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A Practitioner's Guide to Pennsylvania's Newly Adopted Uniform Fraudulent Transfer Act

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I. Introduction

On December 3, 1993, the Pennsylvania Legislature substantially altered the nature of creditors' rights within the Commonwealth by repealing Pennsylvania's version of the Uniform Fraudulent Conveyance Act ("Pa. UFCA") and replacing it with Pennsylvania's version of the Uniform Fraudulent Transfer Act ("Pa. UFTA"). According to the statute's drafters, the switch to the Pa. UFTA was necessary to modernize and clarify the Pa. UFCA and to make Pennsylvania's law consistent with the laws of other states and the federal bankruptcy laws.[1] Although the Pa. UFTA is hailed as a refinement of the Uniform Fraudulent Transfer Act ("UFTA") and is purported to be "reflective of Pennsylvania practice,"[2] the unstated and perhaps unintentional result of the legislature's "modernization" and "synchronization" of Pennsylvania's fraudulent conveyance law is to dilute the rights of creditors in Pennsylvania. Honest creditors who were once protected by the Pa. UFCA will now have a more difficult time pursuing fraudulent debtors under the Pa. UFTA.

A. Development of the Law of Fraudulent Transfers

The laws forbidding fraudulent conveyances have their origin in the ancient Statute of 13 Elizabeth which was enacted in 1571. The Statute of 13 Elizabeth was designed to protect creditors by forestalling debtors from transferring their assets to friendly hands, thereby frustrating clamoring creditors.

The Uniform Fraudulent Conveyance Act ("UFCA") was developed in 1918 by the Conference of Commissioners on Uniform State Laws as

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1. *See* Report on the Pennsylvania Uniform Fraudulent Transfer Act with Committee Comments (May 21, 1994).

2. Introduction, Report on the Pennsylvania Uniform Fraudulent Transfer Act (May 21, 1994).

a "codification of the 'better' decisions applying the Statute of 13 Elizabeth."[3] In particular, the Commissioners drafted provisions governing constructive fraud, that is, fraud which is implied from the existence of certain, well-recognized facts, regardless of the transferor's intent. In the absence of such facts, actual fraudulent intent could also be proven under the UFCA. Pennsylvania adopted the UFCA in 1921.

The Federal Bankruptcy Code provision which governs fraudulent transfers,[4] Section 548, is derived from both the Statute of 13 Elizabeth and the UFCA.[5] However, the Bankruptcy Code differs from both of these statutes in that the Code is not based on the policy of protecting creditors; rather, "a central purpose of the Code" is providing certain debtors with a "fresh start."[6] As a result, Section 548 of the Code provides less protection to creditors than the UFCA.

Nonetheless, the National Conference of Commissioners on Uniform Laws looked to the Bankruptcy Code in 1984 when they developed the UFTA as a replacement for the UFCA.[7] A stated reason of the Commissioners in creating the UFTA was to devise a fraudulent transfer law that closely paralleled the federal bankruptcy laws.[8] In addition to bringing state law more in line with federal law, the UFTA was purportedly designed to enhance creditors' remedies against transferees, create new defenses for fraudulent transfer defendants, eliminate the "good faith" element of the UFCA's definition of "fair consideration," and provide a statutory enumeration of the types of facts which may be taken into account when considering the issue of actual intent to defraud. In 1993, Pennsylvania became the thirty-first state to adopt the UFTA, following California, Texas, Florida, and others.

In evaluating the need for an updated and uniform version of the law of fraudulent conveyances, the Commissioners concentrated on synchronizing the statutory structures of the law of fraudulent conveyances with the Bankruptcy Code, and they concentrated on eliminating obvious gaps in the coverage of the existing law governing fraudulent transactions. What the drafters of the Pa. UFTA apparently did not consider, but which will be considered in this article, is how the replacement of the Pa. UFCA with the Pa. UFTA will alter the Pennsylvania common law created by judicial application of the Pa.

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3. Annex to Introduction: Prefatory Note to the Uniform Fraudulent Transfer Act by the National Conference of Commissioners on Uniform State Laws.

4. 11 U.S.C. § 548.

5. 4 Collier on Bankruptcy § 548.01[1] (15th ed. 1992).

6. *See* Grogan v. Garner, 498 U.S. 279, 286 (1990).

7. *See* Prefatory Note to the Uniform Fraudulent Transfer Act.

8. *Id.*

UFCA, how the nuances of that judge-made law created important advantages for creditors, and how application of the Pa. UFTA might work subtle, unintended changes on the rights of debtors and creditors.

Part II of this article will compare generally the Pa. UFTA and the Pa. UFCA. Parts III and IV will discuss actual fraud and constructive fraud, will evaluate the likely reconfiguration of the rights between debtors and creditors that have resulted from the legislature's decision to replace the Pa. UFCA with the Pa. UFTA, and will examine the net effect of adoption of the Pa. UFTA on the litigators who will attempt to enforce its provisions. Part V will examine other issues that are associated with the adoption of the Pa. UFTA.

II. Similarities Between the Pa. UFTA and the Pa. UFCA

As a result of their common origins, the Pa. UFCA, the Pa. UFTA, and the fraudulent transfer portions of the Bankruptcy Code have several common components. First, all three statutes have provisions that prohibit intentional fraud by proscribing transactions designed to defraud, hinder, or delay creditors.[9] Second, all three statutes recognize the notion of constructive fraud, that is, fraud which is implied from the existence of certain, well-recognized facts, regardless of the transferor's actual intent.[10] Finally, all three statutes place significance upon the transferor's financial circumstances at the time of the transfer.[11] While other similarities among the laws of fraudulent conveyances may exist, these similarities represent the common threads that link all three statutes to their ancient ancestors.

Ironically, these common threads also represent the obvious points of divergence among the three statutes. Most of the differences among the statutes can be traced to the competing policies upon which the statutes are based, that is, the policy of creditor protection upon which the Pa. UFCA is based and the policy of debtor protection upon which the Bankruptcy Code is grounded.

III. Actual Intent To Defraud

The Bankruptcy Code, the Pa. UFTA, and the Pa. UFCA all contain similarly worded provisions that characterize, as fraudulent, transfers that

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9. 11 U.S.C. § 548(a)(1); 39 PA. STAT. § 357 (repealed 1993); 12 PA. CONS. STAT. ANN. § 5104(a)(1).

