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Report: The Indiana Uniform Fraudulent Transfer Act - Introduction

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REPORT

THE INDIANA UNIFORM FRAUDULENT TRANSFER ACT *INTRODUCTION*

BRUCE A. MARKELL*

On March 11, 1994, Governor Evan Bayh signed Public Law 144-1994.¹ This act completely revised Indiana fraudulent transfer law, and in so doing repealed laws dating from 1852. The basis for this sweeping change in Indiana commercial law was the Uniform Fraudulent Transfer Act (UFTA), a uniform law first promulgated in 1984 by the National Conference of Commissioners on Uniform State Laws (NCCUSL). The reporter for the UFTA was Frank Kennedy, now the Thomas M. Cooley Emeritus Professor of Law at the University of Michigan. As of this writing, thirty-three states have adopted the UFTA in one form or another.²

Indiana's adoption of the UFTA was the product of three years of effort and planning. The Debtor-Creditor Committee of the Indiana State Bar led this effort. In 1991 it formed a committee to study the UFTA, and selected William I. Kohn of the law firm of Barnes & Thornburg as its chair. In 1992 the whole committee approved a report recommending, with slight changes, adoption of the UFTA ("Report"). That Report, in its original form, follows this Introduction.³

The Report was a significant factor in the process that led to the UFTA's enactment in Indiana. Also important in this process were the efforts of Indiana's Uniform Law Commissioners, four of whom deserve special mention: my colleague Kevin Brown, Professor of Law at Indiana University School of Law—Bloomington; Wayne Kreuzscher of Barnes & Thornburg (who has now resigned as a commissioner); State Senator Vi

* Professor of Law and Louis F. Niezer Faculty Fellow, Indiana University School of Law—Bloomington. Professor Markell served as the Reporter for the Debtor-Creditor Committee of the Indiana State Bar, and prepared the Report that follows this introduction.

Indiana's enactment of the Uniform Fraudulent Transfer Act would not have been possible without the wise counsel and guidance of William I. Kohn and Gerald L. Bepko, two individuals whose selfless devotion to public service has made Indiana a better state.

1. 1994 Ind. Acts. 144. The bill that became Public Law 144 was introduced on January 6, 1994 as House Bill 1169, 108th General Assembly, 2d Sess. (1994). During the closing days of the legislature, the bill was amended and the text placed in another bill, House Bill 1159. Both houses of the Indiana General Assembly approved the final bill on March 4, 1994.

2. 7A UNIF. LAWS ANN. 188 (Supp. 1995). The Act is pending in four more states: Alaska, 1995 Alaska H.B. No. 72, 19th Legislature, 1st Sess. (1995); Kansas, Kan. H.B. No. 2503, 76th Legislature, 1st Reg. Sess. (1995); Massachusetts, Mass. H.B. No. 281, 179th General Court, 1st Annual Sess. (1995); and North Carolina, N.C. H.B. No. 842, 1995 Reg. Sess.

3. I have placed a hypertext version of the Report on the World Wide Web. Its address, or Universal Resource Locator (URL) is: <http://www.law.indiana.edu/codes/in/indufta.html>.

Simpson, who took Mr. Krueischer's position and serves in the Indiana General Assembly;⁴ and Gerald L. Bepko, Professor of Law at the Indiana University School of Law—Indianapolis and who also served on the national drafting committee for the UFTA.⁵

The intent of the Report was to provide guidance not only on the existing state of Indiana fraudulent transfer law, but also on the changes the UFTA would bring. In doing so it incorporated, in great detail, the original comments to the UFTA as drafted and adopted by NCCUSL.⁶ The Report also highlighted variations from the text of the UFTA recommended by the Debtor-Creditor Committee. The main value of the Report now lies in the guidance it can give to practitioners who now must apply the UFTA to Indiana transactions.

In addition to this original text, the version printed here includes annotations that reflect the bill as enacted, and changes in the law generally since the Report's adoption. I have, for example, noted when a statute referred to was repealed, and have tried to indicate where a section referred to in the Report was ultimately codified.

To allow the reader to determine the original text, all new material is surrounded by square brackets. Thus, where the Report stated, for example, "Section 4 does this . . ." the version that follows will appear as follows: "Section 4 [IND. CODE §32-2-7-4] does this . . ." The original Report also had numbered footnotes, and these are retained. New footnotes to update or explain the material have been added and are represented by daggers (†).

The Indiana General Assembly also declined to adopt some changes suggested by the Committee. The unadopted suggestions are introduced by material in brackets, and sections of the Report that related solely to unadopted suggestions are noted in italics.

With the adoption of the UFTA, Indiana moved into the mainstream of American debtor-creditor law. Its speedy and efficient adoption is as an example of the salutary results of a public partnership of practicing lawyers, academics and state legislators.

4. Senator Simpson became a Uniform Law Commissioner after enactment of the UFTA. In her capacity as state senator, however, she was instrumental in explaining its provisions to the General Assembly.

5. Professor Bepko is also Vice President of Indiana University and Chancellor of Indiana University-Purdue University at Indianapolis. Professor Bepko has often lent his skills to support commercial law revisions to the Indiana Code.

6. The NCCUSL and West Publishing have granted permission to the *Indiana Law Review* to reprint portions of the comments to the UNIFORM FRAUDULENT TRANSFER ACT.

**REPORT OF THE DEBTOR—CREDITOR COMMITTEE
OF THE
INDIANA STATE BAR ASSOCIATION
REPORTING ON AND RECOMMENDING ADOPTION OF THE
INDIANA UNIFORM FRAUDULENT TRANSFER ACT***

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I. INTRODUCTION

This Report presents the recommendations of the Debtor-Creditor Committee of the Indiana State Bar Association (“Committee”) with respect to adoption of the Uniform Fraudulent Transfer Act (“Uniform Act” or UFTA).¹ As described in more detail below, the Committee recommends adoption of the Uniform Act in Indiana with few changes.

This Report first briefly surveys existing Indiana statutory and case law regarding fraudulent conveyances. As an introduction to the Indiana Act, it next examines the structure and purposes of the Uniform Act. It concludes with a section by section review of the proposed Indiana Act, and with a review of suggested changes to other laws. This commentary highlights some of the major changes in Indiana law that the UFTA would effect, as well as the proposed modifications to the Uniform Act before adoption in Indiana.

1. The National Conference of Commissioners of Uniform Laws adopted the UFTA in 1984, and the American Bar Association approved it in 1985. Since its promulgation in 1985, several law review articles have examined the UFTA. See Peter A. Alces & William E. Dorr, *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U. ILL. L. REV. 527; Frank R. Kennedy, *The Uniform Fraudulent Transfer Act*, 18 U.C.C. L.J. 195 (1986); Paul M. Shupack, *Confusion and Policy and Language in the Uniform Fraudulent Transfer Act*, 9 CARDOZO L. REV. 811 (1987); Louis J. Vener, *Transfers and Frauds of Creditors Under the Uniform Acts and the Bankruptcy Code*, 92 COMM. L.J. 218 (1987). Since then, at least 27 states have adopted the UFTA, including Ohio, OHIO REV. CODE ANN. §§ 1336.01 to 1336.11 (1993), and Illinois, ILL. ANN. STAT. ch. 740, paras. 160/1-160/12 (Smith-Hurd 1993). Michigan was one of the first states to adopt the UFCA, MICH. COMP. LAWS ANN. §§ 566.11 to 566.23 (West 1967), and a bill is currently pending in the Michigan legislature to adopt the UFTA. Mich. H.B. 5317, 86th Legislature, 1991 Regular Session (Introduced Nov. 6, 1991). [Michigan has not yet adopted the UFTA.]

II. OVERVIEW OF CURRENT INDIANA LAW

A. Existing Statutory Law

Indiana traces its fraudulent conveyance law to the English Statute of 13 Elizabeth, enacted in 1571. 13 Eliz., ch. 5 (1571), *repealed by* The Law of Property Act, 15 Geo. 5, ch. 20, § 172 (1925). That statute made it unlawful to convey property with the intent to “hinder, delay or defraud creditors and others of their just and lawful actions.” *Id.* § 1.

In Indiana, fraudulent conveyances are dealt with primarily by Indiana Code section 32-2-1-14. Enacted in 1852 [and repealed when the UFTA was enacted], that statute provides:

All conveyances or assignments, in writing or otherwise, of any estate in lands, or of goods or things in action, every charge upon lands, goods or things in action, and all bonds, contracts, evidences of debt, judgments, decrees, made or suffered with the intent to hinder, delay or defraud creditors or other persons of their lawful damages, forfeitures, debts or demands, shall be void as to the persons sought to be defrauded.

Indiana Code section 34-1-45-1 compliments this basic section by making real estate that has been fraudulently conveyed subject to attachment and execution to satisfy judgments against the transferor. [The UFTA modified section 34-1-45-1 to delete the reference to real estate.]

Additional restrictions are found in the “resulting trust” provisions of Indiana Code sections 30-1-9-6 to -8, which provide that when a conveyance for valuable consideration is made to one person, but the consideration paid by another, the conveyance is presumed to be fraudulent as against the creditors of the person paying the consideration. This presumption, if not rebutted, gives rise to a trust in favor of such creditors, including those pre-transfer and, if sufficient evidence of fraudulent intent exists, post-transfer creditors. IND. CODE § 30-1-9-7 [repealed by UFTA]. The presumption may be overcome by demonstrating that the debtor, at the time of the transfer, had sufficient additional property to satisfy his debts. *Eiler v. Crull*, 14 N.E. 79 (Ind. 1897).

Other statutes augment the fraudulent transfer provisions by defining terms such as “creditor.”² Indiana Code section 32-2-1-8 [repealed by UFTA] construes “creditor” to include all persons who are creditors of the vendor or assignor at any time while the transferred goods were in that vendor’s or assignor’s possession or control (as contrasted to post-transfer creditors, who are expressly protected under the UFTA). *But see Gable v. Columbus Cigar Co.*, 38 N.E. 474 (Ind. 1894) (conveyance can be set aside at request of *subsequent* creditors of grantor, where it is shown that the conveyance was *intended* to defraud subsequent as well as existing creditors); *Petree v. Brotherton*, 32 N.E. 300 (Ind. 1892) (same).

2. In addition, statutory provisions relating to redemptions and dividends under the Indiana Business Corporation Law supplement fraudulent transfer law by defining when such transfers or distributions may be made. *See, e.g.*, IND. CODE §§ 23-1-28-1 to -6 (1993) (dealing with permissible distributions in respect of stock ownership).

Indiana Code section 32-2-1-18 [repealed by UFTA] provides that fraudulent intent is a question of fact.³ This statute additionally clarifies that a transaction may not be deemed fraudulent as against creditors or purchasers solely on the ground that it was not founded on valuable consideration; the element of fraudulent intent must additionally have been present. *See Hosanna v. Odishoo*, 193 N.E. 599 (Ind. 1935). Intent may be inferred from attendant facts and circumstances. *Vermillion v. First Nat'l Bank of Greencastle*, 105 N.E. 530 (Ind. App. 1914). The burden of proving fraud is on the party alleging it. *A.D. Baker Co. v. Berry*, 141 N.E. 623 (Ind. App. 1923).

Innocent purchasers for value are given limited protection under Indiana Code section 32-2-1-17 [repealed by UFTA], *unless* they had prior notice of their immediate grantor's or assignor's fraudulent intent, or of the fraud that rendered such grantor's or assignor's title void. The determinative fact is whether the grantee had notice of the fraud of his immediate grantor or transferor. *Jameson v. Dilley*, 61 N.E. 601 (Ind. App. 1901). If the grantee had notice, a fraudulent transfer may be set aside entirely, even though the grantee paid full consideration. *See Milburn v. Phillips*, 34 N.E. 983; 36 N.E. 360 (Ind. 1894); *Harrison v. Jaquess*, 29 Ind. 208 (1867); *Bray v. Hussey*, 24 Ind. 228 (1865). *Cf. Seager v. Aughe*, 97 Ind. 285 (1884) (setting aside conveyance only to extent of unpaid purchase price where grantee knew of fraud); *Rhodes v. Green*, 36 Ind. 7 (1871) (same). As set forth in Indiana Code section 32-2-1-10 [repealed by UFTA], a grantee with *notice* of the fraud of its immediate transferor or grantor holds property or its proceeds (if the grantee has disposed of the property) in trust for creditors. *See Doherty v. Holiday*, 32 N.E. 315 (Ind. 1892).

