

# ESSAYS

## BULLS, BEARS, AND PIGS: REVISITING THE LEGAL MINEFIELD OF VIRGINIA FRAUDULENT TRANSFER LAW

*Isaac A. McBeth* \*

*Landon C. Davis III* \*\*

### I. INTRODUCTION

With the state of the Virginia economy as it is,<sup>1</sup> the law surrounding fraudulent transfers has never been more relevant to members of the Virginia Bar than at the present. There is an old investment truism which states, “Bulls make money, bears make money, pigs get slaughtered.”<sup>2</sup> Admittedly, this quip is more applicable to a financial maverick on Wall Street than it is to a Virginia general practitioner. Nonetheless, it hints at the very real truth that those who are reckless with their property run the risk of losing it. Much in the same way, an attorney who recklessly structures a transfer of a client’s property without giving due re-

---

\* Associate, Hirschler Fleischer, P.C., Richmond, Virginia; J.D., 2011, University of Richmond School of Law; B.A., 2008, American Military University. The author specifically thanks Professor David Epstein for his invaluable guidance in forming this article and the members of the *University of Richmond Law Review* for their hard work in bringing it to fruition.

\*\* Associate, Parrish, Houck & Snead, PLC, Fredericksburg, Virginia; J.D., 2011, University of Richmond School of Law; B.S., 2008, University of Mary Washington.

1. *A Monthly Update of the Fifth District Economy*, FED. RESERVE BANK OF RICHMOND (Fed. Reserve Bank of Rich., Richmond, V.A.), Mar. 2011, at 1 (“The Virginia economy remained weak in recent months, with sluggish labor markets and continued weakness in the housing sector.”). Especially relevant to this essay is the fact that foreclosure starts and inventory rates both rose in March of 2011. *Id.*

2. *Foolsaurus*, THE MOTLEY FOOL, [http://wiki.fool.com/Bulls\\_make\\_money\\_bears\\_make\\_money\\_pigs\\_get\\_slaughtered](http://wiki.fool.com/Bulls_make_money_bears_make_money_pigs_get_slaughtered) (last visited Oct. 12, 2011).

garg to risks imposed by fraudulent transfer law could wreak disastrous consequences on the client and find herself in an ethical dilemma. Unfortunately, Virginia's body of fraudulent transfer law is less than well-defined and acts as a legal minefield—out of sight and capable of harming the unwary who traverse it.

Generally speaking, a fraudulent transfer can be defined as a transfer of property which the debtor uses—intentionally or unintentionally—to place the property beyond the reach of creditors.<sup>3</sup> U.S. history shows a correlation between a faltering economy and increases in various types of fraudulent transactions.<sup>4</sup> Currently, the economy is still recovering from the effects of a severe recession that depreciated the value of all classes of assets.<sup>5</sup> Not surprisingly, the current economic difficulties confronting the United States are generating increased fraudulent transfer litigation in both federal and state courts.<sup>6</sup> There are at least two reasons have been linked to an increase in fraudulent transfer litigation in poor economic conditions: (a) debtors are more likely to attempt fraudulent conveyances; and (b) creditors are more likely to challenge transfers as fraudulent.<sup>7</sup>

The Uniform Fraudulent Transfer Act ("UFTA") is the prevailing body of fraudulent transfer law in the United States.<sup>8</sup> Currently, Virginia is one of eight jurisdictions that has not adopted the Act.<sup>9</sup> Rather, Virginia's body of fraudulent transfer law is primarily governed by two statutes that are merely recodifications of versions that find their roots in the 1800s.<sup>10</sup> Although Virginia has a body of fraudulent transfer law wholly separate

---

3. See BLACK'S LAW DICTIONARY 733 (9th ed. 2009).

4. Jonathan N. Helfat et al., *Ten Assumptions That Secured Lenders Should Not Make in 2010*, SECURED LENDER, Mar. 2010, at 33. ("Every economic downturn in recent U.S. history has generated a flurry of fraudulent transfer claims as creditors, committees, and bankruptcy trustees of troubled companies turn to lenders and former shareholders for redress, and the current economic crisis is no exception.")

5. William R. Culp & Christian L. Perrin, *The Case for Caution: Fraudulent Conveyance Risks in Estate Planning*, THE WILLS & THE WAY (North Carolina Bar Ass'n, Cary, N.C.), Sept. 2010, at 25.

6. Helfat, et al., *supra* note 4, at 33.

7. Culp & Perrin, *supra* note 5, at 25.

8. As of March 3, 2011 forty-four states and the District of Columbia have enacted the UFTA. See *Legislative Fact Sheet—Uniform Fraudulent Transfer Act*, UNIFORM LAW COMMISSION, [http://www.nccusl.org/LegislativeFactSheet.aspx?title=Fraudulent Transfer Act](http://www.nccusl.org/LegislativeFactSheet.aspx?title=Fraudulent%20Transfer%20Act) (last visited Oct. 12, 2011) [hereinafter *UFTA Legislative Fact Sheet*].

9. *Id.*

10. See *infra* Part I.B.

from the UFTA, the provisions of the UFTA are equally relevant to Virginia practitioners for several reasons: (a) it is the law of the majority of jurisdictions in the United States, including several that border Virginia;<sup>11</sup> (b) federal common law is aligned with the UFTA;<sup>12</sup> and (c) the UFTA was specifically designed to operate in accordance with fraudulent transfer provisions in the Bankruptcy Code.<sup>13</sup>

Virginia attorneys—particularly attorneys practicing commercial law—must maintain a thorough understanding of both the UFTA and Virginia fraudulent transfer law in order to assure their client's interests are fully protected. This is true for several reasons. In terms of state court litigation, creditors often rely on fraudulent transfer laws to attempt to undo a transfer that placed a debtor's assets beyond their reach.<sup>14</sup> For Virginia lawyers, this may involve litigating under Virginia fraudulent transfer law or—due to conflict of law principles or contractual agreement—under the UFTA.<sup>15</sup> In terms of federal litigation, a party could use diversity jurisdiction to litigate whether a transfer of property may be avoided as fraudulent.<sup>16</sup> In such a lawsuit, conflict of law principles or a court exercising its discretion to make use of federal common law create possibility that either body of law could control the outcome of the case.<sup>17</sup> Additionally, the Bankruptcy

---

11. See *UFTA Legislative Fact Sheet*, *supra* note 8 (listing forty-five jurisdictions that have enacted the UFTA, including West Virginia, Tennessee, and North Carolina).

12. *Terry v. June*, 359 F. Supp. 2d 510, 520 (W.D. Va. 2005).

13. UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 4, prefatory note (2006) (noting that the commission's decision to draft the UFTA was influenced by the fact that recent revisions to the Bankruptcy Code made the UFCA incompatible with that Act).