10. 11 U.S.C. § 548(a)(2); 39 PA. STAT. ANN. §§ 354, 355 (repealed 1993); 12 PA. CONS. STAT. ANN. § 5104; 12 PA. CONS. STAT. ANN. § 5105.

11. *See* 11 U.S.C. § 548(a)(2); 39 PA. STAT. ANN. § 354 (repealed 1993); 12 PA. CONS. STAT. ANN. § 5105.

have been made with actual intent to hinder, delay, or defraud creditors.[12] The Pa. UFTA diverges from the other two statutes by specifically enumerating certain "Badges of Fraud"[13] from which the trier of fact may infer an actual intent to defraud.

"'Badges of Fraud' are circumstances so frequently attending fraudulent transfers that the inference of fraud arises from them."[14] The drafters of the UFTA thought that by specifically enumerating the Badges of Fraud they would help the courts and practitioners in "appraising the welter of allegations and proof that may be tendered by the litigants in a case under the [UFTA]."[15]

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12. 11 U.S.C. § 548. Fraudulent transfers and obligations
(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily-
(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; . . .

2. 39 PA. STAT. § 357 (repealed 1993). Conveyance made with intent to defraud
Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

12 Pa. Cons. Stat. Ann. § 5104. Transfers fraudulent as to present and future creditors
(a) General rule—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:
(1) with actual intent to hinder, delay or defraud any creditor of the debtor; . . .

13. 12 Pa. Cons. Stat. Ann. § 5104(b)
Certain Factors.—In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:
(1) the transfer or obligation was to an insider;
(2) the debtor retained possession or control of the property transferred after the transfer;
(3) the transfer or obligation was disclosed or concealed;
(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
(5) the transfer was of substantially all the debtor's assets;
(6) the debtor absconded;
(7) the debtor removed or concealed assets;
(8) 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;
(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

14. Profeta v. Lombardo, 600 N.E.2d 360, 364 (Ohio Ct. App. 1991) (citations omitted).

15. Frank R. Kennedy, THE UNIFORM FRAUDULENT TRANSFER ACT, 18 UCC L.J. 195, 201

The Pa. UFCA did not contain a listing of the Badges of Fraud. Rather, under the Pa. UFCA, the courts recognized that "[s]ince fraud is usually denied, it must be inferred from all facts and circumstances surrounding the conveyance, including subsequent conduct."[16] In particular, "[w]here the transferor and transferee have knowledge of the claims of creditors and know that creditors cannot be paid and where consideration is lacking for the transfer the court may infer an intent to hinder delay or defraud creditors."[17]

Pennsylvania courts have long permitted the trier of fact to infer actual fraud from facts and circumstances that resemble the Badges of Fraud which are found in the Pa. UFTA. In addition, Pennsylvania courts have previously referred to the UFTA's Badges of Fraud in determining whether a conveyance was made with actual intent to hinder, delay, or defraud creditors under the Pa. UFCA.[18]

A specific statutory listing of the Badges of Fraud, therefore, does nothing to expand the fraudulent transfer theories upon which Pennsylvania creditors may rely. To the contrary, rather than simplifying the actual fraud analysis for the trier of fact, the Badges of Fraud may well make proving intentional fraud more difficult under the Pa. UFTA than under the Pa. UFCA. Because the list of the Badges of Fraud is, by its own terms, not inclusive, the list serves only as a legislative acknowledgement of well-recognized indicia of fraud. As a practical matter, the Badges of Fraud will most likely serve as the basis for a jury instruction that is as likely to confuse a jury as it is to enlighten it.

Although proof of one or more of the Badges of Fraud does not create a presumption of a fraudulent transfer,[19] the effect of such a list

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(1986). Professor Kennedy was the reporter for the committee which drafted the UFTA.

16. Godina v. Oswald, 211 A.2d 91, 93 (Pa. Super. Ct. 1965) (citing Sheffit v. Koff, 100 A.2d 393, 395 (Pa. Super. Ct. 1953) (citation omitted)). *See* Continental Bank v. Marcus, 363 A.2d 1318, 1321 (Pa. Super. Ct. 1976) (holding that "[actual] intent may be established by circumstantial evidence") (citation omitted).

17. United States v. Gleneagles Inv. Co., 565 F. Supp. 556, 580 (M.D. Pa. 1983), *aff'd in part and remanded*, United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. 1986), *cert. denied*, McClellan Realty Co. v. United States, 483 U.S. 1005 (1987); *see* Voest-Alpine Trading USA Corp. v. Vantage Steel, 732 F. Supp. 1315, 1324 (E.D. Pa. 1989); Godina v. Oswald, 211 A.2d 91 (Pa. Super. Ct. 1965) (holding that a jury could infer intent to defraud creditors from relationship between transferor and transferee and that transfer occurred immediately before civil trial in which transferor was a defendant).

18. *See* Moody v. Security Pac. Bus. Credit, Inc., 127 B.R. 958, 991 (W.D. Pa. 1991), *aff'd* 971 F.2d 1056 (3rd Cir. 1992); *In re* Pinto Trucking Service, Inc., 93 B.R. 379, 386-88 (Bankr. E.D. Pa. 1988); *In re* Compton, 70 B.R. 60, 62 (Bankr. W.D. Pa. 1987).

19. Comment (5) to 12 PA. CONS. STAT. ANN. 5104(b). *See* Lindholm v. Holtz, 581 N.E.2d 860, 864 (Ill. App. Ct. 1991) (interpreting Rich v. Rich, 405 S.E.2d 858 (W. Va. 1991)); Citizens State Bank v. Leth, 450 N.W.2d 923, 927 (Minn. Ct. App. 1990) (holding that the presence of

on the trier of fact cannot be denied. Indeed, observers and commentators, involved in the deliberations of the drafting committee of the UFTA, criticized the inclusion of the Badges of Fraud.[20] They objected largely because "evidence of the presence of one of the factors named in a case would be given disproportionate significance by the trier of fact."[21]

Conversely, legislative recognition of a list of common indicators of fraud may suggest to a jury that dishonest conduct must either fit within one of the categories enumerated in the statute or fall outside the purview of the law of fraudulent conveyances. The Badges of Fraud list attempts to categorize fraudulent conduct which, in all probability, defies categorization. Indeed, "the law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity."[22] The danger of such categorization is that juries will be tempted to pigeonhole all fraudulent actions into this specific list. A jury may not consider, as fraudulent, behavior that does not fit into any of the statutory Badges of Fraud even though that conduct may, in fact, be fraudulent.

