commentator has described substantive con-

and one receives the benefits of a transaction made by the other, the burdened debtor has made a fraudulent conveyance. This is most clear in the context of a "bootstrap" acquisition, in which either the seller of corporate stock is paid with assets of the acquired corporation, or the acquired corporation guarantees the purchase price. The corporate veil is not pierced in these cases, because at the time of purchase the acquired corporation is a separate entity.⁷⁹

Similarly, in *Wells Fargo Bank v. Desert View Building Supplies, Inc.*,⁸⁰ a subsidiary obtained a secured loan from a bank and transferred the proceeds to its parent by dividend to enable the parent to repay a defaulted loan to the bank. The court held that the subsidiary's transfer of the security interest to the bank was made without fair consideration, because the subsidiary did not receive any benefit from the transaction. In fact, the subsidiary's liabilities were approximately doubled and the subsidiary's property secured the loan without recourse to the parent company's assets.⁸¹ The court, in effect, refused to pierce the corporate veil to find concurrent benefits running to the subsidiary.⁸²

In *In re Realsite, Inc.*,⁸³ a debtor borrowed \$300,000 from a bank in an unsecured loan transaction. Two months later, the debtor purchased a subsidiary, which it operated separately. Approximately one year later, when the debtor was unable to repay the bank, the subsidiary executed a note to the bank for \$250,000 and transferred a security interest in all of its assets. The court found that the two corporations were separate and distinct and had separate business purposes, and refused to ignore the corpo-

solidations as follows:

Substantive consolidation permits the consolidation of the assets and liabilities of the separate entities so that their combined assets and liabilities will be treated as though held and incurred by one entity. Thus, among other things, substantive consolidation will eliminate duplicate claims for the same indebtedness, intercompany claims, and cross-corporate guarantees.

Conti, *An Analytical Model for Substantive Consolidation of Bankruptcy Cases*, 38 Bus. Law. 855 (1983) (footnotes omitted).

79. See *Palmer v. Stokely*, 255 F. Supp. 674 (W.D. Okla. 1966); *In re Atlas Foundry Co.*, 155 F. Supp. 615 (D.N.J. 1957); *Roxbury State Bank v. The Clarendon*, 129 N.J. Super. 358, 324 A.2d 24 (Super. Ct. App. Div. 1974).

80. 475 F. Supp. 693 (D. Nev. 1978), *aff'd mem.*, 633 F.2d 225 (9th Cir. 1980).

81. *Id.* at 696. The court also found that the bank did not act in good faith. *Id.*

82. Arguably, because there were no "conflicting intents" as in *In re American Properties*, 14 Bankr. 637 (Bankr. D. Kan. 1981), *Desert View* falls within the facts of *Dean v. Davis*. See *supra* notes 64-70 and accompanying text.

83. 256 F. Supp. 322, 328-36 (S.D. Fla. 1966).

rate fiction.⁸⁴ Similarly, in *In re Security Products Co.*,⁸⁵ the court refused to disregard the separate corporate existence of a subsidiary that shared the same management and offices as the parent, had none of its own employees, and that the parent solely owned, where the rights of the subsidiary's creditors would be prejudiced.⁸⁶

The identity of interest/veil-piercing analysis appears adequate where the parent obviously controls the subsidiary for its own purposes. Because veil-piercing is the exception rather than the rule, this analysis leads to a pro-trustee result in most cases. Further, because a creditor cannot depend on a subsequent judicial finding of an identity of interest, it is not likely to advance funds to a struggling debtor on the strength of guarantees and security interests that are of dubious enforceability.

The identity of interest approach, like the *Dean* approach in the context of multiple corporations, leads to a particularly harsh result where the corporations are legally separate but otherwise share the burdens and benefits of the particular transaction in question. In such a situation, the courts accept as fair consideration or reasonably equivalent value an indirect benefit received from a transfer of consideration to a third party.