14. See *Raytech Corp. v. Pension Benefit Guar. Corp.* (*In re Raytech Corp.*), 241 B.R. 790, 794 (Bankr. D. Comm. 1999) (“[T]he general purpose of fraudulent transfer law . . . is to prevent [a] debtor from taking deliberate action to hinder, delay, or defraud his creditors by providing a remedy to creditors and potential creditors to undo the detrimental effects of a fraudulent transfer.”) (internal quotation marks omitted).

15. See *Terry v. June*, 420 F. Supp. 2d 493 (W.D. Va. 2006) (involving a defendant operating a Ponzi scheme while living in Charlottesville, Virginia whose fraudulent transfer case was eventually adjudicated under the laws of Florida and Michigan, two states which enacted the UFTA); see also *Settlement Funding v. Von Neumann-Lillie*, 274 Va. 76, 80, 645 S.E.2d 436, 438 (2007) (holding that “[i]f a contract specifies that the substantive law of another jurisdiction governs its interpretation or application, the parties’ choice of substantive law should be applied”).

16. See 28 U.S.C. § 1332 (2006).

17. See *GM Motors Acceptance Corp. v. Camilleri Bros. Chevrolet*, 109 F. Supp. 2d 58, 60 (D. Mass. 2000) (holding the court had subject-matter jurisdiction over the fraudulent transfer claim based on diversity).

Code allows a trustee to avoid transfers of the debtor's property made in violation of state fraudulent transfer law or the fraudulent transfer provisions of the Code, and a significant amount of fraudulent transfer litigation occurs in this context.<sup>18</sup>

The role of lawyers in relation to fraudulent transfers, however, is not limited to merely representing a debtor or creditor in litigating the validity of a purported fraudulent transfer. Indeed, well before any litigation occurs, both debtors and creditors call upon lawyers to issue opinions concerning the risk that a contemplated transfer could subsequently be attacked as fraudulent.<sup>19</sup> Debtors may rely on such opinions for purposes of estate planning or business planning, and creditors may rely on such opinions when determining whether to litigate the validity of a particular transfer.<sup>20</sup> To perform these services effectively, lawyers must know both what is clear and what is unclear about the bodies of fraudulent transfer law that could later impact any given transfer.<sup>21</sup> This article provides a long-overdue critical analysis of the differences between the UFTA and Virginia's fraudulent transfer statutes in order to alert practitioners to the unsettled areas in both bodies of law. Part I discusses the background of the UFTA and Virginia fraudulent transfer statutes. Part II analyzes the UFTA provisions in comparison to their Virginia counterparts and the UFTA provisions that have no Virginia counterparts, so as to identify differences between the two bodies of fraudulent transfer law. Part III presents the authors' conclusion regarding Virginia fraudulent transfer law and considers whether creditors would realize any additional protection if the General Assembly were to adopt the UFTA.

---

18. 11 U.S.C. § 544(b)(1) (2006) (enabling a bankruptcy trustee to avoid any transfer of property that an unsecured creditor with an allowable claim could have avoided under applicable state law); *see also* Alan Resnick, *Finding the Shoes That Fit: How Derivative Is the Trustee's Power to Avoid Fraudulent Conveyances Under Section 544(b) of the Bankruptcy Code?*, 31 CARDOZO L. REV. 205, 206 (2009). The purpose of this section was to recognize the body of state laws addressing fraudulent transfers and allow a trustee the choice of avoiding transfers under § 544 and the applicable state fraudulent transfer law, or under only federal law pursuant to § 548. 5 COLLIER ON BANKRUPTCY § 548.01[4] (Alan N. Resnick & Henry J. Sonner eds., 15th ed. rev.).

19. *See, e.g., Bankruptcy*, TROUTMAN SANDERS, <http://www.troutmansanders.com/bankruptcy/> (last visited Oct. 12, 2011); *Preference & Fraudulent Transfers Litigation Defense*, AKERMAN, <http://laborlaw.com/practices/practice.asp?id=494&more=1> (last visited Oct. 12, 2011).

20. Barry A. Nelson, *Surprise! You May Already Be an Asset Protection Attorney—Take the Quiz and Find Out*, 79 FLA. BAR J. 10, 10 (2005).

21. *See id.*

## II. BACKGROUND

### A. *History of the Uniform Fraudulent Transfer Act*

The UFTA's roots can be traced to the common law of England.<sup>22</sup> In 1570, England's parliament enacted the Statute of 13 Elizabeth ("Statute 13").<sup>23</sup> Statute 13 made it unlawful for an individual to convey real or personal property with the intent to "delay, hinder or defraud creditors."<sup>24</sup> Following America's independence from England, many states relied on Statute 13's concept of intending to hinder, delay, or defraud creditors as the foundation for their fraudulent transfer law.<sup>25</sup> Some states incorporated the doctrine as part of their common law tradition, while others enacted legislation reflecting identical or similar language to Statute 13.<sup>26</sup>

States, however, also adopted divergent approaches in applying their own versions of Statute 13.<sup>27</sup> This disunity formed, in part, because of how different states allowed an individual to prove intent to hinder, delay, or defraud creditors.<sup>28</sup> Creditors rarely proved the intent element of a fraudulent transfer by use of direct evidence.<sup>29</sup> Rather, they relied on circumstantial evidence known as "badges of fraud" from which the court could infer the existence of the requisite intent.<sup>30</sup> While some badges were commonly recognized throughout multiple states—such as transfers where the debtor purported to transfer title but retained possession and use of the property, or transfers for nominal consideration or no consideration at all—each state developed its own additional and unique badges of fraud.<sup>31</sup> Eventually, the list of potential badges became innumerable.<sup>32</sup> Moreover, as courts struggled to preserve

---

22. Elaine A. Welle, *Is It Time for Wyoming to Update Its Fraudulent Conveyance Laws?*, 5 WYO. L. REV. 207, 210 (2005); *see also* 13 Eliz., c.5 (1570) (Eng.).

23. Welle, *supra* note 22, at 210.

24. 13 Eliz., c.5 (1570) (Eng.); Welle *supra* note 22, at 211.

25. Welle, *supra* note 22, at 210–11.

26. *Id.* at 211.

27. *Id.*

28. *Id.*; *see* UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 4, prefatory note (2006).

29. Welle, *supra* note 22, at 211.

30. *Id.*

31. *Id.* at 211–12.

32. *Id.* at 211.

equitable outcomes in individual cases, they constantly applied different weight to different badges in case-by-case situations.<sup>33</sup> This ultimately resulted in ambiguous, confusing, and inconsistent fraudulent transfer law at both the intrastate and interstate levels.<sup>34</sup>

Recognizing the issues plaguing the body of fraudulent transfer law, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") sought to promote uniformity in the application of fraudulent transfer law by eliminating the inconsistencies and confusion that had evolved over the years.<sup>35</sup> Accordingly, in 1918, NCCUSL promulgated the Uniform Fraudulent Conveyance Act ("UFCA").<sup>36</sup> Given the dire need for clarification in this area of the law, many commentators strongly supported the UFCA and encouraged state legislatures to enact it.<sup>37</sup> The Act also received a warm welcome among its various target audiences. Twenty-six jurisdictions ultimately enacted the UFCA.<sup>38</sup> Most of these states did so without making any substantive change to the UFCA's provisions.<sup>39</sup> Additionally, states that did not statutorily enact the UFCA adopted its approach to fraudulent transfer law by developing common law rules based on its provisions.<sup>40</sup> Finally, provisions of the UFCA were incorporated in the Bankruptcy Act of 1938.<sup>41</sup>

The UFCA remained the definitive source of fraudulent transfer law for the next seventy years. Over that period of time, however, several legal developments diminished the effectiveness of the UFCA.<sup>42</sup> These developments included changes to: (a) federal bankruptcy statutes; (b) the Model Corporation Act; (c) the Amer-

---

33. *Id.*

34. *Id.* at 211–12.