Consequently, if defense lawyers responding to allegations of actual fraud are entitled to a jury instruction delineating the Badges of Fraud, they may use that instruction as a device to convince jurors that their clients' behavior falls outside the parameters of the Badges of Fraud and, therefore, cannot amount to serious evidence of fraudulent intent. The absence of evidence of a specifically delineated Badge of Fraud will enable defense lawyers to argue that the plaintiffs have failed to satisfy their substantial burdens, notwithstanding ample evidence of fraudulent conduct that falls outside the categories of conduct created by the Badges of Fraud provision in the Pa. UFTA.

Furthermore, neither the UFTA nor the interpretative case law from other jurisdictions offer proper guidance in applying the Badges of Fraud. It is unclear whether conduct may constitute actual fraud under the Pa. UFTA if it does not include at least one of the Badges of Fraud or involves only one or two of the Badges of Fraud and is otherwise not objectionable. In summary, while the Pa. UFTA's list of the Badges of Fraud may, at first blush, appear to be a sword in the hands of creditors,

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several Badges of Fraud supported a finding of actual intent); U.S. v. Romano, 757 F. Supp. 1331, 1337 (M.D. Fla. 1989), *aff'd* 918 F.2d 182 (11th Cir. 1990) (same).

20. Kennedy, 18 U.C.C. L.J. at 201.

21. Kennedy, U.C.C. L.J. at 201.

22. United States v. Curry, 681 F.2d 406, 410 (5th Cir. 1982) (quoting Weiss v. U.S., 122 F.2d 675, 681 (5th Cir. 1941), *cert. denied*, 314 U.S. 687 (1941)).

it may well prove to be a shield in the hands of debtors and their transferees.

The danger in specifically enumerating Badges of Fraud cannot be viewed out of context. Pursuant to section 357 of the UFCA and section 548(a) of the Bankruptcy Code, plaintiffs have the burden of proving actual intent to defraud by clear and convincing evidence.[23] The new statute will not change this burden of persuasion.[24] However, an undesirable and presumably unintended consequence of the Pa. UFTA's adoption of the Badges of Fraud may be that defense attorneys will seize upon the absence of several Badges of Fraud to argue that the plaintiffs' evidence cannot meet this weighty burden.

IV. Constructive Fraud

The Code, the Pa. UFCA, and the Pa. UFTA all recognize that, under certain circumstances, a transfer or an incurred obligation may be constructively fraudulent; that is, the circumstances are such that the intent of the transferor is irrelevant to a determination of fraud.[25]

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23. *See Moody*, 127 B.R. at 990 (citing United States v. Gleneagles Inv. Co., 565 F. Supp. 556, 580 (M.D. Pa. 1983), *aff'd in part and remanded*, United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3rd Cir. 1986), *cert. denied*, McClellan Realty Co. v. United States, 483 U.S. 1005 (1987); *In re* DeVito, 111 B.R. 529, 531 (Bankr. W.D. Pa. 1990)); *In re* Metro Shippers, Inc., 78 B.R. 747, 750-51 (Bankr. E.D. Pa. 1987). *But see* Chorost v. Grand Rapids Factory Showrooms, 77 F. Supp. 276, 280 (D. N.J. 1948) (holding that actual intent to defraud creditors must be proved by a "fair preponderance of evidence"), *aff'd*, 172 F.2d 327 (3rd Cir. 1949).

24. *See* Reddy v. Gonzalez, 8 Cal. App. 4th 118, 123 (Cal. Ct. App. 1992) (applying California's version of § 5104 A and noting that "actual intent to defraud must be shown by clear and convincing evidence").

25. 11 U.S.C. § 548. Fraudulent Transfers and Obligations

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily . . .
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
>
> (iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

39 PA. STAT. ANN. § 354 (repealed 1993). Conveyances by insolvents

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent, is fraudulent as to creditors, without regard to his actual intent,if the conveyance is made or the obligation is incurred without a fair consideration.

39 PA. STAT. ANN. § 355 (repealed 1993). Conveyances by persons in business

> Every conveyance made without fair consideration, when the person making it is engaged, or is about to engage, in a business or transaction for which the property remaining in his

Pursuant to all three statutes, a transfer is constructively fraudulent if made for inadequate consideration and, if 1) the transferor was insolvent when the transfer was made or became insolvent due to the transfer; 2) the transferor was undercapitalized after the transfer; or 3) the debtor believed he would incur debts that would be beyond his ability to pay.[26]

A. Constructive Fraud: Transfers by Insolvents

Of the three forms of constructive fraud recognized by the statutes, the provisions governing transfers made by insolvents are the most important,[27] and have been most frequently utilized by creditors. Pennsylvania law has historically favored the rights of creditors in constructive fraud cases as evidenced by the evidentiary principles of burden shifting which developed under the Pa. UFCA. Pursuant to these principles, after a plaintiff proved that the transferor transferred an asset while in debt, the burden then shifted to the party defending the transaction to prove by clear and convincing evidence that the debtor was not insolvent at the time of the transaction, was not rendered insolvent by

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hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors, and as to other persons who become creditors during the continuance of such business or transaction, without regard to his actual intent.

39 PA. STAT. § 356 (repealed 1993). Conveyances by a person who is about to incur debts

> Every conveyance made and every obligation incurred without fair consideration, when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

12 PA. CONS. STAT. ANN. § 5104. Transfers fraudulent as to present and future creditors

> (a) General rule.—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:...
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (i) 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
>
> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

12 PA. CONS. STAT. ANN. § 5105. Transfers fraudulent as to present creditors

> 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.

26. 11 U.S.C. § 548(a); 39 PA. STAT. § 354-356; 12 PA. CONS. STAT. § 5104(a)(2).

27. 5 Debtor-Creditor Law § 22.04[B] (Theodore Eisenberg ed., Times-Mirror Books 1990).

the transaction, or that the transferor received fair consideration for the object transferred.

Unfortunately for creditors, the drafters of the Pa. UFTA have rejected this burden shifting doctrine as an "archaism," which "in any event should not be followed" in applying the Pa. UFTA.[28] However, the drafters did not reject evidentiary fictions completely; rather, they substituted a rebuttable presumption of insolvency that makes certain changes in the order and burdens of proof. The Pa. UFTA also significantly changes the Pa. UFCA's definition of insolvency and deletes the Pa. UFCA's good faith component of fair consideration. In total, these modifications will make proving constructive fraud considerably more difficult for creditors under the new statute.