Finally, Indiana Code section 35-43-5-4(8) (1993) states that the concealment, encumbrance or transfer of property with the intent to defraud a creditor is criminal fraud. If successfully prosecuted, criminal fraud is a Class D felony, punishable by a jail term of six months to three years, and by a fine of up to \$10,000. If the transfer is done "knowingly and fraudulently" in connection with a federal bankruptcy case, the action may be prosecuted as a federal bankruptcy crime. 18 U.S.C. § 152 (1988). Jail terms of up to one year and fines of up to \$5000 can be imposed. *Id.*

B. Existing Judicial Decisions and Their Effect

As set forth above, Indiana statutes require a finding that fraud existed in connection with a transaction challenged as a fraudulent transfer. However, it is a rare case in which the transferor readily admits the existence of fraudulent intent, and the courts therefore have enhanced the statutory scheme by recognizing that the intent to defraud creditors may be inferred from the facts and circumstances of a particular case. Numerous decisions exist dealing with or enunciating various "badges of fraud" which, when present in sufficient number, will support the inference of fraudulent intent. *See, e.g., Eyler v. C.I.R.*, 760 F.2d 1129 (11th Cir. 1985) (interpreting Indiana law); *Nader v. C.I.R.*, 323 F.2d 139 (7th Cir. 1963); *In re Delagrang*, 65 B.R. 97 (Bankr. N.D. Ind. 1986); *Milburn v. Phillips*, 34 N.E. 983; 36 N.E. 360 (Ind. 1894); *LaPorte Prod. Credit Ass'n v. Kalwitz*, 567 N.E.2d 1202 (Ind. Ct. App. 1991); *Jackson v. Farmers State Bank*, 481 N.E.2d 395

3. "The question of fraudulent intent, in all cases arising under this act, shall be deemed a question of fact . . ." IND. CODE § 32-2-1-18 [repealed by UFTA]. *See also LaPorte Prod. Credit Ass'n v. Kalwitz*, 567 N.E.2d 1202 (Ind. App. 1991).

(Ind. Ct. App. 1985); *Arnold v. Dirrim*, 398 N.E.2d 442 (Ind. App. 1979). Examples of badges of fraud from which a court may infer intent to defraud include the following:

- (a) A transfer not in the ordinary course of the debtor's affairs;
- (b) The existence of significant indebtedness in comparison to assets;
- (c) The threat, expectation or existence of litigation;
- (d) Receipt of less than fair value for the transfer;
- (e) Secrecy or "deviousness" of the transaction;
- (f) Retention by the transferor of significant rights or privileges with respect to the transferred property;
- (g) Transfer to family members or close friends;
- (h) Evidence of a hurried set of contemporaneous transfers; or
- (i) Retaining assets of highly questionable value.

Milburn, 34 N.E. at 985, quoting O. BUMP, A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS (3d ed. 1890); *Jackson*, 481 N.E.2d 395. Courts have also considered post-transfer insolvency as a major factor. *Deming Hotel Co. v. Sisson*, 24 N.E.2d 912, 915 (Ind. 1940). Generally, courts require a combination of the foregoing badges of fraud—including insolvency—for a basis of inference of the requisite fraudulent intent. *Id.*; *Jackson*, 481 N.E.2d 395 (holding insolvency merely one badge of fraud, although the strongest badge of fraud; setting aside transaction as fraudulent despite fact that it did not result in debtor's insolvency). It should be noted that the mere presence of badges of fraud does not fatally mark the transaction as fraudulent; it merely establishes a rebuttable presumption of fraudulent intent that can be overcome if the debtor otherwise justifies or defends the transaction. *Jones v. Central Nat'l Bank of St. Johns*, 547 N.E.2d 887 (Ind. Ct. App. 1989).

As the foregoing discussion suggests, a creditor challenging a transaction as fraudulent in Indiana has, historically at least, been required to show that:

- (1) The transaction was *intended* to delay, defraud or hinder creditors;
- (2) The transactions occurred while debtor was insolvent or rendered him insolvent; and
- (3) At the time the creditor attempted to execute on the debt or obligation, the debtor remained insolvent.

Deming Hotel Co., 24 N.E.2d at 915.

This summary was cast into doubt by *Jackson*, which held that insolvency is not an essential prerequisite to the existence of a fraudulent transfer. *Jackson*, 481 N.E.2d at 404-05 (stating that insolvency is merely one badge of fraud, although the strongest badge of fraud; setting aside transaction as fraudulent despite fact that it did not result in debtor's insolvency). Prior to *Jackson*, Indiana decisions holding that transactions were characterized by fraud nearly always involved situations in which the debtor was insolvent at the time of the transfer, or was rendered insolvent as the result of the transfer in question. *See, e.g., Deming Hotel Co.*, 24 N.E.2d at 915. No doubt this logically flows from the fact that creditors typically will not mount a challenge to a transfer if, despite the transfer, the transferor/debtor has sufficient assets to satisfy obligations.

Despite the historic importance of insolvency in Indiana as part of fraudulent transfer law, the term "insolvency" for purposes of fraudulent transfers is not statutorily defined in Indiana. *Cf. IND. CODE § 23-1-28-3* (1993) (adopting both balance sheet and equitable

insolvency standards in context of permissible corporate distributions); IND. CODE § 26-1-1-201(23) (1993) (adopting equitable standard of insolvency for transactions subject to the Indiana UCC). The Bankruptcy Code, as discussed below, defines insolvency by reference to the “balance sheet” test, under which the debtor is insolvent if its liabilities exceed assets at a fair valuation. 11 U.S.C. § 101(32) (1988). Several Indiana decisions have apparently utilized this standard. *See, e.g., Deming Hotel Co.*, 24 N.E.2d at 915; *Pennington v. Flock*, 93 Ind. 378, 381 (1883). However, Indiana courts may occasionally have utilized the “equitable insolvency” standard, under which an individual or entity is deemed insolvent if unable to pay obligations as they become due in the ordinary course of the debtor’s business or affairs. *See Schmelling v. Esch*, 147 N.E. 734, 735 (Ind. App. 1925). *See also Jackson*, 481 N.E.2d at 403 n.7 (discussing possible shift from balance sheet standard to equitable standard). A creditor seeking to avoid an allegedly fraudulent transfer typically has been required to demonstrate that the debtor’s insolvency (a) continues to exist at the date the creditor attempted to execute on its claim, *Sell v. Bailey*, 21 N.E. 338 (Ind. 1889), and (b) continues to exist at the time the cause of action to avoid a fraudulent transfer was commenced. *Deming Hotel Co.*, 24 N.E.2d at 915.

III. THE PROPOSAL FOR A NEW ACT

A. *General Reasons For Change*

Indiana’s statutory law has not changed substantively since its enactment in 1852. During that time, the Uniform Fraudulent Conveyance Act (“UFCA”) was promulgated by the Conference of Commissioners on Uniform State Laws (“Conference”) in 1918. The UFCA was adopted in twenty-five jurisdictions, including the Virgin Islands. It was also adopted in the sections of the Bankruptcy Act of 1938.

The 1918 UFCA was a codification of the “better” decisions applying the Statute of 13 Elizabeth. *See National Bankruptcy Conference, Analysis of H.R. 12889*, 74th Cong., 2d Sess. 213 (Comm. Print 1936). The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of fraudulent transfer was part of the law of every American jurisdiction. Since the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on badges of fraud. The weight given these badges varied greatly from jurisdiction, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on the evidence of actual intent. An important reform effected by the Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing an action to avoid a transfer as fraudulent. *See American Surety Co. v. Conner*, 166 N.E. 783 (N.Y. 1929) (Cardozo, C.J.).

Indiana did not adopt the UFCA. Partially as a result, recent Indiana decisions have put in doubt the role of insolvency in finding a fraudulent transfer. *Compare Deming Hotel Co.*, 24 N.E.2d at 915 (finding insolvency essential to successful fraudulent conveyance actions) *with Jackson*, 481 N.E.2d at 405 (finding insolvency merely one badge of fraud, although the strongest badge of fraud; setting aside transaction as fraudulent despite fact that it did not result in debtor’s insolvency). Other uncertainties make it perilous for Indiana attorneys to counsel clients on the possible effect of such commonplace transactions as foreclosures and leveraged buyouts. *See Bundles v. Baker*,

856 F.2d 815 (7th Cir. 1988) (holding that provisions of fraudulent transfer provision of Bankruptcy Code require examination of all facts and circumstances surrounding foreclosure). *Compare* Parke County Coal Co. v. Terre Haute Paper Co., 26 N.E. 884 (Ind. 1891) (holding that transaction structured as what would today be called a leveraged buyout could not be attacked by creditors with knowledge of the facts of the transactions) with *Crowthers McCall Pattern, Inc. v. Lewis.*, 129 Bankr. 992 (S.D.N.Y. 1991) (holding that creditors with knowledge of a leveraged buyout could, under New York fraudulent transfer statute, challenge leveraged buyout) and *Aluminum Mills Corp. v. Citicorp North America, Inc.*, 132 B.R. 869 (Bankr. N.D. Ill. 1991) (finding the same result under Illinois law).

To date, twenty-seven states have adopted the UFTA, making it more widely accepted than the original 1918 UFCA. Although for the most part the UFTA has been adopted without substantial modifications, several states have made modifications that the Committee believes are sensible. It is to a survey of the UFTA, and the Committee's proposed modifications, that this Report now turns.

B. General Overview of the Uniform Act

1. *General Comments and Coverage.*—The Conference named the Uniform Act the Uniform Fraudulent Transfer Act in recognition of its applicability to transfers of personal property as well as real property, “conveyance” having a connotation restricting it to a transfer of real property. As noted in comment (2) accompanying section 1(1) and comment (8) accompanying section 4, however, the UFTA does not purport to cover the whole law of voidable transfers and obligations. The limited scope of the original UFCA did not impair its effectiveness in achieving uniformity in the areas covered. *See* James A. McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 405 (1933).

2. *Basic Structure.*—The UFTA preserves the basic structure and approach of the UFCA. Two sections in the UFTA delineate which transfers and obligations are fraudulent. Section 4 [IND. CODE § 32-2-7-14] is an adaptation of three sections of the UFCA; section 5 [IND. CODE § 32-2-7-15] is an adaptation of another section of the UFCA. The new placement of these sections highlights standing issues. Both present and future creditors of the transferor can bring actions under section 4 [IND. CODE § 32-2-7-14]; only creditors of the transferor at the time of the transfer can bring actions under section 5 [IND. CODE § 32-2-7-15].

The UFTA carries forward the wording from the Statute of Elizabeth and current Indiana law by declaring a transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors to be fraudulent. In addition, however, the UFTA clarifies the role of insolvency and the role of badges of fraud by rendering a transfer made or obligation incurred without adequate consideration to be constructively fraudulent—*i.e.*, without regard to the actual intent of the parties—under one of the following conditions: (1) the debtor was left by the transfer or obligation with unreasonably small assets for a transaction or the business in which he was engaged; (2) the debtor intended to incur, or believed that he would incur, more debts than he would be able to pay; or (3) the debtor was insolvent at the time or as a result of the transfer or obligation.

A transfer or obligation that is constructively fraudulent because insolvency concurs with or follows failure to receive adequate consideration is voidable only by a creditor in

existence at the time the transfer occurs or the obligation is incurred. Either an existing or subsequent creditor may avoid a transfer or obligation for inadequate consideration when accompanied by the financial condition specified in section 4(b)(1) [IND. CODE § 32-2-7-14(2)] or the mental state specified in section 4(b)(2) [IND. CODE § 32-2-7-14(1)].

3. *Reasonably Equivalent Value.*—As noted above, reasonably equivalent value is required in order to constitute adequate consideration under the UFTA. The provisions of the UFTA follow the Bankruptcy Code in eliminating good faith on the part of the transferee or obligee as an issue in the determination of whether adequate consideration is given by a transferee or obligee. The UFTA, like the Bankruptcy Code, allows the transferee or obligee to show good faith as a defense after a creditor establishes that a fraudulent transfer has been made or a fraudulent obligation has been incurred. Thus a showing by a defendant that a reasonable equivalent has been given in good faith for a transfer or obligation is a complete defense although the debtor is shown to have intended to hinder, delay, or defraud creditors.

A good faith transferee or obligee who has given less than a reasonable equivalent value is nevertheless allowed a reduction in a liability to the extent of the value given. The UFTA, like the Bankruptcy Code, eliminates the provision of the UFCA that enables a creditor to attack a security transfer on the ground that the value of the property transferred is disproportionate to the debt secured. The premise of the UFTA is that the value of the interest transferred for security is measured by and thus corresponds exactly to the debt secured. Foreclosure of a debtor's interest by a regularly conducted, noncollusive sale on default under a mortgage or other security agreement may not be avoided under the UFTA as a transfer for less than a reasonably equivalent value.