35. *Id.* at 212. NCCUSL currently operates as the Uniform Law Commission, often referred to as "ULC." *Notice Anything Different?*, UNIF. LAW COMM'N QUARTERLY REPORT (Unif. Law Comm'n, Chicago, I.L.), Nov. 2007, at 2. However, to avoid any unnecessary discussion as to the history of ULC and NCCUSL, this article will simply use the name NCCUSL throughout its discussion.

36. Welle, *supra* note 22, at 212.

37. *See id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. BRIAN A. BLUM, BANKRUPTCY AND DEBTOR/CREDITOR, EXAMPLES AND EXPLANATIONS 73 (2d ed. 1999) (explaining that by the late 1970s the UFCA was outdated and unable to accommodate developments in commercial law).

ican Bar Association Model Rules of Professional Conduct; and (d) article 9 of the Uniform Commercial Code.<sup>43</sup> Moreover, the lapse of time brought changes to the commercial marketplace not contemplated by the drafters of the UFCA.<sup>44</sup> Accordingly, NCCUSL set out to revise the UFCA so that it would be consistent with developments in other bodies of law and compatible with the evolving commercial marketplace.<sup>45</sup>

In 1979, the NCCUSL appointed a committee to review the UFCA with the specific purpose of drafting a revision to address the concerns discussed above.<sup>46</sup> The committee held its first reading of the draft “revised UFCA” at the NCCUSL’s annual meeting in July of 1983.<sup>47</sup> The committee changed the name of the UFCA to the UFTA because the term “conveyance” indicated the statute applied only to transfers involving real property.<sup>48</sup> The committee designed the provisions of the UFTA, however, to apply to fraudulent transfers of both real property and personal property.<sup>49</sup> Although the committee modified the name of the statute from that of its predecessor, the basic structure and approach remained the same.<sup>50</sup>

---

43. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 4, prefatory note (2006). Specifically, the Bankruptcy Reform Act of 1978 significantly changed the portion of the Bankruptcy Code dealing with fraudulent transfers. See *id.* Additionally, the portion of the Uniform Commercial Code regulating transfers of personal property also experienced significant change during this time. See *id.*

44. See Welle, *supra* note 22, at 213–14.

45. UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 4, prefatory note (2006); see also Welle, *supra* note 22, at 213–14.

46. UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 4, prefatory note (2006).

47. *Id.* at 5.

48. *Id.*

49. *Id.*

50. *Id.* The structure of the UFTA preserves the approach of the UFCA. *Id.* However, there are several important substantive and organizational changes. The UFCA contains fourteen distinct sections. UNIF. FRAUDULENT CONVEYANCE ACT, 9 U.L.A. 125 (1923). Of these fourteen sections, five of them define the types of transfers that are fraudulent. *Id.* at 127–29. The UFTA uses only two sections (sections 4 and 5) to accomplish the same goal. UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 4, prefatory note (2006). Substantively, the commissioners deleted, changed or added many other provisions to bring the UFTA in line with the Bankruptcy Code and create a more equitable and less redundant Act. See *id.* The UFTA contains thirteen sections. *Id.* at 13. The UFTA’s first section defines terms frequently used in the Act. *Id.* § 2, 7A pt. 2 U.L.A. 13. Section 2 defines the term “insolvency” in detail. *Id.* § 2, 7A pt. 2 U.L.A. 37. Section 3 does the same with the term “value.” *Id.* § 3, 7A pt. 2 U.L.A. 47. Section 4 describes several instances in which transfers are fraudulent as to present and future creditors. *Id.* § 4, 7A pt. 2 U.L.A. 58. Section 5 lays out two more situations in which transfers are fraudulent to present creditors only. *Id.* § 5, 7A pt. 2 U.L.A. 129. Section 6 specifies exactly the point transfers are deemed

### B. *History of Fraudulent Transfer Law in Virginia*

The Virginia Code of 1819 at chapter 101 marks the beginning of Virginia's fraudulent transfer statutes.<sup>51</sup> Like many other jurisdictions,<sup>52</sup> Virginia incorporated Statute 13 into its statutory framework.<sup>53</sup> Although the Code of 1819 is the first "official code" enacted by the General Assembly that centrally compiled all existing laws in force,<sup>54</sup> chapter 101 first went into force January 1, 1787, as a codification of the common law of England.<sup>55</sup> It provided that any transfer of land or personal property made with the intent to delay, hinder, or defraud creditors would be void.<sup>56</sup> In addition, it provided that a conveyance of goods or chattels made without receipt of consideration deemed valuable in the law was also a fraudulent transfer.<sup>57</sup> The General Assembly relocated chapter 101 to chapter 118 when it recodified the Virginia Code in 1849.<sup>58</sup>

---

to have been made or obligations are deemed to have occurred. *Id.* § 6, 7A pt. 2 U.L.A. 149. Section 7 lays out the remedies for creditors that are victims of a fraudulent transfer. *Id.* § 7, 7A pt. 2 U.L.A. 155. Section 8 lists the defenses, liability, and protections for transferees. *Id.* § 8, 7A pt. 2 U.L.A. 178. Section 9 gives the applicable statute of limitations for each claim for relief/cause of action. *Id.* § 9, 7A pt. 2 U.L.A. 194. Section 10 states that the UFTA is subject to the general principles of law and equity unless explicitly displaced by some part of the Act. *Id.* § 10, 7A pt. 2 U.L.A. 202. Section 11 notes that the UFTA shall be applied in a way that effectuates the general purpose of the Act and makes the law uniform among enacting states. *Id.* § 11, 7A pt. 2 U.L.A. 203. Section 12 gives the short title of the Act. *Id.* § 12, 7A pt. 2 U.L.A. 204. Finally, Section 13 offers a space for the enacting states to repeal their existing fraudulent transfer law the UFTA is to replace. *Id.* § 13, 7A pt. 2 U.L.A. 204.