B. Rebuttable Presumption of Insolvency

The Pa. UFTA contains a rebuttable presumption of insolvency,[29] not found in either the Bankruptcy Code or in the Pa. UFCA, which provides that a debtor who is not generally paying his debts as they become due is presumed to be insolvent. Once a debtor is found to be presumptively insolvent, the burden of proof switches to the debtor to demonstrate that "the nonexistence of insolvency is more probable than its existence."[30] Determining whether a debtor is generally not paying his debts as they become due "[calls] for inquiry mainly into the extent to which the debtor is now *actually* paying debts *presently* due."[31] More specifically,

> [i]n 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 debtors' payment practices prior to the period of alleged nonpayment

28. Comment (6) to 12 PA. CONS. STAT. ANN. § 5102.

29. 12 PA. CONS. STAT. § 5102(b)

> Presumption of insolvency.—A debtor who is generally not paying the debtor's debts as they become due is presumed to be insolvent. This presumption shall impose on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

30. *Id.*

31. Comment (4) to 12 PA. CONS. STAT. ANN. § 5104 (emphasis included).

> and the payment practices of the trade or industry in which the debtor is engaged.[32]

Moreover, the Comment to 12 Pa. Cons. Stat. section 5102 notes that general nonpayment of debts as they become due constitutes a ground for filing an involuntary petition pursuant to section 303(h)(1) of the Bankruptcy Code, and cites to opinions interpreting that section of the Bankruptcy Code.[33] Accordingly, the following language discussing whether debtors are generally paying their debts under section 303(h)(1) is helpful in understanding the test of presumed insolvency.

> The relevant standard for determining whether or not an alleged debtor is generally paying its debts is not a mechanical one. (citation omitted) Rather, it is flexible and involves consideration of the totality of the circumstances and requires a balancing of the interests of the alleged debtor against the interests of its creditors. (citation omitted).
>
> A determination that an alleged debtor generally is not paying its debts as they become due requires a more general showing of their financial condition and debt structure than *simply establishing the existence of a few unpaid bills.* (emphasis added) . . . The burden of establishing that [the alleged debtor] generally is not paying its debts as they become due is upon petitioning creditors. (citation omitted).[34]

Once a creditor establishes that the transferor is presumptively insolvent, the party against whom the presumption of insolvency is directed carries the burden of proving that "the nonexistence of insolvency is more probable than its existence."[35] In support of the adoption of the rebuttable presumption, the drafters of the Pa. UFTA noted the difficulties creditors often experience in proving insolvency because the relevant information is held by a "non-cooperative debtor" whose records are "more often than not incomplete and inaccurate."[36]

Conversely, under section 354 of the Pa. UFCA, Pennsylvania courts have held that the party attacking the conveyance need only establish that the person conveying the property was in debt at the time of the conveyance.[37] A "debt" is any existing legal liability, "whether matured

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32. Comment (2) to 12 PA. CONS. STAT. ANN. § 5102.
33. *See* Comment (2) to 12 PA. CONS. STAT. ANN. § 5102.
34. *See In re* Petro Fill, Inc., 144 B.R. 26, 30 (Bankr. W.D. Pa. 1992).
35. 12 PA. CONS. STAT. § 5102(b).
36. Comment (2) to 12 PA. CONS. STAT. ANN. § 5102.
37. First Nat'l Bank of Marietta v. Hoffines, 239 A.2d 458, 462 (1968); *Moody*, 127 B.R. at 993; *In re* Pittsburgh Cut Flower Co., 124 B.R. 451, 457 (Bankr. W.D. Pa. 1991).

or unmatured, liquidated or unliquidated, absolute, fixed or contingent."[38] Under the Pa. UFCA, upon the plaintiff's showing that the transferor was in debt at the time of the transfer, the burden of proof shifted to the party defending the transfer to prove by *clear and convincing* evidence that the debtor was solvent at the time of the conveyance or was not rendered insolvent thereby, or that the debtor received fair consideration for the conveyance.[39] The party defending the transfer carries a demanding burden of proving these elements. Under the clear and convincing evidence standard, the party defending the transfer must prove his case such that "[there is] no substantial doubt in [one's] mind. It is proof that establishes . . . not only [that] the proposition at issue is probable, but also that it is highly probable."[40] Unless the party defending the transfer meets this burden, the transfer will be considered fraudulent.

Thus, under the Pa. UFTA, proving insolvency will present obstacles to creditors that were not present under the Pa. UFCA. Moreover, given that the stated purpose of the drafters of the Pa. UFTA in establishing the rebuttable presumption of insolvency was to place the burden of proving insolvency on the debtors because they presumably possess the relevant information,[41] the adoption of the rebuttable presumption has led to the anomalous result of creditors having to provide more information about debtors under the Pa. UFTA than was previously required under the Pa. UFCA.

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38. Baker v. Geist, 321 A.2d 634, 636 (1974) (citing 39 Purdon § 351 (1954)).

39. Speiser v. Schmidt, 563 A.2d 927, 931 (Pa. Super. 1989); *Hoffines*, 239 A.2d at 462; *Moody*, 127 B.R. at 993 (quoting *Hoffines*, 239 A.2d at 462 (1968)).

A minority of Pennsylvania cases have held that the creditor bears the burden of proving inadequate consideration. In the 1992 case Garden State Standardbred v. Seese, 611 A.2d 1239 (Pa. Super.), the Pennsylvania Superior Court defied precedent by expanding the creditor's burden to include proof that fair consideration was not received for the exchange. Interestingly, the citation following this statement was to First Bank of Marietta v. Hoffines, 239 A.2d 458 (Pa. 1968). *Hoffines* does not support this proposition and in fact clearly states that the trustee must show that "the person conveying the property was in debt at the time he made the conveyance, [and] then the burden rests upon the grantee . . . to establish . . . that the person conveying was then solvent and was not by such conveyance rendered insolvent or that a fair consideration had been paid for the conveyance." *Hoffines*, 239 A.2d at 462. Contrary to the holding in *Seese*, the transferee carries the burden of proving that the debtor received an inadequate consideration for the conveyance. This holding is strongly supported by Pennsylvania precedent. *See Moody*, 127 B.R. at 993; *In re* Pittsburgh Cut Flower Co., 124 B.R. at 457. *See also In re* Pinto Trucking Service, 93 B.R. at 380 (stating incorrectly that no authority supports proposition that trustee does not carry burden of proving inadequate consideration).