In *Williams v. Twin City Co.*,⁸⁷ the debtor delivered warehouse receipts for his inventory to some creditors as security for the debt owed them. Pursuant to a substituted agreement, the debtor executed a note to the secured creditors that the debtor's mother-in-law guaranteed. The debtor transferred his inventory and accounts receivable to a trust with his mother-in-law as beneficiary. The creditors agreed to forebear from immediately collecting their debt and delivered the warehouse receipts to the mother-in-law, who pledged them as security for her guaranty. The trust agreement provided that twenty percent of all inventory proceeds were to be remitted to the creditor. The debtor would use the re-

84. *Id.* at 331-33.

85. 310 F. Supp. 110 (E.D. Mo. 1969).

86. *Id.* at 116. The subsidiary had assigned accounts receivable to the parent for no consideration. The parent in turn assigned the accounts to the bank creditor to secure the parent's loan. Although the court did not rest its decision on good faith, the bank was aware that both the parent and the subsidiary were insolvent when the assignments were made and that the subsidiary received no consideration for the assignment. *Id.* at 111. The court stated that: "To disregard the separate identity of . . . [the subsidiary] at the instance of . . . [one creditor] would clearly prejudice the rights of . . . [the subsidiary's] creditor, other than . . . [the parent], and work an injustice upon them." *Id.*

87. 251 F.2d 678 (9th Cir. 1958).

maining proceeds in his business.

The *Williams* court rejected the fraudulent transfer claim submitted by the debtor's trustee in bankruptcy. In determining whether there was fair consideration given for the note, the court held that "consideration can run to a third party, so long as it is given in exchange for the promise sought to be enforced."⁸⁸ Thus, the release of the warehouse receipts to the mother-in-law was consideration—the debtor received the indirect benefit of additional time to avoid bankruptcy.⁸⁹

The indirect benefit conveyed to the debtor in *Williams* was both nonmonetary and continuous in nature. Some cases have indicated that fair consideration can exist for a novation when discharge of a corporation's debt to an outside creditor by the corporation's subsidiary or sister corporation also discharges a debt of the subsidiary or sister corporation. In these cases, the benefit is both monetary and immediate. If the subsidiary or sister corporation making the payment is not indebted to the corporation at the time of the transaction, however, no indirect benefit will be found.⁹⁰ This approach appears to be susceptible to abuse in light of the relative ease with which intercompany accounts are manipulated and used extensively.

The problem inherent in the open-ended indirect benefit approach illustrated by *Williams* is that benefits reaped by the debtor are readily identifiable. For example, in *Klein v. Tabatchnick*,⁹¹ the debtor's majority shareholder, Tabatchnick, took out a personal loan that was payable on demand and secured by collateral owned by another. In turn, the shareholder loaned the money to the corporation under a one-year subordinated loan. When the year ended, Tabatchnick decided to extend the subordinated loan for another year. He replaced the existing collateral with collateral owned by another substantial shareholder, Emmer, and assigned certain portfolio securities belonging to the corpora-

88. *Id.* at 681.

89. *Id.*; see also *Russel v. Tecce*, 451 F. Supp. 585 (E.D. Pa. 1978), *aff'd mem.*, 591 F.2d 1336 (3rd Cir. 1979) (fair consideration found where principal creditors assented to transaction that allowed debtor to remain in business nine months longer); *McNellis v. Raymond*, 287 F. Supp. 232, 239 (N.D.N.Y. 1968) (indirect benefit of postponed bankruptcy supported finding of fair consideration), *modified on other grounds*, 420 F.2d 51 (2d Cir. 1970).

90. See, e.g., *Barr & Creelman Mill & Plumbing Supply Co. v. Zoller*, 109 F.2d 924 (2d Cir. 1940); *Bennett v. Rodman & English, Inc.*, 2 F. Supp. 355 (E.D.N.Y.), *aff'd*, 62 F.2d 1064 (2d Cir. 1932).