4. *Insolvency.*—As noted above, Indiana law currently lacks any definition for insolvency. The UFTA's definition of insolvency is adapted from the definition of the term in the Bankruptcy Code, which adopts a balance sheet test. In addition, because of the procedural context of most fraudulent transfer actions—a frustrated creditor suing a transferee of the debtor—insolvency is presumed from proof of a general failure to pay debts as they become due.

5. *Remedies.*—Section 7 of the UFTA [IND. CODE § 32-2-7-17] lists the remedies available to creditors under the Uniform Act. It eliminates as unnecessary and confusing the UFCA's distinction between remedies available to holders of matured claims and those holding unmatured claims. Since promulgation of the UFCA in 1918, the United States Supreme Court has imposed restrictions on the availability and use of prejudgment remedies. As a result many states have amended their statutes and rules applicable to such remedies, and it is frequently unclear whether a state's procedures include a prejudgment remedy against a fraudulent transfer or obligation.

6. *Defenses.*—Section 8 of the UFTA [IND. CODE § 32-2-7-18] prescribes the measure of liability of a transferee or obligee and enumerates defenses. Liability is limited to the amount of the property or obligation received. Moreover, a transferee of a transfer made with actual intent to hinder, delay or defraud has a complete defense to the extent she gave value in good faith. The transferee of a transfer or obligation that is constructively fraudulent has a lien on the property or may enforce the obligation to the extent of actual value given. Finally, Section 8 [IND. CODE § 32-2-7-18] precludes avoidance, as a constructively fraudulent transfer, of the termination of a lease on default or the enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

7. *Timing of Transfers and Statutes of Limitations.*—Section 6 of the UFTA [IND. CODE § 32-2-7-16] is new. It specifies when a transfer is made or an obligation is incurred. The section specifying the time when a transfer occurs is adapted from section 548(d) of the Bankruptcy Code. Its premise is that if the law prescribes a mode for making the transfer a matter of public record or notice, it is not deemed to be made for any purpose under the Uniform Act until it has become such a matter of record or notice.

The Uniform Act also includes a statute of limitations that bars the right rather than the remedy on expiration of the statutory periods prescribed. The law governing limitations on actions to avoid fraudulent transfers among the states is unclear and full of diversity. The UFTA recognizes that laches and estoppel may operate to preclude a particular creditor from pursuing a remedy against a fraudulent transfer or obligation even though the statutory period of limitations has not run.

C. *The Uniform Act in Indiana—Suggested Modifications*

The Committee believes that the enactment of the UFTA would be a great advance in Indiana commercial law. It also believes, however, that certain of the provisions of the Uniform Act require modification before enactment in Indiana. These changes are outlined below, and a more detailed explanation of their effect is to be found in the commentary to the section affected.

1. *Badges of Fraud.*—Section 4(b) of the UFTA sets forth a nonexclusive list of factors that may be appropriate for consideration by a court in determining whether the debtor had an actual intent to hinder, delay or defraud one or more creditors within the meaning of section 4(a). Historically, courts construing Indiana law have referred to such factors as “badges of fraud.” See *Eyler v. C.I.R.*, 760 F.2d 1129 (11th Cir. 1985) (interpreting Indiana law); *Nader v. C.I.R.*, 323 F.2d 139 (7th Cir. 1963); *In re Delagrange*, 65 B.R. 97 (Bankr. N.D. Ind. 1986); *Milburn v. Phillips*, 34 N.E. 983; 36 N.E. 360 (Ind. 1894); *LaPorte Prod. Credit Ass’n v. Kalwitz*, 567 N.E.2d 1202 (Ind. Ct. App. 1991); *Jackson v. Farmers State Bank*, 481 N.E.2d 395, 395 (Ind. Ct. App. 1985); *Arnold v. Dirrim*, 398 N.E.2d 442 (Ind. App. 1979).

The badges of fraud listed in section 4(b) of the UFTA are also set forth and elaborated upon in the Uniform Comments. The UFTA and the Uniform Comments make it clear that the existence of any one or more of the badges of fraud listed in section 4(b) of UFTA may merely be relevant evidence as to the debtor’s actual intent, and does not create any presumption or otherwise have any legal effect.

Accordingly, the Committee views those factors as being more appropriately addressed solely in the comments, and has removed them from the statute. Listing of those factors in the statute may cause inappropriate significance to be given to the existence or nonexistence of one or more of the listed factors in a particular case, notwithstanding the clear statements in the text and comments of the UFTA to the contrary. Cf. *Frank R. Kennedy, The Uniform Fraudulent Transfer Act*, 18 U.C.C. L.J. 195, 201 (1986). The Committee does not view this as a change in the meaning of the UFTA.

2. *Decision Not to Make Insider Preferences Fraudulent Transfers.*—The UFTA creates a new category of fraudulent transfer that has no parallel in the UFCA nor in prior Indiana law: a transfer on account of an antecedent debt by an insolvent debtor to an insider who has reasonable cause to believe the debtor to be insolvent is deemed to be a fraudulent transfer under section 5(b) of the UFTA. The transactions that are the subject

of section 5(b) of the UFTA are not fraudulent transfers as historically understood, however, but rather preferences. Under current Indiana law, a non-fraudulent satisfaction of any debt in good faith—including satisfaction of a debt payable to an insider such as an officer of a corporation—is permitted without regard to its preferential effect. *Nappanee Canning Co. v. Reid, Murdock & Co.*, 64 N.E. 870 (Ind. 1902); *Jordan v. Lynch Land Co.*, 147 N.E. 318 (Ind. App. 1925); *Abe v. Summerville*, 92 N.E. 658 (Ind. App. 1916). *See also* *Vale v. Gary Nat'l Bank*, 406 F.2d 39 (7th Cir. 1969) (holding that debtor may assign less than all of its property for the benefit of less than all of its creditors). In short, adoption of section 5(b) would convert a transfer previously permissible under Indiana law into a transfer labelled fraudulent and hence illegal.

The Indiana Act omits this new category of fraudulent transfer. At least two other states that have adopted the UFTA, Arizona and California, have done likewise. ARIZ. REV. STAT. § 44-1005; CAL. CIV. CODE § 3439.05. A third, Pennsylvania, is considering its omission.[†]

The Committee believes that it is inappropriate to expand the fraudulent transfer laws to include preferential transfers. As with other rights under fraudulent transfer laws, the rights created by section 5(b) of the UFTA would be difficult or impossible, as a practical matter, to adjust by contract, no matter how large a majority of creditors might be willing to agree to such adjustment. It thus would adversely affect the ability of a debtor and its creditors to achieve an effective composition agreement in those cases in which the vast majority of interested parties would prefer to avoid a bankruptcy. By contrast, omission of section 5(b) does not raise a practical bar to contractual adjustment, at least for voluntary creditors, because they may (and frequently do) obtain much the same rights as are created by section 5(b) through debt subordination agreements.

Furthermore, under both existing law and the UFTA, avoidance of a transfer is not for the benefit of the debtor's creditors generally, but only for the benefit of the plaintiff creditor. Hence section 5(b) merely shifts the benefit of the preference from the insider creditor to the plaintiff creditor. The Committee believes that preferential transfers are properly dealt with under state law, if at all, only as an adjunct to a comprehensive state insolvency law providing a mechanism for the recovery of such transfers for the benefit of all creditors. *Cf.* IND. CODE § 32-12-1-1 (1993) (providing for statutory assignment for the benefit of creditors that preserves the right of potential assignees to preferences except in limited circumstances); IND. CODE § 27-9-3-14 (1993) (providing for recovery of fraudulent transfer in context of liquidation of insurance companies); IND. CODE § 27-9-3-16 (1993) (providing for recovery of preferences in context of liquidation of insurance companies). In this regard, concepts of equitable subordination and the precepts of corporate law affecting dividends would seem to adequately address any issues raised by such insider transfers. If anything is to be left to state fraudulent transfer law, the Committee believes that proposed section 4(a) [IND. CODE § 32-2-7-14(2)] provides adequate coverage.

Finally, if the debtor is the subject of a case under the Bankruptcy Code, section 544(b) of the Bankruptcy Code may enable the debtor's trustee to recover for the benefit of the creditors generally any transfers avoidable under section 5(b) of the UFTA. But in any such case the debtor's trustee also would be entitled to invoke section 547 of the

[†] Pennsylvania ultimately did not adopt section 5(6). 12 PA. CONS. STAT. § 5105 (1994).

Bankruptcy Code, which deals comprehensively with preferences and places special burdens on preferences in favor of insiders. In the view of the Committee, no need exists to supplement section 547 with overlapping rights created under state law. In particular, the Committee believes that the primary use of section 5(b) will be in bankruptcy, and as an extension of the preference periods from ninety days to four years. *Cf.* *Browning Interests v. Allison*, 955 F.2d 1008 (5th Cir. 1992) (setting aside grant of security interest to secured debt to former wife made outside of preference period in bankruptcy under Texas version of section 5(b); holding former wife to be an “insider.”).

Accordingly, the Indiana Act omits section 5(b) of the Uniform Act, as well as related definitions and implementing provisions (Uniform Act sections 1(1), 1(7), 1(11), 3(c), 8(f), 9(c)).

[The legislature did not adopt the changes related to this recommendation.]

3. *Modifications to Exemption Laws.*—*The Uniform Act is silent with respect to the status of a transfer made by a debtor to take advantage of state exemption laws. Such transfers raise the following issue: Is the intent to take advantage of state exemption laws an intent to “hinder” or “delay” creditors within the meaning of proposed section 4(a)? The issue is critical to practicing lawyers. If such transfers are avoidable, then lawyers risk counseling a fraudulent transaction, and possibly a crime, by giving advice on available exemptions. If they are not avoidable, then lawyers risk malpractice if they do not advise on the available exemptions. The Federal Bankruptcy Code appears not to categorize such transfers as fraudulent. S. Rep. No. 989, 95th Cong., 2d Sess. 76 (1978) (“As under current law, the debtor will be permitted to convert non-exempt property into exempt property before filing a petition. The practice is not fraudulent as to creditors and permits the debtor to make full use of the exemptions to which he is entitled under the law.”).*

To remove this potential dilemma from state law, the Committee has suggested modifying Indiana Code section 34-2-28-1 to state explicitly that such transfers, if made in good faith, are exempt from avoidance under the Indiana Act. This modification will allow lawyers to counsel confidently with respect to a debtor’s right, provided for by the Indiana Constitution, to take advantage of reasonable exemptions.

4. *Other Modifications.*—Section 2(b) of the UFTA [IND. CODE § 32-2-7-12(d)] is modified to make explicit the effect of the presumption of insolvency when a debtor is not paying his debts as they become due. Section 7(a)(3)(i) [IND. CODE § 32-2-7-17(a)(3)(A)] is expanded to ensure that a court may enjoin all transfers of proceeds of an asset fraudulently transferred within the meaning of the Indiana Act. Finally, section 10 [IND. CODE § 32-2-7-20] is modified to include the law of equitable subordination in the list of provisions of other state law not preempted by the Indiana Act.

IV. SECTION BY SECTION COMMENTARY OF THE PROPOSED INDIANA ACT

Section 1. Definitions [IND. CODE §§ 32-2-7-2 to 32-2-7-11]1. *The Text.*—As used in this Act:

(1) “Asset” [IND. CODE § 32-2-7-2] means property of a debtor, but the term does not include:

- (i) property to the extent it is encumbered by a valid lien;
- (ii) property to the extent it is generally exempt under nonbankruptcy law; or
- (iii) an interest in property held in tenancy by the entirety to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(2) “Claim” [IND. CODE § 32-2-7-3] means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(3) “Creditor” [IND. CODE § 32-2-7-4] means a person who has a claim.

(4) “Debt” [IND. CODE § 32-2-7-5] means liability on a claim.

(5) “Debtor” [IND. CODE § 32-2-7-6] means a person who is liable on a claim.

(6) “Lien” [IND. CODE § 32-2-7-7] means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(7) “Person” [IND. CODE § 32-2-7-8] means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(8) “Property” [IND. CODE § 32-2-7-9] means anything that may be the subject of ownership.

(9) “Transfer” [IND. CODE § 32-2-7-10] means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(10) “Valid lien” [IND. CODE § 32-2-7-11] means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

2. *The Comment.*—(1) [IND. CODE § 32-1-7-1] The definition of “asset” is substantially the same as the definition of “assets” in section 1 of the UFCA. The definition in the Indiana Act, unlike that in the earlier UFCA, does not, however, require a determination that the property is liable for the debts of the debtor. Thus, an unliquidated claim for damages resulting from personal injury or a contingent claim of a surety for reimbursement, contribution, or subrogation may be counted as an asset for the purpose of determining whether the holder of the claim is solvent as a debtor under section 2 of this Act, although applicable law may not allow such an asset to be levied on and sold by a creditor. *Cf. Manufacturers & Traders Trust Co. v. Goldman*, 578 F.2d 904, 907-09 (2d Cir. 1978).