40. 3 Leonard B. Sand et al., Modern Federal Jury Instructions, § 73.01, at 73-15 (1993), citing Addington v. Texas, 441 U.S. 418 (1979).

41. *See* Comment (2) to 12 PA. CONS. STAT. ANN. § 5102.

For example, to shift the burden of proof from creditors to debtors under section 5102 of the Pa. UFTA, creditors will have to show much more about transferors' financial conditions. The mere fact that transferors were "in debt," as previously required under section 354 of the Pa. UFCA, will no longer suffice. Also, since the drafters of the Pa. UFTA have rejected the principles of burden shifting previously required under the Pa. UFCA, presumptively insolvent debtors will only be required to demonstrate the nonexistence of insolvency and will not be forced to show by clear and convincing evidence either that the transferors have received reasonably equivalent value for the transfer or that they have met the financial conditions delineated in section 5104(a)(2) and section 5105.[42] Conversely, the Pa. UFCA required transferors who were "in debt" to prove by clear and convincing evidence that they were solvent at the time of the conveyance, were not rendered insolvent by the conveyance, or that the debtors received fair consideration, *i.e.*, fair equivalent for the transfer received in good faith.[43]

Under the Pa. UFTA, the debtor need only prove that "the nonexistence of insolvency is more probable than its existence."[44] This is not nearly as exacting a burden of persuasion as was the clear and convincing standard required under section 354 of the Pa. UFCA. It appears, therefore, that in an effort to do away with the "archaism" of burden shifting, the drafters of the Pa. UFTA have made it easier for those who are defending an allegedly fraudulent conveyance to defeat a cause of action based upon the constructive fraud provisions of the statute.

C. Definition of Insolvency

The Pa. UFTA adopted the "balance sheet" definition of insolvency presently found in the Bankruptcy Code.[45] Pursuant to the Pa. UFTA,

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42. *See* Comment (6) to 12 PA. CONS. STAT. ANN. § 5102.

43. *See* Michael L. Cook & Richard E. Mendales, *The Uniform Fraudulent Transfer Act: An Introductory Critique*, 62 AM. BANKR. L.J. 87 (1988); 5 Fisher, et al., Debtor-Creditor Law ¶ 22.03[D][1].

44. 12 PA. CONS. STAT. § 5102(b).

45. 11 U.S.C. § 101(32). "Insolvent" means —

(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of —

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title . . . *See Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d

"a person is 'insolvent' if, at 'fair valuations,' debts exceed assets."[46] Because the "balance sheet" test is narrower than the insolvency test found in the Pa. UFCA, establishing insolvency will be more difficult under the Pa. UFTA than under the Pa. UFCA.

The Pa. UFTA does not define the term "fair valuation," which is used in the definition of insolvency, nor does it delineate particular methods for determining "fair valuation." However, the drafters' comments demonstrate that the economic realities of the debtor must be considered. For example,

> [d]ifferent bases of valuation may be appropriate depending upon the circumstances, and different methods of determining value on any particular basis may be appropriate depending upon the business engaged in by the debtor and other factors. For a debtor which is a business enterprise, valuation on the basis of continuation of the business by the debtor as a going concern ordinarily would be the appropriate basis of valuation if, at the time as of which the valuation is made, it reasonably would be expected that the enterprise will continue as a going concern. Particularly in such a case, appropriate values may be ascribed to goodwill and to nonassignable licenses, franchises, contracts and rights. Often it would be appropriate not to attempt to determine the value of separate assets and debts, but rather to determine only the "enterprise value" representing the aggregate difference between the debtor's assets and debts. Enterprise value should be determined by methods appropriate in the circumstances. It may be appropriate in many cases to determine enterprise value by multiplying earnings or cash flow measures by appropriate multipliers, or by discounting reasonably projected net cash flow at appropriate rates, for example. Even if it is appropriate in a particular case to value a business enterprise on a liquidation basis, it may be appropriate to value some or all of the assets on the assumption that they would be sold as one or more smaller going concerns (in which case the assets so disposed of should be valued in like manner, with appropriate values ascribed to goodwill and to licenses, franchises, contracts and rights which are assignable or for which consent to

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635, 648 (3rd Cir. 1991) (stating that the test of insolvency is "frequently described as the 'balance sheet test'");

12 PA. CONS. STAT. ANN. § 5102

(a) General rule.—A debtor is insolvent if, at fair valuations, the sum of the debtor's debts is greater than all of the debtor's assets.

46. Comment (1) to 12 PA. CONS. STAT. § 5102. *See Citizens State Bank*, 450 N.W.2d at 926 (holding that pursuant to the UFTA a debtor is insolvent if he has no non-exempt assets or if his non-exempt assets minus his liabilities are less than or equal to zero).

assignment may reasonably be expected; likewise, an "enterprise valuation" of such assets and related debts may be appropriate).

As with valuation of assets, valuation of debts should take into account all relevant factors. For example, debt due in the future should not be valued at its face amount if the debt does not bear interest or bears interest at an inappropriately low rate. Rather, the face amount of such a debt should be discounted to its present value at an appropriate rate to reflect the time value of money. Likewise, in general, contingent liabilities and assets should be discounted by factors representing the probability that such contingent liabilities or assets will ever be realized (as well as by factors representing the time value of money with respect to the resulting deferred payments or collections). For example, if a debtor enters into a written guaranty, the time as of which financial condition of the guarantor is to be determined for purposes of analyzing whether its obligation under the guaranty is fraudulent under 12 Pa.C.S. §§ 5104(a)(2) and 5105 is the date on which such guaranty is executed and delivered.[47]

Practitioners should note that

values shown on a balance sheet prepared in accordance with generally accepted accounting principles ("GAAP") generally would not be fair valuations as that term is used in this section. Such a balance sheet will have been prepared in accordance with accounting conventions that do not for the most part purport to reflect fair valuations (in any sense), nor will such a balance sheet necessarily reflect all of the debtor's assets and debts as defined in this chapter. For example, asset values under GAAP in most cases are based on historical costs rather then current fair valuations, and accounting conventions may ignore or relegate to footnotes certain assets and debts that should be taken into account in determining fair valuation, such as, for example, valuable contracts and leases, contingent assets and liabilities, and goodwill arising from operations. In some cases, however, a GAAP balance sheet may serve as a useful starting point in analyzing whether a debtor is insolvent, given suitable adjustments to the values of particular line-items and addition or deletion of line-items.[48]

The Pa. UFCA definition of insolvency is broader than the definition of insolvency found in the Bankruptcy Code and the Pa. UFTA.[49]

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47. Comment (1) to 12 PA. CONS. STAT. § 5102. *See* 12 PA. CONS. STAT. § 5106(5).