91. 610 F.2d 1043 (2d Cir. 1979).

tion to Emmer to protect him against loss.⁹² Upon the trustee's motion for summary judgment that this latter transfer was made for insufficient consideration, the court stated:

[W]e cannot say that . . . [the debtor corporation] received no benefit from Tabatchnick's use of Emmer's collateral. Whether this furnished fair consideration for the transfer of . . . [the debtor's] own securities to Emmer depended among other things on . . . [the debtor's] need for the \$50,000 [loan], its availability from some source other than Tabatchnick, and the value of the securities transferred to Emmer. . . . [W]ithdrawal of Tabatchnick's \$50,000 would have created a severe cash and capital problem⁹³

Thus, the benefit accruing to Emmer by the use of the debtor's securities could have resulted in an indirect benefit on the debtor—the prevention of a cash and capital problem by renewal of the loan—and could be deemed fair consideration to the debtor.⁹⁴

The *Tabatchnick* court concluded, at least in light of the summary judgment posture of the case, that Tabatchnick would not have renewed his loan to the corporation without Emmer's collateral and, implicitly, that Emmer would not have put up collateral had he not received a pledge of the corporation's assets. Because the corporation evidently needed the renewal of Tabatchnick's loan to continue in business, it received some benefit from the transaction. The court left for trial on remand the issue of whether the benefit the corporation received was fairly equivalent to the value of the collateral that it surrendered.⁹⁵

At the time of the transaction the corporation was seriously undercapitalized. Not only was the loan from Tabatchnick necessary to prevent a "severe cash and capital problem," but also the National Association of Securities Dealers had determined that an additional \$138,000 contribution was necessary for the corporation to comply with the Net Capital Rule.⁹⁶ Thus, the case can be viewed as one in which the stockholders made a capital contribution disguised as a subordinated short-term loan, the funds for

92. *Id.* at 1046.

93. *Id.* at 1047-48.

94. *Id.* at 1047-48.

95. *Id.* at 1048. The Net Capital Rule, 17 C.F.R. § 240.15c3-1(a) (1984), requires, among other things, that no securities broker or dealer incurs aggregate indebtedness exceeding 1500 percent of his net capital.

96. *Tabatchnick*, 610 F.2d at 1049.

which were procured by a bank loan secured by corporate assets. From this perspective, the pledge of the corporate assets strongly resembles those seen in the "bootstrap" acquisition cases. In those cases, fair consideration was invariably found to be absent.⁹⁷

Because the *Tabatchnick* court correctly characterized the issue of fairness of consideration as a question of fact and, as the court recognized, more facts had to be established to dispose of the issue, one cannot say simply on the basis of the opinion whether the court's characterization or the alternative "bootstrap model" characterization of the transaction more closely fits the facts. The case does illustrate, however, the relative ease in finding indirect benefits as compared with the difficulty in piercing the corporate veil, particularly where the corporations are legally separate or, as in *Tabatchnick*, where the stockholder is a natural person.

A recent case illustrates even more strongly how characterization of the transaction may influence the outcome of the case. In *In re Greenbrook Carpet Co., Inc.*,⁹⁸ the bank refused a loan needed to purchase a controlling block of stock in Lewis, a carpet mill, to the Greens, principle owners of Greenbrook. The bank subsequently loaned Greenbrook \$350,000 in exchange for a security interest in its inventory. Greenbrook then transferred the \$350,000 to the Greens to allow them to purchase the Lewis stock. In return, Greenbrook received a nonrecourse note from the Greens and a security interest in the Lewis stock.

Greenbrook's trustee in bankruptcy contended that the bankruptcy court should have characterized the transaction as a direct loan from the bank to the Greens, for which Greenbrook received in return only a "relatively worthless security interest in the Lewis stock."⁹⁹ The court considered the transaction to be two separate ones. One was the bank loan to Greenbrook in exchange for Greenbrook's transfer of a security interest to the bank. The court concluded that Greenbrook received reasonably equivalent value in that transaction. The fact that the bank knew that Greenbrook "would use the funds for a speculative venture" did not render the transfers invalid. The key issue, the court noted, is whether the bank received more consideration than it was due.¹⁰⁰

The second transaction, not at issue in the suit between the trustee and the bank, was the transaction between Greenbrook and

97. See *supra* notes 77-85 and accompanying text.

98. 722 F.2d 659 (11th Cir. 1984).