51. See VA. CODE ANN., ch. 101, §§ 1–2 (1819).

52. See Welle, *supra* note 22, at 210–11.

53. Frederick S. Wait, *Fraudulent Conveyances*, in 20 CYCLOPEDIA OF LAW AND PROCEDURE 323, 342–43 (William Mack ed., 1906) (noting that "[i]n the United States statute of 13 Elizabeth . . . has, in practically all the states, been either recognized as part of the common law or expressly adopted or reenacted in more or less similar terms"). Wait specifically recognizes the following states as ones incorporating statute 13 of Elizabeth into their statutory framework or common law doctrine: Alabama, Connecticut, Georgia, Illinois, Iowa, Illinois, Kansas, Kentucky, Massachusetts, Minnesota, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, South Carolina, and Virginia. *Id.* at 343 n.19.

54. VA. CODE ANN., intro. cmt. (1819).

55. See VA. CODE ANN., ch. 101, § 4 & annotation (1819) (identifying commencement date of chapter 101 and explaining that the second and third sections are taken from the statutes of Elizabeth 13 and 27).

56. *Id.* § 2.

57. *Id.*

58. See VA. CODE ANN., ch. 118, §§ 1–2 (1849).



The General Assembly recodified the Virginia Code once again in 1887 and, in doing so, formed the primary structure of Virginia's current fraudulent transfer law.<sup>59</sup> Virginia Code section 2458 of the Code of 1887 provided, in relevant part, that:

Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given with the intent to delay, hinder, or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully entitled to, shall, as to such creditors, purchasers, or other persons, their representatives, or assigns, be void.<sup>60</sup>

In addition to section 2458, the General Assembly also included Virginia Code section 2459 in the 1887 Code.<sup>61</sup> That provision addressed voluntary conveyances and conveyances made in consideration of marriage. It provided that:

Every gift, conveyance, assignment, transfer, or charge, which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account, merely be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made; and though it be decreed to be void as to a prior creditor, because voluntary or upon consideration of marriage, it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers.<sup>62</sup>

When the General Assembly recodified the Virginia Code in 1919, it relocated sections 2458 and 2459 to sections 5184 and 5185, respectively.<sup>63</sup> The recodification did not, however, alter the substance of the statutes in any way.<sup>64</sup>

In 1950, the General Assembly recodified the Virginia Code as its current structure. Virginia Code section 5184—the provision governing transfers of real or personal property made with the intent to hinder, delay, or defraud creditors—became Virginia Code

---

59. VA. CODE ANN. § 30-2458 (1887). Specifically, the General Assembly structured fraudulent transfer law so that transfer made with intent to delay, hinder, or defraud creditors would be addressed by one statute and voluntary transfers made for inadequate consideration would be addressed by another. *Id.*

60. *Id.*

61. *Id.* § 2459.

62. *Id.*

63. VA. CODE ANN. §§ 46-5184, -5185 (1919).

64. Compare VA. CODE ANN. §§ 46-2458, -2459 (1887), with VA. CODE ANN. §§ 46-5184, -5185 (1919).

section 55-80.<sup>65</sup> Virginia Code section 5185 became Virginia Code section 55-81.<sup>66</sup> Virginia Code section 55-80 did not differ from Virginia Code section 5184 substantively as a result of the recodification and, indeed, remains unchanged to this day.<sup>67</sup> Accordingly, Virginia Code section 55-80 provides that:

Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, every suit commenced or decree, judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void.<sup>68</sup>

Originally, Virginia Code section 55-81—the provision addressing conveyances for consideration not deemed valuable in law—also did not vary in substance from its predecessor, Virginia Code section 5185.<sup>69</sup> In 1988, however, the General Assembly made a significant substantive amendment to Virginia Code section 55-81.<sup>70</sup> Following the amendment, a creditor seeking to avoid a transfer pursuant to Virginia Code section 55-81 still needs to demonstrate that the transfer involved no consideration deemed valuable in the law.<sup>71</sup> However, the General Assembly inserted an additional requirement into the statute that “the party seeking to avoid the transfer must prove that the transferor was insolvent at the time the transfer was made or was rendered insolvent as a result of the transfer.”<sup>72</sup>

Accordingly, following the July 1, 1988 amendment, Virginia Code section 55-81 provided—and currently provides—that:

Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, by an insolvent transferor, or by a transferor who is thereby rendered insolvent, shall be void as to creditors whose debts shall have been contracted at the time it was made, but

---

65. Compare VA. CODE ANN. § 46-5184 (1919), with VA. CODE ANN. § 55-80 (1950).

66. Compare VA. CODE ANN. § 46-5185 (1919), with VA. CODE ANN. § 55-81 (1950).

67. Compare VA. CODE ANN. § 46-5184 (1919), with VA. CODE ANN. § 55-80 (1950).

68. VA. CODE ANN. § 55-80 (Repl. Vol. 2007 & Cum. Supp. 2011).

69. Compare VA. CODE ANN. § 46-5185 (1919), with VA. CODE ANN. § 55-81 (1950).

70. Act of Apr. 3, 1988, ch. 512, 1988 Va. Acts 624 (codified as amended at VA. CODE ANN. § 55-81 (Repl. Vol. 2007 & Cum. Supp. 2011) (inserting requirement of debtor insolvency into Virginia Code section 55-81)).

71. *Id.*

72. *Leake v. Mitchell (In re Mitchell)*, 108 B.R. 112, 113 (Bankr. W.D. Va. 1989).

shall not, on that account merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made. Even though it is decreed to be void as to a prior creditor, because voluntary or upon consideration of marriage, it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers.<sup>73</sup>

Virginia's current statutory framework lacks the thorough coverage provided by the UFTA and leaves to common law many issues which the UFTA expressly addresses. Indeed, Virginia is one of eight U.S. jurisdictions that has not adopted the UFTA.<sup>74</sup> The failure of the General Assembly to adopt the UFTA, however, is not the result of a lack of awareness of UFTA or its potential benefits. As with all other states, several appointed commissioners represent Virginia at the NCCUSL.<sup>75</sup> Each year, these commissioners prepare reports on the status of various uniform laws being considered at the NCCUSL and make recommendations to the General Assembly as to what uniform laws should be adopted.

The NCCUSL has been meeting every year since 1892.<sup>76</sup> Virginia began sending commissioners appointed by the governor in 1898.<sup>77</sup> The first recommendation by commissioners to adopt a uniform act concerning fraudulent transfers came in 1920.<sup>78</sup> That year, the Virginia commissioners recommended that Governor Westmoreland Davis and the General Assembly adopt five uniform acts:<sup>79</sup> The Uniform Sales Act of 1906; The Uniform Bill of Lading Act of 1909; The Uniform Stock Transfer Act of 1909; The Uniform Conditional Sales Act of 1918; and The Uniform Fraudulent Conveyances Act of 1918.<sup>80</sup> Together, these five acts—with the four other uniform acts Virginia had already adopted—made up what, at the time, were known as the Uniform Commercial Acts.<sup>81</sup> The commissioners urged the General Assembly of 1920 to

---

73. VA. CODE ANN. § 55-81 (Rep. Vol. 2007 & Cum. Supp. 2011).

74. See *UFTA Legislative Fact Sheet*, *supra* note 8.

75. REPORT OF THE VA. COMM'RS TO THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS TO THE GOVERNOR AND THE GEN. ASSEMBLY OF VA., Report Doc. No. 116, at 6–7 (2010).