48. *Id.*

49. 39 PA. STAT. § 352 (repealed 1993). Insolvency

(1) A person is insolvent when the present, fair, salable value of his assets is less than the amount that will be required to pay his probable liability on this existing debts as they

> A person is insolvent under the [Pa. UFCA] when the present, fair, salable value of their [sic] assets is less than the amount required to pay their [sic] probable debts as they become absolute and matured. 39 Pa. C.S.A. section 352(1) (1954). Insolvency under the [Pa. UFCA] is broader than insolvency in bankruptcy, which is purely mathematical and results when the aggregate value of the debtor's property is less than their [sic] liabilities. (citation omitted) One is insolvent under the [Pa. UFCA] if the *present* salable value of one's assets is less than the amount required to pay existing debts as *they mature.* (citation omitted).[50]

Moreover, "Pennsylvania Courts have held that this solvency definition contains two components. First, in the bankruptcy sense, a transferor may be insolvent if it has a 'deficit net worth.' (citation omitted) Second, insolvency 'in the equity sense' means 'the inability to meet obligations as they mature.'"[51]

In establishing lack of insolvency under the Pa. UFCA, the debtor must demonstrate both that it was not insolvent in the bankruptcy sense, and also that the *present* value of its assets exceeded the sum of its liabilities.[52]

> A reasonable construction of the . . . statutory definition of insolvency indicates that it not only encompasses insolvency in the bankruptcy sense *i.e.*, a deficit net worth, but also includes a condition wherein a debtor has insufficient presently salable assets to pay existing debts as they mature. If a debtor has a deficit net worth, then the present salable value of his assets must be less than the amount required to pay the liability on his debts as they mature. A debtor may have substantial paper net worth including assets which have a small salable value, but which if held to a subsequent date could have a much higher salable value. Nevertheless, *if the present salable value of [his] assets [is] less than the amount required to pay existing debts as they mature the debtor is insolvent.*[53]

While under the Pa. UFCA, the terms "present, fair, salable value" were subject to differing judicial interpretation,[54] those terms clearly

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become absolute and matured.

See In re Glenn, 108 B.R. 70, 74 (Bankr. W.D. Pa. 1989).

50. *In re* Glenn, 108 B.R. 70, 74 (Bankr. W.D. Pa. 1989).

51. Moody v. SEC. PAC. Business Credit, Inc., 127 B.R. 958, 994 (W.D. Pa. 1991), *aff'd*, 971 F.2d 1056 (3rd Cir. 1992).

52. *Id.*

53. United States v. Tabor Court Realty, 803 F.2d 1288, 1303 (3rd Cir. 1986) (quoting Larrimer v. Feeney, 192 A.2d 351, 353 (Pa. 1963)) (emphasis added).

54. *See Gleneagles*, 565 F. Supp. at 578 (holding that present, fair, salable value "means that value which can be obtained if the assets are liquidated with reasonable promptness in an arms-length

worked a significant modification on the standard balance sheet test. As *Larrimer* makes clear, if transferors qualify as insolvent under the balance sheet test found in the Bankruptcy Code and the Pa. UFTA, then the transferors do not have presently salable assets available to pay their existing debts.[55] However, if transferors are solvent pursuant to the balance sheet test, under *Larrimer* and the Pa. UFCA, those transferors may still be found insolvent if the present salable value of their assets will not sufficiently pay their debts as they mature. This insolvency test is "not a difficult test to meet: 'in panic times, and during the earlier portions of the periods of depression which follow, an enormous majority of merchants' (citation omitted), though able to pay their bills, are, under the UFCA definition of the term, insolvent."[56]

Consequently, the balance sheet definition of insolvency adopted by the Pa. UFTA will make proving insolvency more difficult under Pa. UFTA section 5105 because creditors will no longer be able to rely on the more accommodating equitable definition of insolvency. In fact, section 5102(a) of the Pa. UFTA "clarifies that 'insolvency' is defined solely in the 'balance sheet' sense."[57] As a result, "cases construing 'insolvency' under the previous Act need not necessarily have any persuasive force under this chapter."[58] However, "'[e]quity insolvency' concepts are dealt with in 12 PA. CONS. STAT. section 5104(a)(2),"[59] the Pa. UFTA section which contains the other constructive fraud provisions pertaining to undercapitalization and the debtors' belief that they will incur debts beyond their ability to pay.[60] The net result of this change

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transaction in an existing and not theoretical market"); *Moody*, 127 B.R. at 995 (holding that in determining present, fair salable value the Court cannot ignore the "economic realities of the transfer," and assets must be valued at going concern values rather than at liquidation values unless the company's failure is imminent).

55. *See In re* Joshua Slocum, Ltd., 103 B.R. 610, 626 (Bankr. E.D. Pa. 1989), *aff'd* 121 B.R. 442 (E.D. Pa. 1989) (finding that a debtor insolvent under the Code is also insolvent under the Pa. common law insolvency test).

56. *In re* Fleet, 89 B.R. 420, 425 (Bankr. E.D. Pa. 1988) (quoting McGill v. Commercial Credit, 243 F. 637, 646 (D. Md. 1917)).

57. Comment (1) to PA. CONS. STAT. Ann. § 5102.

58. *Id.*

59. *Id.*

60. 12 PA. CONS. STAT. Ann. § 5104. Transfers fraudulent as to present and future creditors

(a) General rule.—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:

. . .

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) 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

may be that creditors who allege that a fraudulent transfer was made by an "equitably insolvent" debtors should plead their cases under section 5104(a)(2) rather than under section 5105.

Practitioners should also note that the Pa. UFTA definition of insolvency "does not contain the words 'salable' or 'present,' thereby removing any possible implication that liquidation is the required or preferred basis of valuation or that, if liquidation value is appropriate in a particular case, a prompt liquidation is necessarily appropriate."[61] While this change should clarify the confusion that existed about the terms "salable" and "present" which were found in the Pa. UFCA,[62] it is almost certain to lessen the evidentiary burdens historically imposed upon parties defending allegedly fraudulent transactions.