99. *Id.* at 660.

100. *Id.*

the Greens. With respect to this transaction, the court simply stated that if it was a fraudulent transfer, "the trustee may sue the Greens."¹⁰¹

The *Greenbrook* court's finding of reasonably equivalent value resulted from its form over substance characterization of the transaction. Although not decided in the rubric of indirect benefit, *Greenbrook* is similar to *Tabatchnick* in that the outcome hinges on the characterization of the transaction and illustrates the pro-creditor tendency of the indirect benefit analysis.

The analysis and quantification required under *Rubin v. Manufacturers Hanover Trust Co.*¹⁰² represents a reasonable compromise between the pro-trustee identity of interest cases and the pro-creditor indirect benefit cases. On the one hand, the insistence upon a quantification of benefits received by the debtor is a refinement of the indirect benefit analysis of *Williams* and a rejection of the corporate veil-piercing doctrine of the identity of interest approach. On the other hand, the benefit considered is that which the debtor received, and in that sense, is not indirect at all. Quantification avoids the all-or-none problem inherent in the veil-piercing doctrine. Corporations that are legally separate but are interdependent with respect to the burdens and benefits of a transaction will have this interdependence considered in the analysis.

This "trickle down" test, as interpreted in *Rubin*, only considers monetary benefits flowing to the guarantor as a result of loan advances. The use of borrowed funds by the principal debtor to purchase goods or services of the guarantor would seem to be fair consideration or reasonably equivalent value to the guarantor under this test. The test, however, did not require consideration of the complete interdependence between the check cashers and the debtors. Without the guaranties, the check cashers might not have received further credit when they ran into financial difficulty; without the funds, the check cashers would have failed sooner. With the credit backing of the debtors, the check cashers bought additional time to avoid bankruptcy. Keeping the check cashers in business was vital to the debtors. Without the check cashers to sell the money orders, the debtors would soon be out of business. These nonmonetary benefits, however, are not considered under the *Rubin* analysis.

The fraudulent conveyance case law with respect to considera-

101. *Id.* at 661.

102. 661 F.2d 979 (2d Cir. 1981); see *supra* notes 22-28 and accompanying text.

tion of nonmonetary benefits is split. In measuring fair consideration in a two-party situation, most courts have simply compared the value of property received by the debtor to that which was exchanged.¹⁰³ In some cases, courts have found that foreclosure proceeds significantly deviating from the property's fair market value are less than reasonably equivalent value.¹⁰⁴ In other cases, however, courts have held that reasonably equivalent value may be nonmonetary.¹⁰⁵

The *Rubin* test, which prescribes the quantification and comparison of burdens on, and benefits to, the debtor, considers only those benefits accruing between the time of the transaction and the date of the bankruptcy petition. In devising the test, the *Rubin* court was largely influenced by two factors. First, the court stated that the purpose of the fair consideration standard was conservation of the debtor's estate for the benefit of creditors. The indirect benefit and identity of interest cases, according to the court, turned on the statutory purpose of estate conservation. In either type of case, "the net effect of the transaction on the debtor's estate is demonstrably insignificant, for he has received, albeit indirectly, either an asset or the discharge of a debt worth approximately as much as the property he has given up or the obligation