76. *Id.* at 1.

77. REPORT OF COMM'RS FOR THE PROMOTION OF UNIFORMITY OF LEGISLATION IN THE UNITED STATES, S. Doc. No. 5, at 1 (1920).

78. *Id.* at 2–3.

79. *Id.*

80. *Id.*

81. *Id.* at 3.

“place Virginia in line with the great progressive [s]tates with which she has commercial dealings by adopting the rest of these [U]niform [C]ommercial [A]cts.”<sup>82</sup>

The Senate of Virginia acted on the suggestions contained in the commissioner’s report. It introduced bills relating to all five of the Uniform Commercial Acts, which Virginia had not yet adopted.<sup>83</sup> Germane to this article is Senate Bill 177 (“S.B. 177”), introduced on January 30, 1920 by Senator Julien Gunn of District 35.<sup>84</sup> S.B. 177 was coined “[a] bill concerning fraudulent conveyances and to make uniform the law relating thereto.”<sup>85</sup> The senate forwarded S.B. 177 to the Committee for Courts of Justice for review.<sup>86</sup> Several weeks later on February 19, 1920, the senate read for a third time and unanimously passed S.B. 177 by a vote of 38 to 0.<sup>87</sup> On February 20, 1920, the House of Delegates recognized that the senate had passed S.B. 177 and referred the bill to the House Committee on General Laws.<sup>88</sup> There is no record that the house dismissed S.B. 177 or that the governor vetoed the bill, and it appears that S.B. 177 died in committee.<sup>89</sup> The other four Uniform Commercial Acts met similar fates.<sup>90</sup> While this is the closest the General Assembly ever came to adopting the UFCA, it was not the last time the General Assembly considered its adoption.

In 1922, Senator Cannon took up the cause, presenting Senate Bill 258 (“S.B. 258”): “A bill concerning fraudulent conveyances, and to make uniform the law relating thereto.”<sup>91</sup> The senate referred S.B. 258 to the Committee for Courts of Justice.<sup>92</sup> There is no record that the bill ever made it out of committee or that either the senate or house took any further action.<sup>93</sup> Finally, Virgin-

---

82. *Id.*

83. S. JOURNAL, Senate of Va., Reg. Sess. 991–92 (1920).

84. *Id.* at 102.

85. *Id.*

86. *Id.*

87. *Id.* at 298, 305.

88. H. JOURNAL, House of Delegates of Va., Reg. Sess. 359, 363 (1920).

89. *See id.* at 995.

90. *Id.*; *see also* S. JOURNAL, Senate of Va., Reg. Sess. 991–92 (showing that S.B. 176, a bill making uniform the transfer of stock at corporations, was dismissed by the house, and that the others appear to have died in committee).

91. S. JOURNAL, Senate of Va., Reg. Sess. 181 (1922).

92. *Id.*

93. *Id.* at 1046.

ia's flirtation with the UFCA ended in 1924, when Senator B.F. Buchanan presented Senate Bill 87 ("S.B. 87"): "[A] bill concerning fraudulent conveyances, and to make uniform the law relating thereto."<sup>94</sup> S.B. 87 suffered the same fate as its 1922 predecessor. The senate took up the bill and referred it to the Committee for Courts of Justice, where it died.<sup>95</sup>

The commissioners' last mention of the UFCA and, consequently, their first mention of the UFTA came in their 1984 report.<sup>96</sup> At that point, the report only noted that the NCCUSL intended to produce a "Revised Uniform Fraudulent Conveyance Act" in the future.<sup>97</sup> The commissioners next raised the issue of the UFTA to the General Assembly in their 1986 report.<sup>98</sup> By that time, the NCCUSL had finalized the UFTA and the Act had been sent to the states for consideration by their legislatures.<sup>99</sup> The commissioners strongly recommended the General Assembly adopt the UFTA on the grounds that it "conform[s] the earlier Act to the present Bankruptcy Code provisions and decisional law, and resolves substantial legal issues that provide better protection for creditors from fraudulent transfers."<sup>100</sup> The General Assembly was slow to respond to this recommendation, however, and the commissioners continued to insist that Virginia adopt the UFTA without any progress until 1990.<sup>101</sup> In that year, Delegate Richard Cranwell sponsored House Bill 243 ("H.B. 243").<sup>102</sup> That bill proposed that the General Assembly adopt the UFTA and repeal

---

94. S. JOURNAL, Senate of Va., Reg. Sess. 51 (1924).

95. *See id.* at 918.

96. REPORT OF THE VA. COMM'RS TO THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS TO THE GOVERNOR AND THE GEN. ASSEMBLY OF VA., H. Doc. No. 4, at 4 (1984).

97. *Id.*

98. REPORT OF THE VA. COMM'RS TO THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS TO THE GOVERNOR AND THE GEN. ASSEMBLY OF VA., H. Doc. No. 5, at 4 (1986).

99. *Id.*

100. *Id.* at 5.

101. *See* REPORT OF THE VA. COMM'RS TO THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS TO THE GOVERNOR AND THE GEN. ASSEMBLY OF VA., H. Doc. No. 8, at 6-7 (1990); REPORT OF THE VA. COMM'RS TO THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS TO THE GOVERNOR AND THE GEN. ASSEMBLY OF VA., H. Doc. No. 3, at 5-6 (1989); REPORT OF THE VA. COMM'RS TO THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS TO THE GOVERNOR AND THE GEN. ASSEMBLY OF VA., H. Doc. No. 4, at 6-7 (1988); REPORT OF THE VA. COMM'RS TO THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS TO THE GOVERNOR AND THE GEN. ASSEMBLY OF VA., H. Doc. No. 3, at 4 (1987).

102. H.B. 243, Va. Gen. Assembly (Reg. Sess. 1990).

Virginia Code sections 55-80, 55-81, and 55-82.<sup>103</sup> The General Assembly did not vote on the bill, but carried it over for future consideration in the 1991 session.<sup>104</sup> The General Assembly failed to reconsider the bill in 1991, however, because the Virginia Bar Association and the Virginia Banker's Association did not thoroughly review the Act and form a position on it by that time.<sup>105</sup> Accordingly, both organizations requested that consideration of the UFTA be carried over to the 1992 session and the commissioners agreed.<sup>106</sup> During the 1992 session, Senator Robert Calhoun sponsored Senate Bill 144 ("S.B. 144").<sup>107</sup> As with H.B. 243, S.B. 144 proposed the General Assembly adopt the UFTA and repeal Virginia Code sections 55-80, 55-81, and 55-82.<sup>108</sup> Once again, the General Assembly did not vote on the bill, but decided to carry it over until 1993 to allow the Virginia Bar Association and the Virginia Banker's Association further time prepare input on the UFTA.<sup>109</sup> In 1993, the commissioners made their final recommendation that the General Assembly adopt the UFTA.<sup>110</sup> However, no delegate or senator introduced a bill to do so, and no further action was taken.