Subparagraphs (i), (ii), and (iii) [IND. CODE § 32-2-7-2(1) to (3)] exclude from the term “asset” not only generally exempt property but property to the extent that it is subject to a valid encumbrance and property held in a tenancy by the entirety. This Act, like its predecessor and the Statute of 13 Elizabeth, declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims.

The laws protecting valid liens against impairment by levying creditors, exemption statutes, and the rules restricting levyability of interest in entireties property are limitations on the rights and remedies of unsecured creditors, and it is therefore appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of "asset" for the purposes of this Act.

A creditor of a joint tenant or tenant in common may ordinarily collect a judgment by process against the tenant's interest, and in some states a creditor of a tenant by the entirety may likewise collect a judgment by process against the tenant's interest. *See* 2 AMERICAN LAW OF PROPERTY 10, 22, 28-32 (1952); William G. Craig, *An Analysis of Estates by the Entirety in Bankruptcy*, 48 AM. BANKR. L.J. 255, 258-59 (1974). In Indiana, although property held as a tenancies by the entireties is exempt, IND. CODE § 34-2-28-1(a)(5) (1993), the debtor's interest could be reached if the husband and wife waive any defenses they may have, or if both of them grant a security interest or lien in the property in favor of the creditor. In such cases, the levyable interest of such a tenant is included as an asset under this Act.

Although the definition of "assets" in the UFCA excluded property that is exempt from liability for debts, it did not exclude all property that can not be reached by a creditor through judicial proceedings to collect a debt. Thus, it included the interest of a tenant by the entirety, although in nearly half the states such an interest can not be subjected to liability for a debt unless it is an obligation owned jointly by the debtor with his or her cotenant by the entirety. *See* 2 AMERICAN LAW OF PROPERTY 29 (1952); William G. Craig, *An Analysis of Estates by the Entirety in Bankruptcy*, 48 AM. BANKR. L.J. 255, 258 (1974). The definition in this Act requires exclusion of interests in property held by tenants by the entirety that are not subject to collection process by a creditor without a right to proceed against both tenants by the entirety as joint debtors.

The reference to "generally exempt" property in section 1(2)(ii) [IND. CODE § 32-2-7-2(2)] recognizes that all exemptions are subject to exceptions. Creditors having special rights against generally exempt property typically include claimants for alimony, taxes, wages, the purchase price of the property, and labor or materials that improve the property. *See* Uniform Exemptions Act § 10 and the accompanying comment. The fact that a particular creditor may reach generally exempt property by resorting to judicial process does not warrant its inclusion as an asset in determining whether the debtor is insolvent.

Since this Act is not an exclusive law on the subject of voidable transfers and obligations (see comment (8) to section 4, *infra*), it does not preclude the holder of a claim that may be collected by process against property generally exempt as to other creditors from obtaining relief from a transfer of such property that hinders, delays, or defrauds the holder of such a claim. Likewise the holder of an unsecured claim enforceable against tenants by the entirety is not precluded by this Act from pursuing a remedy against a transfer of property held by the entirety that hinders, delays, or defrauds the holder of such a claim.

Similarly, the holder of a claim secured by a valid lien is not precluded by this chapter from pursuing a remedy against a disposition of the holder's collateral that hinders, delays or defrauds such holder. The extent, if any, to which a common law of fraudulent transfers, derived from the principles underlying the Statute of 13 Elizabeth as historically developed, may be appropriately invoked in such circumstances is left to

judicial development. *Cf.* Comment 2(c) to UCC § 9-306 (IND. CODE § 26-1-9-306 (1993)).

Nonbankruptcy law is state or federal law that is not part of the Bankruptcy Code, Title 11 of the United States Code. The definition of an “asset” thus does not include property that would be subject to administration for the benefit of creditors under the Bankruptcy Code unless it is subject under other applicable law, state or federal, to process for the collection of a creditor’s claim against a single debtor.

Property encumbered by a valid lien is excluded from the definition of “asset” only “to the extent” the property is so encumbered. For example, in the case of property encumbered by a lien securing a contingent obligation, such as a guaranty, in general it would be appropriate to value the obligation by discounting its face amount to reflect the probability that the guaranty will ever be called upon. Likewise, if an obligation is secured by a lien on several items of property and only one such item is disposed of, it may be appropriate to allocate the obligation among the items of property subject to the lien for the purpose of determining the “extent” to which the item disposed of is encumbered for purposes of this definition.

(2) [IND. CODE § 32-2-7-3] The definition of “claim” is derived from section 101(5) of the Bankruptcy Code. Since the purpose of this Act is primarily to protect unsecured creditors against transfers and obligations injurious to their rights, the words “claim” and “debt” as used in this Act generally have reference to an unsecured claim and debt. As the context may indicate, however, usage of the terms is not so restricted.

(3) [IND. CODE § 32-2-7-4] The definition of “creditor” in combination with the definition of “claim” has substantially the same effect as the definition of “creditor” under section 1 of the UFCA. As under that Act, the holder of an unliquidated tort claim or a contingent claim may be a creditor protected by this Act. This carries forward prior Indiana law. *Bishop v. Redmond*, 83 Ind. 157 (1882); *Shean v. Shay*, 42 Ind. 375 (1873).

(4) [IND. CODE § 32-2-7-5] The definition of “debt” is derived from section 101(12) of the Bankruptcy Code.

(5) [IND. CODE § 32-2-7-6] The definition of “debtor” is new.

(6) [IND. CODE § 32-2-7-7] The definition of “lien” is derived from paragraphs (36), (37), (51), and (53) of section 101 of the Bankruptcy Code, which define “judicial lien,” “lien,” “security interest,” and “statutory lien” respectively.

(7) [IND. CODE § 32-2-7-8] The definition of “person” is adapted from paragraphs (28) and (30) of section 1-201 of the UCC, defining “organization” and “person” respectively.

(8) [IND. CODE § 32-2-7-9] The definition of “property” is derived from section 1-201(33) of the Uniform Probate Code. Property includes both real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable.

The definition of “property” is intended to be construed broadly, to include any right or interest that contributes to the value of a person. Hence, for example, “property” in general includes licenses, permits, franchises and contracts, whether or not transferable. In particular, but without limitation, governmental licenses and permits that contribute to the value of the holder in general should be deemed “property” of the holder, whether or not transferable, regardless of whether such items are deemed “property” for other purposes (*e.g.*, regardless of whether such an item may be the subject of execution, or whether such an item is deemed a withdrawable privilege, rather than a property right, as

against the issuing authority). Note, however, that such property may have little or no value in certain circumstances (e.g., such items, if nontransferable, may have no value if the holder is not valued on a going-concern basis). See comment (1) to section 2, *infra*.

(9) [IND. CODE § 32-2-7-10] The definition of “transfer” is derived principally from section 101(54) of the Bankruptcy Code. The definition of “conveyance” in section 1 of the UFCA was similarly comprehensive and the references in this Act to “payment of money, release, lease, and the creation of a lien or incumbrance” are derived from the UFCA. While the definition in the UFCA did not explicitly refer to an involuntary transfer, the decisions under that Act were generally consistent with an interpretation that covered such a transfer. See, e.g., *Lefkowitz v. Finkelstein Trading Corp.*, 14 F. Supp. 898, 899 (S.D.N.Y. 1936) (execution sale); *Hearn 45 St. Corp. v. Jano*, 27 N.E.2d 814 (N.Y. 1940) (execution and foreclosure sales); *Langan v. First Trust & Deposit Co.*, 101 N.Y.S.2d 36 (4th Dept. 1950), *aff’d*, 100 N.E.2d 189 (N.Y. 1951) (mortgage foreclosure); *Catabene v. Wallner*, 85 A.2d 300, 302 (N.J. Super. 1951) (mortgage foreclosure).

Although derived from the Bankruptcy Code, the proposed definition of transfer does not include language added to the Bankruptcy Code by Public Law No. 98-882, the Bankruptcy Amendments and Federal Judgeship Act of 1984. This omission is not intended to exclude the types of transfers covered by the 1984 amendments to the Code, as that was not the intent of the 1984 amendments.

The scope of “transfer” is intended to be quite broad. It includes, for example, transfer under the UFCA and similar statutes governing the “garden variety” change of title in real estate. It also includes the more exotic: a settlement agreement, *In re Edward Harvey Co.*, 68 B.R. 851, 858 (Bankr. D. Mass. 1987); a change of a beneficiary of a life insurance policy, *Schaefer v. Fisher*, 242 N.Y.S. 308, 314 (N.Y. 1930); a transaction entered into in connection with a leveraged buyout, *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288 (3d Cir. 1896), *cert. denied*, 483 U.S. 1005 (1987); see generally *David Gray Carlson, Leveraged Buyouts in Bankruptcy*, 20 GA. L. REV. 73 (1985); and payments of dividends, *Consove v. Cohen*, 783 F.2d 978, 982 (1st Cir. 1983); *Mancuso v. Champion*, 119 B.R. 106, 109 (Bankr. N.D. Tex. 1990); *Fox v. MGM Grand Hotels*, 187 Cal. Rptr. 141 (Cal. Ct. App. 1984). The correlative concept of “obligations incurred” includes guaranties, *Lawrence Paperboard Corp. v. Arlington Trust Co.*, 76 B.R. 866, 874-76 (Bankr. D. Mass. 1987), as well as long term contracts for which the debtor received little benefit, *FDIC v. Malin*, 802 F.2d 12, 18 (2d Cir. 1986) (divorce agreement); *Wilson v. Holub*, 210 N.W. 593, 595 (Iowa 1926) (rescission of a profitable contract); *Larrimer v. Feney*, 192 A.2d 351, 353 (Pa. 1963) (payment of usurious interest).

In short, almost every economic transaction entered into by a debtor is capable of being characterized as either a transfer or an obligation incurred. The UFTA provides limitations on who can avoid these transactions, and which transactions can be avoided in both the standing areas and in the defenses to the substantive causes of action.

(10) [IND. CODE § 32-2-7-11] The definition of “valid lien” is new. A valid lien includes an equitable lien that may not be defeated by a judicial lien creditor. See, e.g., *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 136 (1962) (upholding a surety’s equitable lien in respect to a fund owing a bankrupt contractor).

Section 2. Insolvency [IND. CODE § 32-2-7-12]

1. *The Text.*—(a) [IND. CODE § 32-2-7-12(c)] A debtor is insolvent if the sum of the debtor’s debts is greater than all of the debtor’s assets at a fair valuation.

(b) [IND. CODE § 32-2-7-12(d)] A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent. This presumption, if effective, shall impose upon the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

(c) [IND. CODE § 32-2-7-12(e)] A partnership is insolvent under subsection (a) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over each general partner's nonpartnership debts.

(d) [IND. CODE § 32-2-7-12(a)] Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this Act.

(e) [IND. CODE § 32-2-7-12(b)] Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

2. *The Comment.*—(1) Subsection (a) [IND. CODE § 32-2-7-12(d)] is derived from the definition of “insolvent” in section 101(32)(A) of the Bankruptcy Code. The definition in subsection (a) [IND. CODE § 32-2-7-12(d)] and the correlated definition of partnership insolvency in subsection (c) [IND. CODE § 32-2-7-12(e)] contemplate a fair valuation of the debts as well as the assets of the debtor. As under the definition of the same term in section 2 of the UFCA, exempt property is excluded from the computation of the value of the assets. See § 1(1), *supra*. For similar reasons interests in valid spendthrift trusts and interests in tenancies by the entireties that cannot be severed by a creditor of only one tenant are not included. See the comment to § 1(2), *supra*. Since a valid lien also precludes an unsecured creditor from collecting the creditor's claim from the encumbered interest in a debtor's property, both the encumbered interest and the debt secured thereby are excluded from the computation of insolvency under this Act. See § 1(1) *supra* and subsection (e) of this section.

As under the Bankruptcy Code, this valuation is *not* a liquidation analysis. The “fair valuation” limitation is almost a modified market price valuation. As stated by Collier with respect to the identical provision in the Bankruptcy Code:

[fair] valuation, in general, will signify the reasonable estimate of what can be realized from the assets by converting them into, or reducing them to cash, under carefully guarded if not idealized conditions.

1 COLLIER ON BANKRUPTCY ¶ 101.29[4] (15th ed. 1991). See also *Emerald Hills Country Club, Inc. v. Hollywood, Inc.*, 32 B.R. 408, 420-21 (Bankr. S.D. Fla. 1983); *Varon v. Trimble, Marshall & Goldman, P.C.*, 33 B.R. 872, 885 (Bankr. S.D.N.Y. 1983).