103. See, e.g., *Russell v. Tecce*, 451 F. Supp. 585 (E.D. Pa. 1978), *aff'd mem.*, 591 F.2d 1336 (3d Cir. 1979)(debtor's transfer to stockholder of all interest in civil action subsequently settled for \$50,000 in return for satisfaction of \$260,000 of debt and surrender of stock was fair consideration received); *De Aragon v. Chase Manhattan Bank*, 457 F.2d 263 (1st Cir. 1972) (finding that the discharge of lien was fair consideration where the debtor, a sugar mill, satisfied a lien on sugar cane with \$250,000 payment and received \$209,000 from sale of cane and at least \$41,000 from planters); *Hollander v. Gautier*, 114 N.J. Eq. 485, 168 A. 860 (1933) (bankrupt wife transferred mortgaged property to husband, who paid obligations of \$21,000 secured by property and increased liens on property by \$16,000; consideration not fair, because property worth considerably more than \$5,000 difference).

104. See *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (57.7% of property's fair market value paid at foreclosure sale is not fair equivalent under pre-1978 law); *In re Jones*, 20 Bankr. 988 (Bankr. E.D. Pa. 1982) (approximately 33-50% not reasonably equivalent value); *In re Thompson*, 18 Bankr. 67 (Bankr. E.D. Tenn. 1982) (80% is reasonably equivalent value). Some courts have rejected an absolute percentage approach in favor of overall fairness in the conduct of the transaction. See *Madrid v. Del Mar Commerce Co.*, 21 Bankr. 424 (Bankr. 9th Cir. 1982)(consideration received at a noncollusive regularly conducted public sale satisfies the reasonably equivalent value requirement); *In re Curtina Int'l, Inc.*, 23 Bankr. 969 (Bankr. S.D.N.Y. 1982) (evidence of arm's-length sale showed reasonably equivalent value in a business context).

105. See *In re Missionary Baptist Found. of Am.*, 24 Bankr. 973, 979 (Bankr. N.D. Tex. 1982) (organization whose purpose was to make charitable contributions was held to have received reasonably equivalent value in good will for contributions made while insolvent); see also *In re J.K. Chemicals, Inc.*, 7 Bankr. 897, 898 (Bankr. D.R.I. 1981)(good will may constitute reasonably equivalent value).

he has incurred."¹⁰⁶

The court focused on the conservation of the debtor's estate because of the peculiar equities involved. Most of the creditors were money order purchasers, who were primarily lower-income persons who did not maintain ordinary checking accounts.¹⁰⁷ At the same time the debtor filed the bankruptcy petition, there were at least ten million dollars outstanding in unredeemed money orders held by the debtors. Concentrating on the "equitable purposes of the statute," the court concluded that "any significant disparity between the value received and the obligation assumed by either issuer will have significantly harmed the innocent creditors of that firm."¹⁰⁸

The second factor influencing the *Rubin* court was the nature of money order and check cashing businesses. Because the check cashers were often short of cash, they would be tempted to use the money order proceeds to finance their own operations rather than to remit them to the debtors. Because the debtors' profitability depended on investing the proceeds of money order sales, such a delay in remittance could be disastrous to the debtors.¹⁰⁹ Although never stated explicitly, the court suspected that the check cashers had "bled dry" the debtors financially by delaying remittances of money order sales and using the proceeds for their own benefit.¹¹⁰

Because of its consideration of only monetary benefits accruing to the debtor between the date of the transaction and the petition, *Rubin* is ultimately a pro-trustee case, despite the fact that the burden was on the trustee to prove lack of reasonably equivalent value.¹¹¹ Because business will cease upon the filing of a bankruptcy petition in liquidation, and it will probably do the same in reorganization, the timing of the petition becomes very important in determining when benefits will cease to accrue. A petition filed soon after a guaranty is given can limit all future benefits to the debtor and destroy the debtor's chances of receiving reasonably equivalent value. More importantly, in a case such as *Rubin*, the "trickle-down" benefits may not constitute reasonably

106. *Rubin*, 661 F.2d at 992.

107. *Id.* at 981.

108. *Id.* at 994.

109. *Id.* at 982-83.

110. "Given the financial weakness of [the check cashers] revealed by the present record, it may well be that the trustees will be able to show that those firms absorbed much of the money provided them under the loan lines, remitting little or nothing to their principal . . ." *Id.* at 994.