After 1993, the commissioners never again raised the issue of adopting the UFTA to the Virginia General Assembly. It seems therefore that Virginia's continued reliance on Virginia Code sections 55-80 and 55-81 is not the product of the General Assembly consciously rejecting the UFTA. Rather, it appears the commissioners strongly supported the adoption of the UFTA for nearly a decade, but the matter never reached a final resolution within the legislature.

---

103. REPORT OF THE VA. COMM'RS TO THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS TO THE GOVERNOR AND THE GEN. ASSEMBLY OF VA., H. Doc. No. 23, at 6 (1991).

104. *Id.*

105. REPORT OF THE VA. COMM'RS TO THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS TO THE GOVERNOR AND THE GEN. ASSEMBLY OF VA., H. Doc. No. 18, at 6 (1992) [hereinafter 1992 VA. COMM'RS REPORT].

106. *Id.*

107. REPORT OF THE VA. COMM'RS TO THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS TO THE GOVERNOR AND THE GEN. ASSEMBLY OF VA., H. Doc. No. 34, at 6 (1993) [hereinafter 1993 VA. COMM'RS REPORT]; S.B. 144, Va. Gen. Assembly (Reg. Sess. 1992).

108. S.B. 144.

109. 1992 VA. COMM'RS REPORT, *supra* note 105, at 6.

110. 1993 VA. COMM'RS REPORT, *supra* note 107, at 6.

### III. ANALYSIS OF STATUTORY ISSUES

Virginia Code sections 55-80 and 55-81 have similar counterparts in the UFTA. In the same manner that Virginia Code section 55-80 recognizes that certain creditors may avoid debtor transfers made with the intent to hinder, delay, or defraud those creditors,<sup>111</sup> section 4(a)(1) of the UFTA enables certain creditors to avoid debtor transfers made with such intent.<sup>112</sup> Additionally, Virginia Code section 55-81 allows creditors, regardless of the debtor's intent, to avoid transfers for which the debtor did not receive consideration "deemed valuable in the law."<sup>113</sup> A similar provision appears in the UFTA in section 5(a), which enables creditors to avoid transfers made without receiving "reasonably equivalent value."<sup>114</sup>

There is, however, a provision in the UFTA for which no Virginia statutory counterpart exists—section 4(a)(2). Section 4(a)(2) deals with specific situations that the UFTA deems to be constructively fraudulent—transfers that are fraudulent without regard to the debtor's intent.<sup>115</sup> This section will attempt to identify transfers that Virginia's fraudulent transfer statutes treat differently than the UFTA or simply fail to address. In this regard, Part III.A will compare the Virginia statutes to their UFTA counterparts. Part III.B will examine UFTA provision 4(a)(2), which, as mentioned above, has no Virginia counterpart.

#### A. *Identifying the Differences Between the Virginia Provisions and Their UFTA Counterparts*

##### 1. Virginia Code Section 55-80 and UFTA Section 4(a)(1)

As noted above, both section 55-80 and section 4(a)(1) specifically govern those transfers made by the debtor with an intent to

---

111. VA. CODE ANN. § 55-80 (Repl. Vol. 2007 & Cum. Supp. 2011); *see also* Hyman v. Porter (*In re* Porter), 37 B.R. 56, 63 (Bankr. E.D. Va. 1984) (citing 9A MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA FRAUDULENT AND VOLUNTARY CONVEYANCES § 12 (Repl. Vol. 1977)).

112. UNIF. FRAUDULENT TRANSFER ACT § 4(a)(1), 7A pt. 2 U.L.A. 58 (2006).

113. VA. CODE ANN. § 55-81 (Repl. Vol. 2007 & Cum. Supp. 2011); *see also* Balzer & Assocs., Inc. v. The Lakes on 360, Inc., 250 Va. 527, 531, 463 S.E.2d 453, 455 (1995).

114. UNIF. FRAUDULENT TRANSFER ACT § 5(a), 7A pt. 2 U.L.A. 129 (2006).

115. *Id.* § 4(a)(2), 7A pt. 2 U.L.A. 58, 59 cmt. 5; *see also* Wells v. Sleep (*In re* Mich. Mach. Tool Control Corp.), 381 B.R. 657, 667 (Bankr. E.D. Mich. 2008).

hinder, delay, or defraud creditors.<sup>116</sup> The two provisions operate similarly in many respects. Under both statutes, either a present creditor or future creditor may seek to avoid the alleged fraudulent transfer.<sup>117</sup> A creditor seeking to avoid a transfer pursuant to section 55-80 must prove her case by clear and convincing evidence.<sup>118</sup> Most UFTA jurisdictions impose the same burden of proof on creditors to avoid a transfer pursuant to section 4(a)(1).<sup>119</sup> Additionally, both statutes allow creditors to prove the intent to hinder, delay, or defraud by using either direct evidence or circumstantial evidence.<sup>120</sup> More often than not, creditors rely on circumstantial evidence to demonstrate the presence of certain conditions surrounding the transaction.<sup>121</sup> These conditions are referred to as “badges of fraud.”<sup>122</sup> One minor difference between the UFTA and Virginia’s statutory framework is that the UFTA enumerates what it contemplates as badges of fraud in section 4,<sup>123</sup> whereas Virginia defines its badges of fraud through common law.<sup>124</sup>

116. See *supra* notes 110–13 and accompanying text.

117. *Balzer & Assocs., Inc.*, 250 Va. at 530–31, 463 S.E.2d at 455; UNIF. FRAUDULENT TRANSFER ACT § 4(a), 7A pt. 2 U.L.A. 58 (2006) (stating that a transfer “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 statutory requirements are proved).

118. *Hutcheson v. Savs. Bank of Richmond*, 129 Va. 281, 289, 105 S.E. 677, 680 (1921). Indeed, “[t]he law never presumes fraud, but the presumption is always in favor of innocence and honesty.” *Id.* (citing *N.Y. Life Ins. Co. v. Davis*, 96 Va. 737, 739, 32 S.E. 475, 475 (1899)).

119. See, e.g., *Spangler v. Redick*, 600 N.E.2d 720, 723 (Ohio Ct. App. 1991) (explaining that Ohio uses a clear and convincing standard to determine whether a transfer is fraudulent as to creditors). *But see* *Woodard v. Stewart (In re Stewart)*, 280 B.R. 268, 274 (Bankr. M.D. Fla. 2001) (explaining that Florida uses a preponderance of the evidence standard to determine whether a transfer is fraudulent as to creditors).

120. *Hyman v. Porter (In re Porter)*, 37 B.R. 56, 63 (Bankr. E.D. Va. 1984) (citing *Fowlkes v. Tucker*, 164 Va. 507, 514–15, 180 S.E. 302, 305 (1935); *Hutcheson*, 129 Va. at 289, 105 S.E. at 680; *Witz, Biedler & Co. v. Osburn*, 83 Va. 227, 228, 230, 2 S.E. 33, 34–45 (1877)).