Thus, in their attempts to "modernize" and "synchronize" the Pa. UFCA provisions governing transfers by insolvents with the Bankruptcy Code, the drafters of the Pa. UFTA have significantly altered the rights of debtors and creditors. A creditor's task of proving that a fraudulent transfer was made by an insolvent has been made much more difficult under the Pa. UFTA. In addition to revising the definition of insolvency in a manner detrimental to creditors, the Pa. UFTA also places the burden of meeting the new standard of insolvency squarely on the shoulders of creditors. The Pa. UFTA's imposition of the "rebuttable presumption" on the transferor does little to even the score because the presumption fails to provide creditors with the practical benefits enjoyed under the burden shifting doctrine developed by the courts under section 354 of the Pa. UFCA. Furthermore, although the drafters of the Pa. UFTA rejected the burden shifting doctrine as an "archaism," they have elected to replace that doctrine with an equally antiquated concept: the rebuttable presumption. Rebuttable presumptions are notoriously confusing to juries; consequently, the Pa. UFTA's rebuttable presumption of insolvency will not facilitate juries' determination of correct and just results.

Finally, it is not surprising that proving insolvency is more difficult for creditors under the Pa. UFTA than under the Pa. UFCA. The Pa. UFTA is derived from the Bankruptcy Code — and a central purpose of the Code is to provide the debtor with a fresh start.[63] Therefore, the

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to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

61. Comment (1) to PA. CONS. STAT. Ann. § 5102.

62. *See supra* note 54.

63. *See* Grogan v. Garner, 498 U.S. 279 (1991).

Bankruptcy Code is an unlikely place to find support for creditors' rights, as evidenced by the fact that trustees, when attacking fraudulent transfers made by debtors, must prove all elements of a fraudulent transfer.[64] Although the drafters of the Pa. UFTA may have attempted to account for these policy differences by establishing the rebuttable presumption of insolvency, this presumption does not begin to restore the rights that creditors previously possessed under the Pa. UFCA.

D. Constructive Fraud: Deletion of the Good Faith Requirement

The Bankruptcy Code and the Pa. UFTA both employ the term "reasonably equivalent value" to describe the amount of consideration required to circumvent a finding that a transfer is constructively fraudulent.[65] Although the Pa. UFTA does not define "reasonably equivalent value,"[66] the definition of reasonably equivalent value is "purely objective."[67]

In contrast, the Pa. UFCA uses the term "fair consideration" to describe the amount of consideration that is necessary to avoid a finding of constructive fraud.[68] Fair consideration consists of two elements: property must be transferred for a "fair equivalent" and in "good faith."[69] For purposes of the Pa. UFCA, the issue of good faith turns on the transferee's knowledge rather than its motives.[70] By relieving the parties defending the transactions of any obligation to establish their "good faith," the drafters have rendered irrelevant, to a consideration of constructive fraud, the knowledge and intent of the parties. Here again the change in law will favor debtors by reducing the issue of "fair

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64. *In re* Apex Int'l Management Serv., 148 B.R. 647, 649 (Bankr. M.D. Fla. 1992); *In re* DeVito, 111 B.R. 529, 531 (Bankr. W.D. Pa. 1990); *In re* Metro Shippers, Inc., 78 B.R. 747, 750 (Bankr. E.D. Pa. 1987).

65. *See supra* note 3.

66. *See* Comment (3) to 12 PA. CONS. STAT. § 5103.

67. *See* Comment (1) to 12 PA. CONS. STAT. § 5103.

68. 39 PA. STAT. § 353 (repealed 1993). Fair Consideration

Fair consideration is given for property or obligation:

(a) When, in exchange for such property or obligation, as a fair equivalent therefore and in good faith, property is conveyed or an antecedent debt is satisfied; or

(b) When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained.

69. *See* United States v. Tabor Court Realty Corp., 803 F.2d 1288, 1296 (3rd Cir. 1986) (affirming trial court's holding that, since a lender knew or strongly suspected that transfer at issue would probably render the transferor insolvent, the transferee lacked good faith).

70. *Id.* at 1295-96.

consideration" to a mathematical proof which falls exclusively within the province of expert testimony.

E. Constructive Fraud: Undercapitalization and Leveraged Transactions

The Code and the Pa. UFCA both permit avoidance of conveyances if the debtors did not receive reasonably equivalent value or fair consideration for the transfers and if the debtors were engaged or were about to engage in a business for which they were undercapitalized because the debtors were left with unreasonably small amounts of property.[71] The Pa. UFTA contains a similar provision, but substitutes the term "assets" for "property."[72] This change will make it easier to attack leveraged acquisitions as fraudulent conveyances than it was under the Pa. UFCA. Because the Pa. UFTA excludes from its definition of "asset" property that is encumbered by a valid lien,[73] "a leveraged acquisition that left a corporation with little or no unencumbered property would be even more subject to attack than under present law."[74]

For example, in *United States v. Gleneagles Inv. Co. Inc.*,[75] the court looked to encumbered land and property assets to determine whether a target corporation acquired in a leveraged buy-out was adequately capitalized under section 355 of the Pa. UFCA. However, under the Pa. UFTA, a court will no longer be able to even consider encumbered property in determining whether a debtor is unreasonably undercapitalized under 12 PA. CONS. STAT. section 5104(A)(2)(i).

V. Other Issues

A. Statute of Limitations

By including specific statutes of limitations, the Pa. UFTA will clarify existing law concerning the statute of limitations in fraudulent transfer actions. Generally, under the Pa. UFTA, a four year statute of limitations will govern both actions for actual and constructive fraud.[76]

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71. *See* 11 U.S.C. § 548(a)(2)(B)(ii); 39 PA. STAT. § 355 (repealed 1993).

72. *See* 12 PA. CONS. STAT. § 5104(a)(2)(i).

73. *See* 12 PA. CONS. STAT. § 5101(b)(1).

74. Michael L. Cook & Richard E. Mendales, *The Uniform Fraudulent Transfer Act: An Introductory Critique*, 62 AM. BANKR. L.J. 87, 91 (1988).

75. 565 F. Supp. 556 (M.D. Pa. 1983), *aff'd in part and remanded*, United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. 1986), *cert. denied*, McClellan Realty Co. v. United States, 483 U.S. 1005 (1987).