As under the Bankruptcy Code, contingent liabilities are counted at a value discounted by the probability that they will mature, *In re Xonics Photochemical, Inc.*, 841 F.2d 198 (7th Cir. 1988), even though under the UFCA they were counted at full face value. *Chase Manhattan Bank (N.A.) v. Oppenheim*, 440 N.Y.S.2d 829, 831 (N.Y. Sup. Ct. 1981); *Marine Midland Bank v. Stein*, 433 N.Y.S.2d 325, 327 (N.Y. Sup. Ct. 1980). The same holds true for contingent assets. See *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635 (3d Cir. 1991) (noting that lower court erred in not counting as an asset the debtor's rights of contribution against other guarantors of LBO debt).

(2) Section 2(b) [IND. CODE § 32-2-7-12(d)] establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. Such general nonpayment is a ground for the filing of an involuntary petition under section 303(h)(1) of the Bankruptcy Code. See also IND. CODE § 26-1-1-201(23) (1993), which declares a person to be “insolvent” who “has ceased to pay his debts in the ordinary course of business.” This act elevates language from the official comments to the UFTA to the text of the statute in order to make clear the effect of the presumption; this change is not intended to create any variance from the text of the UFTA, and is made in response to existing academic commentary that suggests that without the elevation, a risk exists for non-uniform interpretation. See Paul M. Shupack, *Confusion in Policy and Language in the Uniform Fraudulent Transfer Act*, 9 CARDOZO L. REV. 811, 830 n.84 (1987).

The presumption is established in recognition of the difficulties typically imposed on a creditor in proving insolvency in the bankruptcy sense, as provided in subsection (a) [(c)]. See generally Louis W. Levit, *The Archaic Concept of Balance-Sheet Insolvency*, 47 AM. BANKR. L.J. 215 (1973). Not only is the relevant information in the possession of a noncooperative debtor but the debtor’s records are more often than not incomplete and inaccurate. As a practical matter, insolvency is most cogently evidenced by a general cessation of payment of debts, as has long been recognized by the laws of other countries and is now reflected in the Bankruptcy Code. See Jan Honsberger, *Failure to Pay One’s Debts Generally as They Become Due: The Experience of France and Canada*, 54 AM. BANKR. L.J. 153 (1980); JAMES A. MACLACHLAN, BANKRUPTCY 13, 63-64, 436 (1956). In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor’s debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court’s determination may be affected by a consideration of the debtor’s payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged. The case law that has developed under section 303(h)(1) of the Bankruptcy Code has not required a showing that a debtor has failed or refused to pay a majority in number and amount of his or her debts in order to prove general nonpayment of debts as they become due. See, e.g., *Hill v. Cargill, Inc.*, 8 B.R. 779 (Bankr. D. Minn. 1981) (holding nonpayment of three largest debts to constitute general nonpayment, although small debts were being paid); *In re All Media Properties, Inc.*, 5 B.R. 126 (Bankr. S.D. Tex. 1980) (holding that missing significant number of payments or regularly missing payments significant in amount constitutes general nonpayment; missing payments on more than 50 percent of aggregate of claims is not required to show general nonpayment; nonpayment for more than 30 days after billing establishes nonpayment of a debt when it is due); *In re Kreidler Import Corp.*, 4 B.R. 256 (Bankr. D. Md. 1980) (holding that nonpayment of one debt constituting 97 percent of debtor’s total indebtedness constitutes general nonpayment). A presumption of insolvency does not arise from nonpayment of a debt as to which there is a genuine bona fide dispute, even though the debt is a substantial part of the debtor’s indebtedness. Cf. 11 U.S.C. § 303(h)(1) (1988), as amended by § 426(b) of Pub. L. 98-882, the Bankruptcy Amendments and Federal Judgeship Act of 1984.

(3) Subsection (c) [IND. CODE § 32-2-7-12(e)] is derived from the definition of partnership insolvency in section 101(32)(B) of the Bankruptcy Code. The definition conforms generally to the definition of the same term in section 2(2) of the UFCA.

(4) Subsection (d) [IND. CODE § 32-2-7-12(a)] follows the approach of the definition of “insolvency” in section 101(32) of the Bankruptcy Code by excluding from the computation of the value of the debtor’s assets any value that can be realized only by avoiding a transfer of an interest formerly held by the debtor or by discovery or pursuit of property that has been fraudulently concealed or removed.

(5) Subsection (e) [IND. CODE § 32-2-7-12(b)] is new. It makes clear the purpose not to render a person insolvent under this section by counting as a debt an obligation secured by property of the debtor that is not counted as an asset. *See also* comments to §§ 1(2) and 2(a), *supra*.

Section 3. Value [IND. CODE § 32-2-7-13]

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

(b) For the purposes of Sections 4(b) [IND. CODE § 32-2-7-14(2)] and 5 [IND. CODE § 32-2-7-15], a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

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

2. *The Comment.*—(1) This section defines “value” as used in various contexts in this Act, frequently with a qualifying adjective. The word appears in the following sections:

4(b) [IND. CODE § 32-2-7-14(2)] (“reasonably equivalent value”);

5 [IND. CODE § 32-2-7-15] (“reasonably equivalent value”);

8(a) [IND. CODE § 32-2-7-18(a)] (“reasonably equivalent value”);

8(b) [IND. CODE § 32-2-7-18(b)], (c) [IND. CODE § 32-2-7-18(c)], and (d) [IND. CODE § 32-2-7-18(d)] (“value”);

(2) Section 3(a) [IND. CODE § 32-2-7-13(a)] is adapted from section 548(d)(2)(A) of the Bankruptcy Code. *See also* UFCA section 3(a). The definition in Section 3 is not exclusive. “Value” is to be determined in light of the purpose of this Act to protect a debtor’s estate from being depleted to the prejudice of the debtor’s unsecured creditors. Consideration having no utility from a creditor’s viewpoint does not satisfy the statutory definition. The definition does not specify all the kinds of consideration that do not constitute value for the purposes of this Act—*e.g.*, love and affection. *See, e.g.*, *United States v. West*, 299 F. Supp. 661, 666 (D. Del. 1969).

(3) Section 3(a) [IND. CODE § 32-2-7-13(a)] does not indicate what is “reasonably equivalent value” for a transfer or obligation. Under this Act, as under § 548(a)(2) of the Bankruptcy Code, a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a discrepancy between the value of the asset transferred and the debt

secured, since the amount of the debt is the measure of the value of the interest in the asset that is transferred. *See, e.g., Peoples-Pittsburg Trust Co., v. Holy Family Polish Nat'l Catholic Church, Carnegie*, 19 A.2d 360 (Pa. 1941). If, however, a transfer purports to secure more than the debt actually incurred or to be incurred, it may be found to be for less than a reasonably equivalent value. *See, e.g., In re Peoria Braumeister Co.*, 138 F.2d 520, 523 (7th Cir. 1943) (holding chattel mortgage securing a \$3000 note to be fraudulent when the debt secured was only \$2500); *Hartford Acc. & Indemnity Co. v. Jirasek*, 235 N.W. 836, 839 (Mich. 1931) (holding quitclaim deed given as mortgage to be fraudulent to the extent the value of the property transferred exceeded the indebtedness secured). If the debt is a fraudulent obligation under this Act, a transfer to secure it as well would also be vulnerable to attack as fraudulent.

(4) Section 3(a) [IND. CODE § 32-2-7-13(a)] of the UFCA has been thought not to recognize that an unperformed promise could constitute fair consideration. *See James Angell McLaughlin, Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 414 (1933). Courts construing these provisions of the prior law nevertheless have held unperformed promises to constitute value in a variety of circumstances. *See, e.g., Harper v. Lloyd's Factors, Inc.*, 214 F.2d 662 (2d Cir. 1954) (transfer of money for promise of factor to discount transferor's purchase-money notes given to fur dealer); *Schlecht v. Schlecht*, 209 N.W. 883, 886-87 (Minn. 1926) (transfer for promise to make repairs and improvements on transferor's homestead); *Farmer's Exchange Bank v. Oneida Motor Truck Co.*, 232 N.W. 536 (Wis. 1930) (transfer in consideration of assumption of certain of transferor's liabilities); *see also Hummel v. Cernocky*, 161 F.2d 685 (7th Cir. 1947) (transfer in consideration of cash, assumption of a mortgage, payment of certain debts, and agreement to pay other debts). Likewise a transfer in consideration of a negotiable note discountable at a commercial bank, or the purchase from an established, solvent institution of an insurance policy, annuity, or contract to provide care and accommodations clearly appears to be for value. On the other hand, a transfer for an unperformed promise by an individual to support a parent or other transferor has generally been held voidable as a fraud on creditors of the transferor. *See, e.g., Springfield Ins. Co. v. Fry*, 267 F. Supp. 693 (N.D. Okla. 1967); *Sandler v. Parlapiano*, 258 N.Y.S. 88 (N.Y. App. Div. 1932); *Warwick Municipal Employees Credit Union v. Higham*, 259 A.2d 852 (R.I. 1969); *Hulsether v. Sanders*, 223 N.W. 335 (S.D. 1929); *Cooper v. Cooper*, 124 S.W.2d 264, 267 (Tenn. Ct. App. 1939); Note, *Rights of Creditors in Property Conveyed in Consideration of Future Support*, 45 IOWA L. REV. 546, 550-62 (1960). This Act adopts the view taken in the cases cited in determining whether an unperformed promise is value.

(5) Section 3(b) [IND. CODE § 32-2-7-13(b)] rejects the rule of such cases as *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (nonjudicial foreclosure of a mortgage avoided as a fraudulent transfer when the property of an insolvent mortgagor was sold for less than 70 percent of its fair value); and *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547 (5th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) (nonjudicial foreclosure held to be fraudulent transfer if made without fair consideration). Subsection (b) adopts the view taken in *Lawyers Title Ins. Corp. v. Madrid*, 21 B.R. 424 (B.A.P. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir. 1984), that the price bid at a public foreclosure sale determines the fair value of the property sold. Subsection (b) prescribes the effect of a sale meeting its requirements, whether the asset sold is personal or real property. The rule of this subsection applies to a foreclosure by sale of the interest

of a vendee under an installment land contract in accordance with applicable law that requires or permits the foreclosure to be effected by a sale in the same manner as the foreclosure of a mortgage. *See* GEORGE E. OSBORNE ET AL., REAL ESTATE FINANCE LAW 83-84, 95-97 (1979). The premise of the subsection is that "a sale of the collateral by the secured party as the normal consequence of default . . . [is] the safest way of establishing the fair value of the collateral . . ." 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1227 (1965). *See also In re Excello Press, Inc.*, 890 F.2d 896 (7th Cir. 1989).

*Section 4. Transfers Fraudulent as to Present
and Future Creditors [IND. CODE § 32-2-7-14]*

1. *The Text.*—A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
- (b) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
 - (1) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
 - (2) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

2. *The Comment.*—(1) Section 4(a) [IND. CODE § 32-2-7-14(1)] is derived from section 7 of the UFCA. This section retains the "badges of fraud" approach currently used by Indiana courts. *See, e.g., Milburn*, 34 N.E. at 983; 36 N.E. at 360 (Ind. 1894); *LaPorte Prod. Credit Ass'n*, 567 N.E.2d at 1202; *Jackson*, 481 N.E.2d 395; *Arnold*, 398 N.E.2d 442; *Eyler*, 760 F.2d 1129 (interpreting Indiana law); *Nader*, 323 F.2d 139; *In re Delagrange*, 65 B.R. 97. Badges of fraud, however, are not evil in and of themselves. They are best used when their purpose is kept in mind: as practical bridges from actual, provable, acts to a deceptive and fraudulent state of mind. In short, they are the traces of actual fraudulent intent. Given the slippery nature of fraud, however, there can be no routinized, mechanical test for finding fraudulent intent. As a result, the presence, or absence, of a particular number of such badges of fraud is not determinative. The holdings of prior Indiana cases that the question of whether the debtor acted with the actual intent to hinder, delay or defraud remains one of fact continues. Indiana, however, is adopting a uniform act enacted in a majority of jurisdictions. As a consequence, factors which other courts have found indicate fraud will be relevant here. A partial listed of these factors appears in comments (5) and (6), *infra*.

(2) Section 4(b) [IND. CODE § 32-2-7-14(2)] is derived from sections 5 and 6 of the UFCA but substitutes "reasonably equivalent value" for "fair consideration." The transferee's good faith was an element of "fair consideration" as defined in section 3 of the UFCA, and lack of fair consideration was one of the elements of a fraudulent transfer as defined in four sections of the UFCA. The transferee's good faith is irrelevant to a determination of the adequacy of the consideration under this Act, but lack of good faith may be a basis for withholding protection of a transferee or obligee under section 8, *infra*.