121. *Hutcheson*, 129 Va. at 289, 105 S.E. at 680 (“The charge of fraud is one easily made, and the burden of proving it rests on the party alleging its existence. It may be proved, not only by positive and direct evidence, but by showing facts and circumstances sufficient to support the conclusion of fraud.”).

122. *Bernstein Bros. Mgmt. v. Miller*, 44 Va. Cir. 69, 75–76 (1997) (Fairfax County) (“The requirement of showing actual intent can usually be shown only by circumstantial evidence in the form of certain ‘badges of fraud’ from which the fraudulent intent may be inferred.” (citing *Fowlkes*, 164 Va. at 514, 180 S.E. at 304–05 (1935)); *Hutcheson*, 129 Va. at 289–91, 105 S.E. at 680–81 (1921); *Todd v. Sykes*, 97 Va. 143, 147, 33 S.E. 517, 519 (1899); *Witz, Biedler & Co.*, 83 Va. at 230, 2 S.E. at 35 (1887); *In re Porter*, 37 B.R. at 63)).

123. UNIF. FRAUDULENT TRANSFER ACT § 4(b), 7A pt. 2 U.L.A. 58–59 (2006). Section 4(b) of the UFTA recognizes the badges of fraud as including:



Furthermore, the range of creditors protected by section 4(a)(1) is significantly larger than those creditors who enjoy the protection of section 55-80. Namely, section 4(a)(1) enables a creditor to avoid a transfer if the debtor makes a transfer or incurs an obligation “with actual intent to hinder, delay, or defraud *any creditor* of the debtor.”<sup>125</sup> A straightforward reading of this statutory language indicates that a debtor who makes a transfer with actual intent to hinder, delay, or defraud even a single creditor opens the door for any of her creditors to avoid the transfer pursuant to section 4(a)(1). This will be referred to as “general intent.”<sup>126</sup> In other words, the UFTA theoretically allows Creditor X to set aside a transfer as fraudulent even though the debtor only made the transfer with the intent to hinder, delay, or defraud Creditor Y.

This concept must be contrasted against the language of Virginia Code section 55-80. That provision voids any transfer “with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled . . . [only] as to such creditors, purchasers, or other persons.”<sup>127</sup> A straightforward reading of this statutory language indicates that a creditor may only set aside a transfer as a fraudulent transfer in violation of the statute if the creditor is capable of proving that the debtor intended the transfer to hinder, delay, or defraud that

---

(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.

*Id.*

124. In Virginia, the badges of fraud consist of: “(1) the relationship of the parties; (2) the grantor's insolvency; (3) pursuit of the grantor by creditors; (4) want of consideration; (5) retention of possession of the transferred property by the grantor; (6) incurring debt fraudulently after the transfer.” *Dollar v. Dollar*, 27 Va. Cir. 474, 475 (1983) (Frederick County).

125. UNIF. FRAUDULENT TRANSFER ACT § 4(a)(1), 7A pt. 2 U.L.A. 58 (2006) (emphasis added).

126. *Id.*

127. VA. CODE ANN. § 55-80 (Repl. Vol. 2007 & Cum. Supp. 2011).

specific creditor. This will be called “specific intent.” This is unlike the UFTA, which only requires that the debtor intended to hinder, delay, or defraud “any creditor” for a creditor to make use of the statute.<sup>128</sup> For example, under this reading of the statute, Virginia Code section 55-80 only allows Creditor *X* to set aside a transfer as fraudulent if the debtor specifically intended to hinder, delay, or defraud Creditor *X*. If the debtor only intended to hinder, delay, or defraud Creditor *Y* when she made the transfer, Creditor *X* would not be able to avoid the transfer under Virginia Code section 55-80.<sup>129</sup>

The court’s decision in *Bernstein Bros. Management v. Miller*, supports the premise that Virginia Code section 55-80 requires “specific intent” to avoid the transfer.<sup>130</sup> The case involved a retired employee (“the Debtor”) of Bernstein Brothers Management (“BBM”) who, during her tenure with the company, embezzled over \$1 million in company funds.<sup>131</sup> BBM discovered the embezzlement after the Debtor’s retirement.<sup>132</sup> By that time, however, the Debtor had given a significant amount of the funds away to various individuals.<sup>133</sup> BBM brought suit to void the transfers as fraudulent in violation of Virginia Code section 55-80.<sup>134</sup> In discussing BBM’s burden of proof under the statute, the court explained that, “[i]n order to prevail [under Virginia Code section 55-80], BBM is required to show that [the Debtor’s] gifts to her children and grandchildren were made with the intent to hinder, delay, or defraud BBM.”<sup>135</sup>

---

128. UNIF. FRAUDULENT TRANSFER ACT § 4(a)(1), 7A pt. 2 U.L.A. 58 (2006).

129. However, the right to avoid a fraudulent transfer is not personal to the specific creditor that the debtor intended to defraud. Accordingly, if the debtor intended to hinder, delay, or defraud Creditor *X* in making the transfer and Creditor *X* subsequently assigns his claim, the assignee will always be able to avoid the transfer pursuant to section 55-80. See *Nat’l Valley Bank v. Hancock*, 100 Va. 101, 106, 40 S.E. 611, 613 (1902).

130. 44 Va. Cir. 69 (1997) (Fairfax County).

131. *Id.* at 71.

132. *Id.*

133. *Id.* at 72.

134. *Id.* at 75.

135. *Id.*; see also *Efessiou v. Efessiou*, 41 Va. Cir. 142, 145 (1996) (Fairfax County) (“The requisite elements of a fraudulent conveyance under Code 55-80 are (i) the conveyance of property to another (ii) with the intent to hinder, delay or defraud (iii) a creditor, purchaser, or other person (iv) from what they are or may be lawfully entitled to.”); *Consolidated Bank & Trust Co. v. Thornhill*, No. 93CHD01260, 1994 WL 16795199, at \*1 (Va. Cir. Ct. Dec. 21, 1994) (Richmond City) (avoiding transfers made to a trust because the transfer were made with the intent to hinder, delay, or defraud creditors, *including* the plaintiff).