76. 12 PA. CONS. STAT. Ann. § 5109. Extinguishment of cause of action

In cases of actual fraud, the Pa. UFTA also makes provisions for a one year discovery period. On the other hand, the Pa. UFCA contained no specific statute of limitations and courts have applied different limitation periods.[77]

Moreover, the comment to section 5109 of the Pa. UFTA notes that this section's purpose is to clarify that lapse of the prescribed statutory period "bars the right and not merely the remedy."[78] Section 5109 also rejects the rule, applied in *Gleneagles*, that the state statute of limitations did not apply to an action brought by the United States.[79]

B. Deletion of Partnership Provisions

The Pa. UFTA's deletion of the Pa. UFCA's provision that dealt specifically with conveyances of partnership property[80] will have little effect on the law concerning conveyances of partnership property. Only one decision, *In re Messenger*,[81] has applied this provision. Therefore, the Pa. UFTA's deletion of this provision should have little effect on the law concerning partnerships and fraudulent conveyances. Indeed, under the Pa. UFTA, a partnership will be treated like any other entity, with the

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A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

(1) under section 5104(a)(1) (relating to transfers fraudulent as to present and future creditors), within four 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

(2) under section 5104(a)(2) or 5105 (relating to transfer fraudulent as to present creditors), within four years after the transfer was made or the obligation was incurred.

77. *See In re* Shields, 148 B.R. 783, 784 (Bankr. E.D. Pa. 1993) (holding that two-year statute of limitations delineated in 42 PA. CONS. STAT. § 5524(7) applies in actions brought under Pa. UFCA and explaining that earlier cases applying other limitations periods pre-dated the addition of 42 PA. CONS. STAT. § 5524(7)); *In re* Penn Packing Co., 42 B.R. 502, 504-06 (Bankr. E.D. Pa. 1984) (when a cause of action predicated on the Pa. UFCA is directed against stockholders and directors, the six year limitation of 42 PA. CONS. STAT. § 5527 applies); *Gleneagles*, 565 F. Supp. at 583 (noting that although the 6 year statute of limitations found at 42 PA. CONS. STAT. § 5527 would governs creditors' fraudulent conveyance claim such limitation did not apply to the United States which was seeking to enforce rights "held in its governmental capacity").

78. See Comment (1) to 12 PA. CONS. STAT. ANN. § 5109.

79. *Id.*

80. 39 PA. STAT. § 358 (repealed 1993). Conveyance of partnership property

Every conveyance of partnership property and every partnership obligation incurred, when the partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred:

(a) To a partner, whether with or without a promise by him to pay partnership debts; or

(b) To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

81. 32 F. Supp. 490 (E.D. Pa. 1940).

exception that the Pa. UFTA, like the Pa. UFCA, has a partnership definition of insolvency.[82] The partnership provision of the Pa. UFCA was deleted because it was considered to be "redundant in part and susceptible to inequitable application."[83]

C. *Insider Provision Not Adopted*

The Pa. UFTA also failed to adopt section 5(b) of the UFTA which deals with transfers made to insiders.[84] The drafters explained the omission of this section:

> The transactions which are the subject of § 5(b) are not fraudulent transfers as historically understood, however, but rather, preferences.[85] 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 § 5(b) of the Uniform 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 . . .
>
> 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.[86]

However, the Pa. UFTA considers a transfer to an insider a Badge of Fraud.[87]

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82. 12 PA. CONS. STAT. Ann. § 5102(c). When partnerships are insolvent

> A partnership is insolvent under subsection (a) if, at fair valuations, the sum of the partnership's debts is greater than the aggregate of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

39 PA. STAT. § 352(2) (repealed 1993). Insolvency

> In determining whether a partnership is insolvent, there shall be added to the partnership property the present, fair, salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present, fair, salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription.

83. Annex to Introduction: Prefatory Note to the Uniform Fraudulent Transfer Act by the National conference of Commissioners on Uniform State Laws, Report on the Pennsylvania Uniform Fraudulent Transfer Act at 7.

84. (b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

85. *See* Comment (1) to 12 PA. CONS. STAT. § 5103.

86. Comment (2) to PA. CONS. STAT. Ann. § 5105.

87. *See* PA. CONS. STAT. Ann. § 5104(b)(1). The Pa. UFTA does not define the term "insider."

D. Remedies

The Pa. UFTA will increase the remedies available to creditors with unmatured claims. Under section 360 of the Pa. UFCA,[88] only creditors with claims that had not matured could have the courts restrain defendants from disposing of their property, appoint receivers, or make any other orders that were required by the circumstances of the cases. However, section 5107 of the Pa. UFTA[89] makes these remedies available to all creditors.

VI. Conclusion

In summary, by adopting the Pa. UFTA, the legislature substantially changed the Pennsylvania law of fraudulent transfers and significantly altered the rights of debtors and creditors. Some of these modifications are positive. For example, the statutory inclusion of a statute of limitations in the Pa. UFTA will dispel confusion about this issue for practitioners and litigants. In addition, making certain remedies available to all creditors, regardless of whether their claims are matured, removes an unreasonable inequity from the law of fraudulent transfers.

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88. 39 PA. STAT. § 360 (repealed 1993). Rights of creditors whose claims have not matured
Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured, he may proceed, in a court of competent jurisdiction, against any person against whom he could have proceeded had his claim matured, and the court may:
(a) Restrain the defendant from disposing of his property;
(b) Appoint a receiver to take charge of the property;
(c) Set aside the conveyance or annul the obligation; or
(d) Make any order which the circumstances of the case may require.

89. 12 PA. CONS. STAT. Ann. § 5107. Remedies of creditors
(a) Available remedies.—In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in sections 5108 (relating to defenses, liability and protection of transferee) and 5109 (relating to extinguishment of cause of action), 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 applicable law.
(3) Subject to the 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 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) Execution.—If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, subject to the limitations of sections 5108 and 5109, may levy execution on the asset transferred or its proceeds.

However, modifications made in the name of modernization, clarification, and standardization of the Pa. UFCA should not be made to the detriment of creditors. Indeed, there is no valid policy reason why the law should reward debtors who allegedly engage in fraudulent behavior by lessening their burdens in litigation at the cost of creditors. Consequently, the Pa. UFTA's rejection of the burden shifting doctrine developed under the Pa. UFCA, the Pa. UFTA's rebuttable presumption of insolvency and its lesser burden of persuasion, and the Pa. UFTA's narrower definition of insolvency are likely to substantially reduce procedural advantages traditionally reserved for creditors under the Pennsylvania laws of fraudulent conveyances.