111. See *In re Royal Crown Bottlers, Inc.*, 23 Bankr. 28, 31 (Bankr. N.D. Ala. 1982).

equivalent value. If the more immediate trickle down benefits materialized to any significant degree, the debtor might not find itself in bankruptcy. In retrospect, from a bankruptcy perspective, the derivative benefits always will be relatively valueless. This is particularly unfair where, as in *Rubin*, the debtor does not physically transfer any property but only guarantees another's debt and transfers a security interest. In such a case, the guarantor still has the use of his assets, and the likelihood of business failure has not been increased.

From a policy standpoint, it might make economic sense to sacrifice a drowning business for the benefit of its creditors when the financial risks of continuing in business, at least in the immediate future, fall on the creditors.¹¹² The business has failed and the assets ought to be used to earn an acceptable rate of return in a more viable endeavor. At the same time, general creditors must be protected against overreaching major creditors, who seek to improve their position on the eve of business failure at the expense of the general creditors.

While this viewpoint is valid as far as it goes, two additional points must be considered. First, in eliminating the codification of *Dean* from the bankruptcy statutes,¹¹³ Congress has manifested an intent to facilitate, or at least not to impede, loans made in good faith to financially troubled companies. Second, the effect of one entity's failure on its affiliated companies should be considered. A company may receive significant benefits from the continued operations of its parent or sister company. Some of these benefits may be immediately quantifiable and some may not. The discontinuance of an affiliate's business by the inability to further receive these benefits may damage the company. Conceivably, such damage could contribute to the demise of other companies within the corporate group.

There is a necessity, therefore, to balance the policy of preventing overreaching by major creditors on the eve of a business failure with the policy of facilitating good faith extensions of credit to distressed businesses at a reasonable cost. In attempting to strike such a balance, the *Rubin* case fails to consider two types of benefits that may be significant. First, the debtor may receive benefits that are, by their nature, unquantifiable. For example, if

112. See Lo Pucki, *A General Theory of the Dynamics of the State Remedies/Bankruptcy System*, 1982 Wis. L. Rev. 311, 336-38.

113. See *supra* note 47 and accompanying text.

the debtor is a member of a corporate group, it may receive the benefit of the experienced management of its parent. Those opposed to consideration of these benefits argue that they must be essentially valueless to the debtor or it would not be in bankruptcy. Even if these benefits have value, they are irrelevant except to the extent that they will continue in the future. Finally, there is the problem of valuation of these benefits. Consequently, consideration of unquantifiable benefits is inherently inconsistent with *Rubin* and the quantification of benefits.

Second, there may be potential future benefits that are quantifiable but that do not arise immediately because they are, in effect, "cut off" by the bankruptcy proceedings. For example, a group of corporations operated for the good of the group as a whole, can confer benefits on its members that are quantifiable but uncertain. The spreading of corporate overhead costs among the group members, the potential for intercorporate guaranty of each member's debts by other members, including the parent, and the increased ease in, and decreased cost of, obtaining credit, all are benefits of being a member of a larger group of corporations. Another benefit is the assistance that financially stronger members, or the group as a whole, may lend to weaker members in financial difficulty.¹¹⁴ For example, a corporation usually uses a set of consolidated financial statements to obtain capital or credit. Investors and creditors typically rely on the financial strength of the entity as a whole in extending credit, not on its constituent parts.

In addition to the generalized benefits available to members of a corporate group, members of the group that are economically interdependent supply goods or services to each other that may not otherwise be available or may not be available from outsiders without significant transaction costs. This type of interrelationship is not necessarily present by virtue of stock ownership but depends on the economic reality of day-to-day intercorporate operations.¹¹⁵

114. One commentator has suggested that "the managers of the enterprise would be acting irrationally if they failed to use the resources of one company to salvage another, if such assistance would ultimately enhance the profitability of the corporate enterprise." Landers, *A Unified Approach to Parent, Subsidiary and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 648-49 (1975).