(3) Unlike the UFCA as originally promulgated, this Act does not prescribe different tests when a transfer is made for the purpose of security and when it is intended to be

absolute. The premise of this Act is that when a transfer is for security only, the equity or value of the asset that exceeds the amount of the debt secured remains available to unsecured creditors and thus cannot be regarded as the subject of a fraudulent transfer merely because of the encumbrance resulting from an otherwise valid security transfer. Disproportion between the value of the asset securing the debt and the size of the debt secured does not, in the absence of circumstances indicating a purpose to hinder, delay, or defraud creditors, constitute an impermissible hindrance to the enforcement of other creditors' rights against the debtor-transferor. *Cf.* UCC § 9-311.

(4) Subparagraph (1) of section 4(b) [IND. CODE § 32-2-7-14(2)(A)] is an adaptation of section 5 of the UFCA but substitutes "unreasonably small [assets] in relation to the business or transaction" for "unreasonably small capital." The reference to "capital" in the UFCA is ambiguous in that it may refer to net worth or to the par value of stock or to the consideration received for stock issued. The special meanings of "capital" in corporation law have no relevance in the law of fraudulent transfers. The subparagraph focuses attention on whether the amount of all the assets retained by the debtor was inadequate, *i.e.*, unreasonably small, in light of the needs of the business or transaction in which the debtor was engaged or about to engage. *See* Bruce A. Markell, *Towards True and Plain Dealing: A Theory of Fraudulent Transfers Involving Unreasonably Small Capital*, 21 IND. L. REV. 469 (1988).

(5) Courts have considered many factors when determining whether the debtor had an actual intent to hinder, delay, or defraud one or more creditors. Proof of the existence of any one or more of the factors listed in comment (6) below may be relevant evidence as to the debtor's actual intent but does not create a presumption that the debtor has made a fraudulent transfer or incurred a fraudulent obligation. The list of factors appearing below includes most of the badges of fraud that have been recognized by the courts in construing and applying the Statute of 13 Elizabeth and section 7 of the UFCA. Not all of the badges should receive equal weight in every case. The presence of certain badges in combination establishes fraud conclusively—*i.e.*, without regard to the actual intent of the parties—when they concur as provided in section 4(b) or in section 5.

Most of the factors below have a long heritage in fraudulent transfer law. The fact that a transfer has been made to a relative or to an affiliated corporation has not been regarded as a badge of fraud sufficient to warrant avoidance when unaccompanied by any other evidence of fraud. The courts have uniformly recognized, for example, that a transfer to a closely related person—discussed in comment 6(a)—warrants close scrutiny of the other circumstances, including the nature and extent of the consideration exchanged. *See* 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 307 (rev. ed. 1940). The factors in comments 6(b), 6(c), 6(d) and 6(e) are all adapted from the classic catalogue of badges of fraud provided by Lord Coke in *Twyne's Case*, 3 Coke 80b, 76 Eng. Rep. 809 (Star Chamber 1601). Lord Coke also included the use of a trust and the recitation in the instrument of transfer that it "was made honestly, truly, and bona fide," but the use of the trust is fraudulent only when accompanied by elements or badges specified in this Act, and recitals of "good faith" can no longer be regarded as significant evidence of a fraudulent intent.

(6) In considering badges of fraud generally, a court should evaluate all the relevant circumstances involving a challenged transfer or obligation. Thus the court may appropriately take into account all indicia negating as well as those suggesting fraud, as illustrated in the following reported cases:

(a) Whether the transfer or obligation was to an insider: *Salomon v. Kaiser*, 722 F.2d 1574, 1582-83 (2d Cir. 1983) (holding insolvent debtor's purchase of two residences in the name of his spouse and the creation of a dummy corporation for the purpose of concealing assets to be evidence of fraudulent intent); *Travelers Indemnity Co. v. Cormaney*, 138 N.W.2d 50 (Iowa 1965) (noting that a transfer between spouses was a circumstance that shed suspicion on the transfer and that with other circumstances warranted avoidance); *Lumpkins v. McPhee*, 286 P.2d 299 (N.M. 1955) (holding that transfer from daughter to mother indicated fraud but was not fraudulent due to adequacy of consideration and delivery of possession by transferor); *Hatheway v. Hanson*, 297 N.W. 824 (Iowa 1941) (holding that transfer from parent to child requires a critical examination of surrounding circumstances, which, together with other indicia of fraud, warranted avoidance); *Milburn*, 34 N.E. at 985 (Ind. 1893); *Banner Construction Corp. v. Arnold*, 128 So.2d 893 (Fla. Dist. App. 1961) (finding that assignment by one corporation to another having identical directors and stockholders constituted a badge of fraud).

(b) Whether the transferor retained possession or control of the property after the transfer: *Jones v. Gott*, 10 Ind. 250 (1858); *Cable Co. v. McElhoe*, 108 N.E. 790 (Ind. App. 1915); *Allen v. Massey*, 84 U.S. (17 Wall.) 351 (1872) (joint possession of furniture by transferor and transferee considered in holding transfer to be fraudulent); *Warner v. Norton*, 61 U.S. (20 How.) 448 (1857) (surrender of possession by transferor deemed to negate allegations of fraud); *Harris v. Shaw*, 272 S.W.2d 53 (Ark. 1954) (retention of property by transferor said to be a badge of fraud and, together with other badges, warrants avoidance of transfer); *Stephens v. Reginstein*, 8 So. 68 (Ala. 1890) (transferor's retention of control and management of property and business after transfer held material in determining transfer to be fraudulent). *See also* IND. CODE § 32-2-1-7 [repealed in 1993 by the Indiana Act](raising presumption of fraud from sale of goods without change in possession).

(c) Whether the transfer or obligation was concealed or disclosed: *Warner*, 61 U.S. at 448 (although secrecy said to be a circumstance from which, when coupled with other badges, fraud may be inferred, transfer was held not to be fraudulent when made in good faith and transferor surrendered possession); *W.T. Raleigh Co. v. Barnett*, 44 So.2d 585 (Ala. 1950) (failure to record a deed in itself said not to evidence fraud, and transfer held not to be fraudulent); *Walton v. First Nat'l Bank*, 22 P. 440 (Col. 1889) (agreement between parties to conceal the transfer from the public said to be one of the strongest badges of fraud).

(d) Whether, before the transfer was made or obligation was incurred, a creditor sued or threatened to sue the debtor: *Spiers v. Whitesell*, 61 N.E. 28 (Ind. App. 1901) (conveyance for \$1 coupled with agreement by transferee to take care of transferor void as against creditor who reduced claim to judgment a few weeks thereafter); *Harris*, 272 S.W.2d at 53 (transfer held to be fraudulent when causally connected to pendency of litigation and accompanied by other badges of fraud); *Pergrem v. Smith*, 255 S.W.2d 42 (Ky. App. 1953) (transfer in anticipation of suit deemed to be a badge of fraud; transfer held fraudulent when accompanied by insolvency of transferor who was related to transferee); *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963) (although threat or pendency of litigation said to be an indicator of fraud, transfer was held not to be fraudulent when adequate consideration and good faith were shown).

(e) Whether the transfer was of substantially all the debtor's assets: *Walbrun v. Babbitt*, 83 U.S. (16 Wall.) 577 (1872) (sale by insolvent retail shop owner of all of his inventory in a single transaction held to be fraudulent); *Lumpkins*, 286 P.2d at 299 (N.M. 1955) (although transfer of all assets said to indicate fraud, transfer held not to be fraudulent because full consideration was paid and transferor surrendered possession); *Cole v. Mercantile Trust Co.*, 30 N.E. 847 (N.Y. 1892) (transfer of all property before plaintiff could obtain a judgment held to be fraudulent).

(f) Whether the debtor had absconded: *In re Thomas*, 199 F. 214 (N.D.N.Y. 1912) (when debtor collected all of his money and property with the intent to abscond, fraudulent intent was held to be shown).

(g) Whether the debtor had removed or concealed assets: *Bentley v. Young*, 210 F. 202 (S.D.N.Y. 1914), *aff'd*, 223 F. 536 (2d Cir. 1915) (debtor's removal of goods from store to conceal their whereabouts and to sell them held to render sale fraudulent); *Cioli v. Kenourgios*, 211 P. 838 (Cal. App. 1922) (debtor's sale of all assets and shipment of proceeds out of the country held to be fraudulent notwithstanding adequacy of consideration).

(h) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred: *Jameson v. Dilley*, 61 N.E. 601 (Ind. App. 1901) (inadequate consideration stated as grounds for setting aside transfer even though transferor had no notice of intention to defraud); *Texas Sand Co. v. Shield*, 381 S.W.2d 48 (Tex. 1964) (inadequate consideration said to be an indicator of fraud, and transfer held to be fraudulent because of inadequate consideration, pendency of suit, family relationship of transferee, and fact that all non-exempt property was transferred); *Weigel v. Wood*, 194 S.W.2d 40 (Mo. 1946) (although inadequate consideration said to be a badge of fraud, transfer held not to be fraudulent when inadequacy not gross and not accompanied by any other badge; fact that transfer was from father to son held not sufficient to establish fraud); *Toomay v. Graham*, 151 S.W.2d 119 (Mo. Ct. App. 1941) (although mere inadequacy of consideration said not to be a badge of fraud, transfer held to be fraudulent when accompanied by badges of fraud).

(i) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation was incurred: *Bank of Sun Prairie*, 218 F. Supp. at 769 (although the insolvency of the debtor said to be a badge of fraud, transfer held not fraudulent when debtor was shown to be solvent, adequate consideration was paid, and good faith was shown, despite the pendency of suit); *Harris*, 272 S.W.2d at 53 (insolvency of transferor said to be a badge of fraud and transfer held fraudulent when accompanied by other badges of fraud); *Wareheim v. Bayliss*, 131 A. 27 (Md. 1925) (although insolvency of debtor acknowledged to be an indicator of fraud, transfer held not to be fraudulent when adequate consideration was paid and whether debtor was insolvent in fact was doubtful).

(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred: *Commerce Bank of Lebanon v. Halladale A Corp.*, 618 S.W.2d 288, 292 (Mo. Ct. App. 1981) (when transferor incurred substantial debts near in time to the transfer, transfer was held to be fraudulent due to inadequate consideration, close family relationship, the debtor's retention of possession, and the fact that almost all the debtors' property was transferred).

(k) Whether the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor: *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206 (3d Cir. 1990) (bank forecloses on assets of steel company at 5:00 p.m. on a Friday, and then transfers assets to affiliate of debtor; bank makes loan to affiliate to enable it to purchase at foreclosure sale on almost the same terms as old loan; and new business opens up Monday morning.). The evil targeted by this factor is not hard to identify: collusive and abusive use of a lienor's superior position to eliminate junior creditors while leaving equity holders unaffected. The kind of disposition sought to be reached here is exemplified by that found in *Northern Pacific Co. v. Boyd*, 228 U.S. 482 (1913), the leading case in establishing the absolute priority doctrine in reorganization law. There the Court held that a reorganization whereby the secured creditors and the management-owners retained their economic interests in a railroad through a foreclosure that cut off claims of unsecured creditors against its assets was in effect a fraudulent disposition. *Id.* at 502-05. See Bruce A. Markell, *Owners, Auctions and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN. L. REV. 69, 74-83 (1991); Jerome Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization*, 19 VA. L. REV. 541, 693 (1933). For cases in which an analogous injury to unsecured creditors was inflicted by a lienor and a debtor, see *Jackson v. Star Sprinkler Corp. of Fla.*, 575 F.2d 1223, 1231-34 (8th Cir. 1978); *Heath v. Helmick*, 173 F.2d 157, 161-62 (9th Cir. 1949); *Toner v. Nuss*, 234 F. Supp. 457, 461-62 (E.D. Pa. 1964); and see *In re Spotless Tavern Co., Inc.*, 4 F. Supp. 752, 753, 755 (D.Md. 1933).

(7) Nothing in comments (5) and (6) is intended to affect the application of sections 2-402(2), 9-205, 9-301, or 6-105 of the UCC, codified in Chapter 1 of Article I of Title 26 of the Indiana Code. Section 2-402(2) recognizes the generally prevailing rule that retention of possession of goods by a seller may be fraudulent but limits the application of the rule by negating any imputation of fraud from "retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification." Section 9-205 explicitly negates any imputation of fraud from the grant of liberty by a secured creditor to a debtor to use, commingle, or dispose of personal property, collateral, or to account for its proceeds. The section recognizes that it does not relax prevailing requirements for delivery of possession by a pledgor. Moreover, the section does not mitigate the general requirement of section 9-301(1)(b) that a nonpossessory security interest in personal property must be accompanied by notice-filing to be effective against a levying creditor. Finally, like the UFCA, this Act does not pre-empt the statutes governing bulk transfers, such as Article 6 of the Uniform Commercial Code. Compliance with the cited sections of the Uniform Commercial Code does not, however, insulate a transfer or obligation from avoidance. Thus a sale by an insolvent debtor for less than a reasonably equivalent value would be voidable under this Act notwithstanding compliance with the UCC.

