

## **New York Enacts New Fraudulent Transfer Law Effective April 4, 2020**

On December 6, 2019, Governor Andrew Cuomo signed into law a new fraudulent transfer statute to replace the Uniform Fraudulent Conveyance Act (“UFCA”), which has been in place in New York since 1925. The new law, entitled the Uniform Voidable Transactions Act (the “UVTA”), is intended to modernize the existing statute and bring New York law in line with federal law and the law in most other states. The UVTA will become effective in New York on April 4, 2020. It will apply only to transactions on or after that date. Although numerous other states have adopted the UVTA, New York’s adoption of the law is particularly notable because New York retained the UFCA over the years, even in the face of virtually every other state adopting the Uniform Fraudulent Transfer Act, the predecessor to the UVTA.

### **I. Overview of Statutory Changes**

The UVTA, like the UFCA, applies to both *transfers made* and *obligations incurred*,<sup>1</sup> and permits the avoidance of (i) transfers made with actual intent to hinder, delay or defraud any creditor, as well as (ii) constructive fraudulent transfers – generally, transfers for less than reasonably equivalent value when the debtor is insolvent. But the UVTA contains several procedural and substantive changes from the UFCA. Below we discuss some of the key changes.

A. Time to Challenge Transfers — The UVTA reduces the time within which a transfer may be challenged from six years to four years. The UVTA limitations period is drafted as a statute of repose, rather than a statute of limitations, as it provides that a claim that is not timely commenced is “extinguished.” There is an express exception to this rule, which provides that if the transfer or obligation was not discovered, and reasonably could not have been discovered within the limitations period, a plaintiff is allowed one year from the discovery date to bring such claim. § 278.

B. Avoidance of Insider Preferences — The UVTA includes a new avoidance provision whereby present creditors (but not future creditors) can avoid transfers made to an insider of the debtor on account of an antecedent debt, if the debtor was insolvent and the insider had reasonable cause to believe that the debtor was insolvent. § 274(b). The statutory definition of “insider” is expansive, and includes relatives of an individual, officers, directors, and persons in control of a corporate debtor, as well as affiliates and insiders of affiliates. New York case law has long recognized this type of “insider preference” claim, subject to the UFCA six-year look-back period. Now, as codified under the UVTA, an insider preference claim must be brought within one year of the transfer. Thus, the UVTA actually provides a limitation on a plaintiff’s ability to avoid such transfers. § 278(c).

C. Replacing “Fair Consideration” with “Reasonably Equivalent Value” — Another significant change effected by the UVTA is the change from “fair consideration” to “reasonably equivalent value” in determining whether an alleged constructive fraudulent transfer was made for fair value. Under the UFCA, “fair consideration” requires that the value received must be “not disproportionately small” to the value transferred **and** must be received in good faith. Under that formulation, a transfer by an insolvent debtor made for fair value could be subject to avoidance if it was received in bad faith (e.g., if the transferee was aware that the transferor was in financial distress). In contrast, under the UVTA, a transfer will not be voidable as a constructive fraudulent transfer even if it is received in bad faith, as long as it involved an exchange of reasonably equivalent value.

D. Choice of Law — The UVTA provides clear guidance on the law applicable to an avoidance action. Section 279 provides that a claim for relief under the UVTA is governed by the law of the location of the debtor. If the debtor is an individual, the debtor is located at the individual’s principal residence. If the debtor

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<sup>1</sup> For ease of reference we use the term “transfers” here to refer to transfers made and obligations incurred.

is an organization (i.e., an entity other than an individual), the organization is located at its place of business, and if it has more than one place of business, its chief executive office.

E. Attorney Fees — Section 276-a provides that a judgment creditor that has been awarded attorney fees in connection with its underlying claim, and who prevails in an action under the UVTA, shall be entitled to an award of attorney fees as part of its UVTA judgment. Under existing law, an award of attorney fees is generally available only in connection with an actual fraudulent transfer.

F. Elimination of Provision Covering Transfers By Defendants in Pending Litigation — The existing statute has a specific provision permitting avoidance of transfers made by a party that is a defendant in an action for money damages, if the transfer was made for less than fair consideration. The UVTA eliminates this provision, likely on the theory that improper transfers by defendants in legal actions are already addressed by the more general provisions permitting avoidance of actual and constructive fraudulent transfers.

G. Burden of Proof — The UVTA clarifies that plaintiff bears the burden of establishing each of the statutory elements of an avoidable transfer, and the defendant bears the burden of establishing any defenses. §§ 273(c), 274(c). The predecessor statute, the UFCA, did not specifically allocate these burdens.

## II. Impact of the New Statute

The enactment of the UVTA in New York will have a variety of consequences in fraudulent transfer litigation. On one hand, adoption of the UVTA brings New York in line with other states and with the Bankruptcy Code in the area of fraudulent transfers, and thus enhances efficiency and predictability through uniformity of the laws. On the other hand, it provides additional limits on creditors in protecting their rights through fraudulent transfer litigation by removing certain tools and shortening the time in which a creditor can pursue fraudulent transfer remedies.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

**Matthew Scheck**

Email: [matthewscheck@quinnemanuel.com](mailto:matthewscheck@quinnemanuel.com)

Phone: 213-443-3190

**Scott C. Shelley**

Email: [scottshelley@quinnemanuel.com](mailto:scottshelley@quinnemanuel.com)

Phone: 212-849-7358

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