115. See Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 357 (1947); see also Landers, *Another Word on Parents, Subsidiaries and Affiliates in Bankruptcy*, 43 U. CHI. L. REV. 527 (1976) (discussion of Lander's affiliated corporations and Posner's economic analysis); Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499 (1976) (discussing Posner's method of splitting affiliated corporations into separate economic units).

These benefits are often quantifiable if it may be safely assumed that the parent company conveying these benefits will continue to be a viable business entity or will be made viable by virtue of the loan.

With respect to the quantifiable future benefits, the proposed test is whether a reasonable man, at the time of the transaction, would believe that the loan or extension of maturity to the parent or sister corporation would provide a future benefit to the guarantor. If so, this expected future benefit may be considered in determining reasonably equivalent value. Under the *Rubin* approach, to prevent considering any benefits twice, only those expected quantifiable benefits that might have occurred after the bankruptcy petition should be added to actual benefits received by the debtor prior to the date of the petition under the *Rubin* approach. To preclude an unnecessary emphasis on benefits expected far in the future, they should be discounted to present value.

This test, which considers the second class of benefits, provides a measure of predictability at the time of the transaction and allows the creditor to assess the risks. At the same time, an objective "reasonable man" standard provides debtors, creditors, and courts with a measure by which to judge the reasonableness of the parties' conduct.

There is authority for interpreting the term "reasonably equivalent value" in a normative rather than a strict fashion. In *Lawyers Title Ins. Corp. v. Madrid*,¹¹⁶ the Ninth Circuit Bankruptcy Appellate Panel held that the words "reasonably equivalent" of section 548(a)(2) refer to consideration received at a noncollusive and regularly conducted foreclosure sale.¹¹⁷ Similarly, in *In re Curtina International, Inc.*,¹¹⁸ a bankruptcy court held that evidence of an arm's-length sale showed reasonably equivalent value. The test proposed here does not go as far as these cases, because the expected benefit must be quantified. Like these cases, however, the test does provide a nonmonetary standard with which to judge the conduct of the parties.

The courts also use a normative standard in the area of actual intent. In *W.T. Grant*,¹¹⁹ certain subordinated debenture holders sought to set aside a bankruptcy settlement agreement and to equitably subordinate the claims of the major creditors, a consortium

116. 21 Bankr. 424 (Bankr. 9th Cir. 1982).

117. *Id.* at 427; accord *In re Gilmore*, 31 Bankr. 615 (Bankr. E.D. Wash. 1983).

118. 23 Bankr. 969 (Bankr. S.D.N.Y. 1982).

119. *In re W.T. Grant Co.*, 699 F.2d 599, 610 (2nd Cir. 1983).

of banks. The objecting debenture holders claimed that the banks had controlled Grant by advancing further funds and had used their control to prevent Grant from filing an earlier petition in bankruptcy. The allegation was that an earlier petition might have allowed the trustee to avoid certain of Grant's transfers to the banks and would have prevented further subordination of the debentures to the banks' claims.¹²⁰ The court held that it was permissible for the banks to proffer "advice to Grant, even advice gloved with an implicit threat that, unless it were taken, further loans would not be forthcoming."¹²¹

To establish that the banks controlled Grant, the claimants had to show "that the banks acted solely for their own benefit . . . and adversely to the interests of others."¹²² It appears that, if unlike *W.T. Grant*, the banks believed that Grant was not a viable entity, a court would be more likely to infer that the loan renegotiation did not serve the business interests of Grant, and that the banks were, therefore, in control of Grant.