Section 5. Transfers Fraudulent as to Present Creditors

[IND. CODE § 32-2-7-15]

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

2. *The Comment.*—Section 5 is derived from section 4 of the UFCA. It adheres to the limitation of the protection of that section to a creditor who extended credit before the transfer or obligation described. As pointed out in comment (2) accompanying section 4, this Act substitutes “reasonably equivalent value” for “fair consideration.”

The classic condition of financial stringency was insolvency. *Deming Hotel*, 24 N.E.2d at 912. One who has more debts than assets should not give away assets. Creditors are injured. Insolvency, however, is a term of art that has never acquired a fixed meaning. Legal insolvency, for example, refers to a balance sheet concept of more debts than assets; equitable insolvency refers to the inability to pay current debts as they became due. As set forth above in the comments to section 2, the UFTA blends both tests.

Section 6. When Transfer is Made or Obligation is Incurred

[IND. CODE § 32-2-7-16]

1. *The Text.*—For the purposes of this Act:

(1) a transfer is made:

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

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

(2) if applicable law permits the transfer to be perfected as provided in paragraph (1) and the transfer is not so perfected before the commencement of an action for relief under this Act, the transfer is deemed made immediately before the commencement of the action;

(3) if applicable law does not permit the transfer to be perfected as provided in paragraph (1), the transfer is made when it becomes effective between the debtor and the transferee;

(4) a transfer is not made until the debtor has acquired rights in the asset transferred;

(5) an obligation is incurred:

(i) if oral, when it becomes effective between the parties; or

(ii) if evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

2. *The Comment.*—(1) One of the uncertainties in the law governing the avoidance of fraudulent transfers and obligations is the difficulty of determining when the cause of action arises. Subsection (1) clarifies this point in time. For transfers of real estate, section 6(1) fixes the time as the date of perfection against a good faith purchaser from the transferor and for transfers of fixtures and assets constituting personalty, the time is fixed as the date of perfection against a judicial lien creditor not asserting rights under this Act. Perfection typically is effected by notice-filing, recordation, or delivery of unequivocal possession. See UCC §§ 9-302, 9-304, and 9-305 (security interest in personal property perfected by notice filing or delivery of possession to transferee); 4 AMERICAN LAW OF PROPERTY §§ 17.10-17.12 (1952) (recordation of transfer or delivery

of possession to grantee required for perfection against bona fide purchaser from grantor). The provision for postponing the time a transfer is made until its perfection is an adaptation of section 548(d)(1) of the Bankruptcy Code. When no steps are taken to perfect a transfer that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to avoid it; without such a provision to cover that eventuality, an unperfected transfer would arguably be immune to attack. Some transfers—*e.g.*, an assignment of a bank account, creation of a security interest in money, or execution of a marital or premarital agreement for the disposition of property owned by the parties to the agreement—may not be amenable to perfection as against a bona fide purchaser or judicial lien creditor. When a transfer is not perfectible as provided in paragraph (1), the transfer occurs for the purpose of this Act when the transferor effectively parts with an interest in the asset as provided in section 1(9), *supra*.

(2) Paragraph (4) requires the transferor to have rights in the asset transferred before the transfer is made for the purpose of this section. This provision makes clear that its purpose may not be circumvented by notice-filing or recordation of a document evidencing an interest in an asset to be acquired in the future. *Cf.* Bankruptcy Code § 547(e); UCC § 9-203(1)(c).

(3) Paragraph (5) is new. It is intended to resolve uncertainty arising from *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 989-91, 997 (2d Cir. 1981), insofar as that case holds that an obligation of guaranty may be deemed to be incurred when advances covered by the guaranty are made rather than when the guaranty first became effective between the parties. *Compare* Robert J. Rosenberg, *Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware*, 125 U. PA. L. REV. 235, 256-57 (1976).

An obligation may be avoided as fraudulent under this Act if it is incurred under the circumstances specified in section 4(a) or section 5(a). The debtor may receive reasonably equivalent value in exchange for an obligation incurred even though the benefit to the debtor is indirect. *See Rubin*, 661 F.2d at 991-92; *Williams v. Twin City Co.*, 251 F.2d 678, 681 (9th Cir. 1958); *Rosenberg*, *supra* at 243-46.

Section 7. Remedies of Creditors [IND. CODE § 32-2-7-17]

1. *The Text.*—(a) In an action for relief against a transfer or obligation under this Act, a creditor, subject to the limitations in section 8, may obtain:

- (1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
- (2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by Indiana Code § 34-1-11-1, or any other applicable statute providing for attachment or other provisional remedy against debtors generally;
- (3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure,
 - (i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred, its proceeds or of other property;
 - (ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee: or
 - (iii) any other relief the circumstances may require.

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

2. *The Comment.*—(1) This section is derived from sections 9 and 10 of the UFCA. Section 9 of that Act specified the remedies of creditors whose claims have matured, and section 10 enumerated the remedies available to creditors whose claims have not matured. A creditor holding an unmatured claim may be denied the right to receive payment for the proceeds of a sale on execution until his claim has matured, but the proceeds may be deposited in court or in an interest-bearing account pending the maturity of the creditor's claim. The remedies specified in this section are not exclusive.

(2) The availability of an attachment or other provisional remedy has been restricted by amendments of statutes and rules of procedure to reflect views of the Supreme Court expressed in *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969), and its progeny. This judicial development and the procedural changes that followed in its wake do not preclude resort to attachment by a creditor in seeking avoidance of a fraudulent transfer or obligation. *See, e.g.*, *Britton v. Howard Sav. Bank*, 727 F.2d 315, 317-20 (3d Cir. 1984); *Computer Sciences Corp. v. Sci-Tek Inc.*, 367 A.2d 658, 661 (Del. Super. 1976); *Great Lakes Carbon Corp. v. Fontana*, 54 A.D.2d 548 (N.Y. App. Div. 1976). Section 7(a)(2) [IND. CODE § 32-2-7-17(a)(2)] continues the authorization for the use of attachment contained in section 9(b) of the UFCA, or of a similar provisional remedy, when the state's procedure provides therefor, subject to the constraints imposed by the due process clauses of the United States and state constitutions. To the extent that this provision provides additional ground for attachment, Indiana Trial Rule 64(B) will need to be modified.

(3) Subsections (a) and (b) of section 10 of the UFCA authorized the court, in an action on a fraudulent transfer or obligation, to restrain the defendant from disposing of his property, to appoint a receiver to take charge of his property, or to make any order the circumstances may have required. Section 10, however, applied only to a creditor whose claim was unmatured. There is no reason to restrict the availability of these remedies to such a creditor, and the courts have not so restricted them. *See, e.g.*, *Lipskey v. Voloshen*, 141 Atl. 402, 404-05 (Md. 1928) (judgment creditor granted injunction against disposition of property by transferee, but appointment of receiver denied for lack of sufficient showing of need for such relief); *Matthews v. Schusheim*, 36 Misc.2d 918, 922-23, 235 N.Y.S.2d 973, 976-77, 991-92 (Sup. Ct. 1962) (injunction and appointment of receiver granted to holder of claims for fraud, breach of contract, and alimony arrearages; whether creditor's claim was mature said to be immaterial); *Oliphant v. Moore*, 293 S.W. 541, 542 (Tenn. 1927) (tort creditor granted injunction restraining alleged tortfeasor's disposition of property).

(4) As under the UFCA, a creditor is not required to obtain a judgment against the debtor-transferor nor to have a matured claim in order to proceed under subsection (a). *See American Surety Co. v. Conner*, 166 N.E. 783 (N.Y. 1929), 65 A.L.R. 244 (1929); 1 GARRARD GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* 129 (rev. ed. 1940); § 1(3) & (4), *supra*. In this regard, *Jackson v. Saylor*, 63 N.E. 881 (Ind. App. 1902) is disapproved to the extent that it holds that a court will set aside a fraudulent transfer unless the defendant has no property other than that which is the subject of the fraudulent transfer action.

(5) The provision in subsection (b) for a creditor to levy execution on a fraudulently transferred asset continues the availability of a remedy provided in section 9(b) of the

UFCA. *See, e.g.*, *Montana Ass'n of Credit Mgmt. v. Hergert*, 593 P.2d 1059, 1063, 1065 (Mont. 1979); *Doland v. Burns Lumber Co.*, 194 N.W. 636 (Minn. 1923); *Corbett v. Hunter*, 436 A.2d 1036, 1038 (Pa. Super. Ct. 1981). *See also American Surety*, 166 N.E. at 784, 65 A.L.R. at 247 ("In such circumstances he [the creditor] might find it necessary to indemnify the sheriff and, when the seizure was erroneous, assume[] the risk of error"); James A. McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 441-42 (1933).

(6) The remedies specified in section 7 [IND. CODE § 32-2-7-17], like those enumerated in sections 9 and 10 of the UFCA, are cumulative. *McNally v. White*, 54 N.E. 794, 56 N.E. 214 (Ind. 1899) (not error for court of equity to direct property which had been fraudulently conveyed to be sold upon order of sale rather than upon execution); *Lind v. O. N. Johnson Co.*, 282 N.W. 661, 667 (Minn. 1939), 119 A.L.R. 940 (1939) (UFCA held not to impair or limit availability of the "old practice" of obtaining judgment and execution returned unsatisfied before proceeding in equity to set aside a transfer); *Conemaugh Iron Works Co. v. Delano Coal Co., Inc.*, 298 Pa. 182, 186, 148 A. 94, 95 (Pa. 1929) (UFCA held to give an "additional optional remedy" and not to "deprive a creditor of the right, as formerly, to work out his remedy at law"); 1 GARRARD GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* 120, 130, 150 (Rev. ed. 1940).

Section 8. Defenses, Liability, and Protection of Transferee

[IND. CODE § 32-2-7-18]

1. *The Text.*—(a) A transfer or obligation is not voidable under Section 4(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Section 7(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

- (1) the first transferee of the asset or the person for whose benefit the transfer was made; or
- (2) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

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

(d) Notwithstanding voidability of a transfer or an obligation under this Act, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to

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

(e) A transfer is not voidable under Section 4(b) or Section 5 if the transfer results from:

- (1) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or
- (2) enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

2. *The Comment.*—(1) Subsection (a) [IND. CODE § 32-2-7-18(a)] states the rule that applies when the transferee establishes a complete defense to the action for avoidance based on section 4(a) [IND. CODE § 32-2-7-14(1)]. The subsection is an adaptation of the exception stated in section 9 of the UFCA. The person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. *Chorost v. Grand Rapids Factory Showrooms, Inc.*, 77 F. Supp. 276, 280 (D.N.J. 1948), *aff'd*, 172 F.2d 327, 329 (3d Cir. 1949).

(2) Subsection (b) [IND. CODE § 32-2-7-18(b)] is derived from section 550(a) of the Bankruptcy Code. The value of the asset transferred is limited to the value of the levyable interest of the transferor, exclusive of any interest encumbered by a valid lien. *See* section 1(2), *supra*.

The requirement of section 550(b)(1) of the Bankruptcy Code that a transferee be “without knowledge of the voidability of the transfer” in order to be protected has been omitted as inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee. Knowledge of the voidability of a transfer would seem to involve a legal conclusion. Determination of the voidability of the transfer ought not to require the court to inquire into the legal sophistication of the transferee.