In the same sense that the court used a subjective inquiry into the banks' belief of the debtor's viability to determine whether the banks were controlling Grant (which is part of the actual intent analysis), they could use a reasonable man test to measure the debtor's parent's viability and the future benefits expected from the parent. Such a test would take into account prospective bene-

120. One use of the "actual intent" branch of fraudulent conveyance law has been to avoid transfers made by financially weak debtors to their controlling creditors. See *In re Christian and Porter Aluminum Co.*, 584 F.2d 326 (9th Cir. 1978); *Jackson v. Star Sprinkler Corp.*, 575 F.2d 1223 (8th Cir. 1978); *Manufacturer's Fin. Co. v. Marks*, 142 F.2d 521 (6th Cir. 1944); *In re American Lumber Co.*, 5 Bankr. 470 (Bankr. D. Minn. 1980) (controlling creditor's claim equitably subordinated). When a transferee or creditor is in a position to dominate or control disposition of the debtor's property, a court may look to see if the controlling creditor had actual intent to hinder, delay, or defraud other creditors. See *In re Cushman Bakery*, 526 F.2d 23 (1st Cir. 1975), *cert. denied*, 425 U.S. 937 (1976); *Langan v. First Trust & Deposit Co.*, 293 N.Y. 604, 59 N.E.2d 424 (1944). Courts have not hesitated to find such intent on the part of creditors who conspired with their willing or unwilling debtors to obtain control and to transfer the debtor's assets either to another company controlled by the creditor or to the creditor itself. This has been particularly true where the creditor has improved his position by obtaining additional security proximate to gaining control.

121. *W.T. Grant*, 699 F.2d at 610.

122. *Id.* at 610-11. As long as the business interests of both parties are served, the fact that a loan and a security interest are negotiated or renegotiated in a workout between a debtor and its major creditor does not mean that the creditor will be deemed in control, even if the terms finally negotiated are favorable to the creditor. *In re Cushman Bakery*, 526 F.2d 23 (1st Cir. 1975), *cert. denied*, 426 U.S. 937 (1976). Regardless of the relative strength or weakness of the parties, the requirement of serving the business interests of both parties appears to evidence an arm's-length transaction.

fits from continued association with an interdependent corporate group while insuring that the expectation of benefits had a real basis in fact.

To free the bankruptcy trustee from the difficult task of demonstrating that these expected quantifiable future benefits did not constitute reasonably equivalent value, the burden of producing evidence of these benefits should be placed on the party seeking to uphold the transaction, presumably the creditor. This will place the burden on the party best able to prove these benefits and will encourage the creditor to focus on this analysis prior to entering into the transaction with the debtor.¹²³

IV. CONCLUSION

When fraudulent conveyance law originated, there was little need to make the law apply to complex three-sided transactions. The doctrines that developed, therefore, were designed to apply to less complex transactions. In the area of actual intent to defraud, applying the doctrine of *Dean v. Davis* in a multiple corporation context has led to complications in identifying whose intent to defraud is relevant, particularly where the corporations involved are economically integrated entities sharing the same goals with respect to the transaction at issue. The actual intent analysis has proven to be both unwieldy and overly powerful in this context and contradictory to Congressional intent.

In the area of constructive fraud, the determination of "reasonably equivalent value" or "fair consideration" is made more complicated in the context of a three-way transaction. The courts developed the doctrines of "identity of interest" and "indirect benefit" to assist in applying the simple concepts to these more complex transactions. The doctrines, however, tend to be skewed in one direction or another, or depend too much on how the transactions are characterized. The latest approach demands quantification of these burdens and benefits but is skewed, because its results are dependent on the timing of the bankruptcy petition.

It should be recognized, however, that certain members of a family of corporations may convey certain benefits on each other by virtue of intercompany transactions unrelated, as well as re-

123. Cf. *In re Royal Crown Bottlers*, 23 Bankr. 28, 31 (Bankr. N.D. Ala. 1982). In dictum, the court stated that the burden of proving reasonably equivalent value should be placed upon the transferee once it has been established that the consideration went to a third party.

lated, to the alleged fraudulent transaction. These benefits can be best included in the calculus of reasonably equivalent value by considering those quantifiable benefits reasonably expected at the time of the transaction to accrue in the future to the debtor, directly or indirectly.