(3) Subsection (c) [IND. CODE § 32-2-7-18(c)] is new. The measure of the recovery of a defrauded creditor against a fraudulent transferee is usually limited to the value of the asset transferred at the time of the transfer. *See, e.g., United States v. Fernon*, 640 F.2d 609, 611 (5th Cir. 1981); *Hamilton Nat'l Bank of Boston v. Halstead*, 31 N.E. 900 (N.Y. 1892); *cf. Buffum v. Peter Barceloux Co.*, 289 U.S. 227 (1932) (transferee's objection to trial court's award of highest value of asset between the date of the transfer and the date of the decree of avoidance rejected because an award measured by value as of time of the transfer plus interest from that date would have been larger). The premise of section 8(c) [IND. CODE § 32-2-7-18(c)] is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor's recovery. Circumstances may require a departure from that measure of the recovery, however, as the cases decided under the UFCA and other laws derived from the Statute of 13 Elizabeth illustrate. Thus, if the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by improvements of the asset transferred or discharge of liens on the property, a good faith transferee should be reimbursed for the outlay for such a purpose to the extent the sale proceeds were increased thereby. *See* Bankruptcy Code section 550(d); *Janson v. Schier*, 375 A.2d 1159, 1160 (N.H. 1977); *Anno.*, 8 A.L.R. 527 (1920). If the value of the asset has been diminished by severance and disposition of timber or minerals or fixtures, the transferee should be liable for the amount of the resulting reduction. *See Damazo v. Wahby*, 305 A.2d 138, 142 (Md. 1973). If the transferee has collected rents, harvested crops, or derived other income from the use or occupancy of the asset after the transfer, the liability of the transferee should be limited in any event to the net income after deduction of the expense incurred in earning the income. *See Anno.*, 60 A.L.R.2d 593 (1958). On the other hand, adjustment for the equities does not warrant an award to the creditor of consequential damages alleged to accrue from mismanagement of the asset after the transfer.

(4) Subsection (d) [IND. CODE § 32-2-7-18(d)] is an adaptation of section 548(c) of the Bankruptcy Code. An insider who receives property or an obligation from an insolvent debtor as security for or in satisfaction of an antecedent debt of the transferor or obligor

is not a good faith transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or the obligation was incurred.

(5) Subsection (e)(1) [IND. CODE § 32-2-7-18(e)(1)] rejects the rule adopted in *Darby v. Atkinson*, 415 F. Supp. 33, 39-41 (W.D. Okla. 1976), that termination of a lease on default in accordance with its terms and applicable law may constitute a fraudulent transfer. Subsection (e)(2) [IND. CODE § 32-2-7-18(e)(2)] protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement of a secured creditor's rights pursuant to and in compliance with the provisions of Part 5 of Article 9 of the UCC. *Cf. Calaiaro v. Pittsburgh Nat'l Bank*, 33 B.R. 288, (Bankr. W.D.Pa. 1983) (sale of pledged stock held subject to avoidance as fraudulent transfer in section 548 of the Bankruptcy Code), *rev'd*, 36 B.R. 476 (W.D.Pa. 1984) (transfer held not voidable because deemed to have occurred more than one year before bankruptcy petition filed). Although a secured creditor may enforce rights in collateral without a sale under section 9-502 or section 9-505 of the Code, the creditor must proceed in good faith (UCC section 9-103) and in a "commercially reasonable" manner. The "commercially reasonable" constraint is explicit in UCC section 9-502(2) and is implicit in section 9-505. *See* 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1224-27 (1965).

Section 9. Extinguishment of Cause of Action
[IND. CODE § 32-2-7-19]

1. *The Text.*—A cause of action with respect to a fraudulent transfer or obligation under this Act is extinguished unless action is brought:

(a) under Section 4(a), within 4 years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant; or

(b) under Section 4(b) or 5(a), within 4 years after the transfer was made or the obligation was incurred.

2. *The Comment.*—(1) This section is new. Its purpose is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy. *See* RESTATEMENT OF CONFLICT OF LAWS 2D § 143 comments (b) & (c) (1971). The section rejects the rule applied in *United States v. Gleneagles Inv. Co.*, 565 F. Supp. 556, 583 (M.D. Pa. 1983) (state statute of limitations held not to apply to action by United States based on UFCA).

(2) Statutes of limitations applicable to the avoidance of fraudulent transfers and obligations vary widely from state to state and are frequently subject to uncertainties in their application. *See* Samuel M. Hesson, *The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations*, 32 CORNELL L.Q. 222 (1946); 100 A.L.R.2d 1094 (1965), 14 A.L.R.2d 598 (1950), 33 A.L.R. 1311 (1941), 128 A.L.R. 1289 (1940), Annos., 76 A.L.R. 864 (1932). Together with section 6 [IND. CODE § 32-2-7-16], this section should mitigate the uncertainty and diversity that have characterized the decisions applying statutes of limitations to actions to fraudulent transfers and obligations. The periods prescribed apply, whether the action under this Act is brought by the creditor defrauded or by a purchaser at a sale on execution levied pursuant to section 7(b) [IND. CODE § 32-2-7-17(b)] and whether the action is brought against the original transferee or subsequent transferee. The prescription of statutory periods of limitation does not preclude the barring of an avoidance action for laches. *See* § 10 and the accompanying comment *infra*.

Section 10. Supplementary Provisions [IND. CODE § 32-2-7-20]

1. *The Text.*—Unless displaced by the provisions of this Act, the principles of law and equity, including the law merchant and the law relating to principal and agent, equitable subordination, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

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

Section 11. Uniformity of Application and Construction
[IND. CODE § 32-2-7-21]

1. *The Text.*—This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

2. *The Comment.*—Indiana will join of majority of jurisdictions when it adopts the UFTA. This section is meant to ensure that court will be able use and cite precedent from other jurisdictions when interpreting the act. Care, however, should be taken to give appropriate effect to non-uniform provisions of the Indiana Act. For example, given the deletion in Indiana of the uniform definitions of “insider”, “affiliate” and “relative,” courts should feel free to weigh any appropriate indicators of closeness or of control should the circumstances warrant.

Section 12. Short Title [not enacted]

This Act may be cited as the Indiana Uniform Fraudulent Transfer Act.

Section 13. Repeal[†]

1. *The Text.*—(a) *The following provisions of the Indiana Code and all other acts and parts of acts inconsistent herewith (except as set forth in sub-section (b) hereof) are hereby repealed as of the effective date of this Act:*

- (1) *Indiana Code § 30-1-9-7 (relating to presumption of fraudulent intent with respect to resulting trusts);*
- (2) *Indiana Code § 32-2-1-7 (relating to presumption of fraud when goods are sold without change of possession);*
- (3) *Indiana Code § 32-2-1-8 (defining creditor for purposes of Indiana Code § 32-2-1-7);*

† Section 4 of Public Law 144-1994 repealed several statutes. It reads:

The following are repealed: IC 30-1-9-7; IC 32-2-1-7; IC 32-2-1-8; IC 32-2-1-9; IC 32-2-1-10; IC 32-2-1-14; IC 32-2-1-15; IC 32-2-1-16; IC 32-2-1-17; IC 32-2-1-18.

- (4) *Indiana Code § 32-2-1-9 (relating to transfers of real estate with intent to defraud prior or subsequent purchasers);*
- (5) *Indiana Code § 32-2-1-10 (providing for exception to Indiana Code § 32-2-1-9 for purchasers who take with notice);*
- (6) *Indiana Code § 32-2-1-14 (general fraudulent conveyance statute);*
- (7) *Indiana Code § 32-2-1-15 (relating to presumption of fraud for trusts settled for the use of the settlor);*
- (8) *Indiana Code § 32-2-1-16 (relating to rights of creditors and purchasers for transfers declared void under statutes of general application);*
- (9) *Indiana Code § 32-2-1-17 (relating to rights of innocent purchasers);*
- (10) *Indiana Code § 32-2-1-18 (stating that all questions of fraudulent intent are questions of fact); and*
- (11) *Indiana Code § 34-1-45-1 (providing for ability to set aside fraudulent conveyances of real estate).*

(b) *Nothing in this Act shall be construed to repeal any provision of Indiana Code § 27-9-3-14 (relating to fraudulent transfers in the context of insurance insolvencies).*

(c) *Indiana Code § 30-1-9-8 is hereby amended by striking the words "the section next before the last" in the first line thereof and inserted the following in lieu thereof: "Indiana Code § 30-1-9-7".*

(d) *Notwithstanding repeal as provided in Subsection (a), all statutes repealed by this Act shall continue to provide the rule of decision for and be applicable to all transfers made and obligations incurred prior to the effective date of this Act.*

2. *The Comment.—Given the wholesale revision to fraudulent transfer law envisioned by the Indiana Act, this repealer provision repeals conflicting existing law which has the same scope as the Indiana Act. These repealed laws are preserved, however, for the purpose of deciding cases involving transfers made or obligations incurred prior to the effective date of the Indiana Act.*

Section 14. Transition Provisions [not enacted]†

1. *The Text.—This Act shall apply to all transfers made and obligations incurred, as defined in section 6, on and after its effective date. Since this Act intends to revise and simplify, rather than restate, the law of fraudulent transfers, its provisions shall not be given retroactive effect.*

2. *The Comment.—Courts in some states interpreting the UFTA have applied its provisions retroactively to transfers and obligations occurring before the effective date of enactment. While there may be some support for this proposition in states which had previously adopted the UFCA, that is not the case in Indiana. The Indiana Act is intend to change and modify Indiana law, and thus it should apply only to those transfers made and obligations incurred from and after its effective date.*

† Section 32-2-7-1 of the Indiana Code handles transitions in a manner consistent with Indiana practice. That section reads:

(a) This chapter applies to all transfers made and obligations incurred after June 30, 1994.

(b) This chapter does not apply to a transfer made or an obligation incurred before July 1, 1994.

Amendment to Exemption Statute—Indiana Code section 34-2-28-1 [not enacted]

1. The Text.—Add the following section:

(e) (1) The judgment debtor's receipt of real estate or personal property as the result of a transfer which the judgment debtor intended, in good faith, to be generally exempt, and which is exempt, under this section or any other applicable exemption law shall not be subject to:

(A) avoidance under [any provision of the Indiana Uniform Fraudulent Transfer Act]; or

(B) attachment pursuant to Indiana Code § 34-1-11-1; or

(C) sale and execution pursuant to Indiana Code § 34-1-45-1.

(2) This subsection (e) shall not apply to judgments obtained prior to the effective date of the Indiana Uniform Fraudulent Transfer Act.

*2. The Comment.—(1) Subsection (e) is an addition to Indiana's existing statute providing for property which is exempt from involuntary court process. It reflects a resolution of the inherent tension between state exemption laws and the actual intent provisions of fraudulent transfer law. A well-advised debtor who attempts to take advantage of state exemption laws would seem to have a clear intent to hinder unsecured creditors. But this position, if adopted, would obliterate state exemption laws. This result would seem to be contrary to the strong state policy of preserving reasonable exemptions, as demonstrated by the Indiana state constitution. IND. CONST. art. 1, § 22 ("The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debtor or liability hereafter contracted . . ."). See also *Isrigg v. Pauley*, 47 N.E. 821 (Ind. 1897) (when debtor transfers exempt property and receives non-exempt property in exchange, proceeds of exchange retain exempt character in debtor's hands.).*

*(2) This proposed amendment address the converse of the situation in *Isrigg*: it seeks to validate a debtor's exchange of non-exempt assets for exempt ones. If this transfer is a good faith effort to convert such non-exempt property into exempt property, this amendment would provide a defense to an otherwise valid fraudulent transfer action. As with all defenses, the burden of qualifying for the defense—which includes, among other things, the burden of demonstrating good faith—falls to the defendant in the action.*

(3) The Committee does not believe that the effect of this defense on creditors will be severe. After enactment, creditors will have to assume that their debtors will take full advantage of the maximum exemptions possible. As seen from section 34-2-28-1 generally, that level is modest. If, however, that level presents an unacceptable credit risk, creditors can always request a waiver of the exemption as to that creditor, or may request security for the obligation. Indeed, such exemption planned is and has been sanctioned in the Bankruptcy Code for some time. S. Rep. No. 989, 95th Cong., 2d Sess. 76 (1978) ("As under current law, the debtor will be permitted to convert non-exempt property into exempt property before filing a petition. The practice is not fraudulent as to creditors and permits the debtor to make full use of the exemptions to which he is entitled under the law.").

(4) It is also the intent of this change to enable individuals to have adequate counsel in planning their financial affairs. Under current law, a lawyer who counsels a debtor to convert non-exempt property to exempt property could run afoul of ethical considerations if the transfer is later set aside. However, if he or she does not give

adequate counsel on the scope of the exemption law, he or she may also fail to adequately represent the client, and may even face claims of malpractice. The Act attempts to resolve this problem by allowing lawyers to counsel clients as to their ability to convert non-exempt into exempt assets. The good faith limitation, however, seeks to limit abuse of the problem.

(5) Under this amendment, no good faith transfer of non-exempt assets that yields exempt assets will be vulnerable to avoidance under the Indiana Act. The text of the statute requires both that the property received qualify as exempt property, and that the transfer be made in good faith. Thus, if the property received is not exempt the statute does not apply. Similarly, if circumstances indicate a lack of good faith—such as a sham marriage and a transfer of real property to the new husband and wife as tenants by the entireties to take advantage of section 34-2-28-1(a)(5)'s exemption—the section would not apply.