*Buchanan v. Buchanan* is another case that lends support for reading Virginia Code section 55-80 as requiring “specific intent.”<sup>136</sup> In *Buchanan*, the plaintiff challenged certain transfers made by her ex-husband to his mother as fraudulent under Virginia Code section 55-80.<sup>137</sup> After the trial court found the transfers to be fraudulent, the ex-husband appealed on the grounds that the claims were unliquidated and contingent at the time of transfer.<sup>138</sup> The court rejected this argument and then briefly discussed the intent requirement under section 55-80.<sup>139</sup> While the court did not establish clear standards regarding the intent requirement, it did discuss the importance of the trial court’s finding of the requisite intent.<sup>140</sup> The discussion focused on the trial court’s finding that the transfers at issue were specifically intended to defraud the transferor’s ex-wife in contemplation of their impending divorce—as opposed to an intent by the debtor to hinder, delay, or defraud creditors generally.<sup>141</sup>

It does not appear, however, that any Virginia court has expressly stated that “specific intent” is a requirement of section 55-80. Indeed, some opinions applying the statute discuss it in a way that indicates only a general intent to hinder, delay, or defraud creditors is required for any creditor to avoid the transfer under the statute. For example, one court stated:

Virginia Code § 55-80 allows any creditor to petition a court to void a conveyance of *any type* from its debtor to a third party on the basis that valuable consideration was not obtained and that it was therefore fraudulently made. The creditor need only show that the conveyance was made with the intent to delay, hinder, or defraud creditors.<sup>142</sup>

Thus, the law on this issue is neither clear nor settled. It may be that situations in which a debtor makes a transfer with the intent simply to hinder, delay, or defraud some of her creditors and not others is sufficiently rare that Virginia courts have yet to need to

---

136. 266 Va. 207, 210–41, 585 S.E.2d 533, 534–55 (2003).

137. *Id.* at 211, 585 S.E.2d at 535.

138. *Id.* at 212, 585 S.E.2d at 536.

139. *Id.* at 212–13, 585 S.E.2d at 536.

140. *Id.* at 213, 585 S.E.2d at 536.

141. *Id.*

142. *Lawyers Title Ins. Corp. v. P.R.T. Enters., Inc.*, 65 Va. Cir. 271, 276 (2004) (Norfolk City).

provide direct guidance on the issue. Whatever the reason for the ambiguity in this area of the law, practitioners need to be wary when advising clients on the likelihood of avoiding an alleged fraudulent transfer if the evidence supports that the requisite intent to hinder, delay, or defraud existed as to some creditors but not others.

One additional difference worth noting is the result of a recent development in the law. It appears that Virginia Code section 55-80 may also require the party seeking to set aside the transfer to prove facts demonstrating the transferee has notice of the debtor's fraudulent intent.<sup>143</sup> Such an interpretation of the statute is seen in *In re Taneja*.<sup>144</sup> In that case, the trustee sought to set aside certain transfers as fraudulent in violation of Virginia Code section 55-80.<sup>145</sup> The transferees argued that the statute's language stating, "[t]his section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor or the fraud rendering void the title of such grantor," stood for the proposition that the trustee had the burden of proving they had notice of the transferor's fraudulent intent in order to avoid the transfers.<sup>146</sup> The trustee argued the same language merely provided an affirmative defense to a purchaser for value where intent to hinder, delay, or defraud was present.<sup>147</sup>

The court determined, based on a prior Supreme Court of Virginia case, that "it seems clear that a plaintiff attacking a fraudulent conveyance under [section] 55-80 must always allege, as part of its cause of action, not only the debtor's fraudulent intent in making the transfer, but the transferee's notice of that intent."<sup>148</sup> Such a reading is at great variance with section 55-80's UFTA counterpart.<sup>149</sup> Section 4(a)(1) does not require any proof regarding the mental state of the transferee in order for the provision to

---

143. *In re Taneja*, No. 08-13293-SSM, 2011 Bankr. LEXIS 1549, at \*11-12 (Bankr. E.D. Va. Apr. 26, 2011); *Alf v. Galen Capital Corp.*, No. CL-2011-3208, 2011 Va. Cir. LEXIS 93, at \*6, \*9, \*10 (July 12, 2011) (Fairfax County).

144. *In re Taneja*, 2011 Bankr. LEXIS 1549, at \*1-2.

145. *Id.* at \*1.

146. *Id.* at \*6-7.

147. *Id.* at \*7.

148. *Id.* at \*11-12.

149. UNIF. FRAUDULENT TRANSFER ACT § 4(a)(1), 7A pt. 2 U.L.A. 58 (2006).

be applicable.<sup>150</sup> Thus, a creditor seeking to avoid a transfer pursuant to section 4(a)(1) maintains a lesser burden of proof in order to prevail.

Indeed, *In re Taneja* is illustrative of this point. In ruling on the trustee's attempt to avoid the transfers, the court explained that there was no question that the plaintiff pleaded sufficient facts to show the debtor made the subject transfers with the intent to hinder, delay, or defraud creditors.<sup>151</sup> In a jurisdiction that adopted UFTA section 4(a)(1), this showing alone would be sufficient grounds to avoid the transfer. However, the added requirement of proving the transferee had notice of the debtor's fraudulent intent was a sufficient hurdle to prevent the trustee from relying on section 55-80 to avoid the transfer.<sup>152</sup>

Although, as a general matter, the provisions of the UFTA provide greater protection to creditors than Virginia's fraudulent transfer statutes, this is not always the case. Virginia Code section 55-80 provides greater protection to creditors in at least one regard. Specifically, section 4(a)(1) is subject to the statute of limitations outlined in section 9(a).<sup>153</sup> Section 9(a) limits the time in which a creditor may bring a cause of action under the statute to "[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."<sup>154</sup> In contrast, Virginia Code section 55-80 is not subject to a statutory or common law statute of limitations. Rather, the only time limitation imposed on creditors for bringing their cause of action is the equitable doctrine of laches.<sup>155</sup> Relying on this doctrine, the Supreme Court of Virginia has avoided fraudulent transfers up to ten years after the transfer took place.<sup>156</sup> Achieving the same result under section 4(a)(1) of the UFTA, while not impossible, is

---

150. *In re Taneja*, 2011 Bankr. LEXIS 1549, at \*11-12.

151. *Id.* at \*3 n.2.

152. *Id.* at \*11-12.

153. See UNIF. FRAUDULENT TRANSFER ACT §§ 4(a)(1), 9(a), 7 pt. 2 U.L.A. 194 (2006).

154. *Id.* § 9(a).

155. See *Bartl v. Ochsner (In re Ichiban, Inc.)*, No. 06-10316-SSM, 2007 Bankr. LEXIS 1255, at \*8 (Bankr. E.D. Va. 2007); *Gold v. Laines (In re Laines)*, 352 B.R. 397, 402 n.5 (Bankr. E.D. Va. 2005); *In re Massey*, 225 B.R. 887, 890 (Bankr. E.D. Va. 1998); *Hyman v. Porter (In re Porter)*, 37 B.R. 56, 66 (Bankr. E.D. Va. 1984).

156. *Atkinson v. Solenberger*, 112 Va. 667, 669, 72 S.E. 727, 728 (1911) (suit instituted nine years after conveyance was recorded); *Flook v. Armentrout's Adm'r*, 100 Va. 638, 639-40, 42 S.E. 686, 686 (1902) (suit brought ten years after conveyance was recorded).

fairly unlikely. Accordingly, this is one of the few ways in which Virginia's fraudulent transfer statutes offer greater protection to creditors than the UFTA.

## 2. Virginia Code Section 55-81 and UFTA Section 5(a)

Virginia Code section 55-81 and UFTA section 5(a) both address the situation in which a debtor receives insufficient consideration for a transfer made when the debtor was insolvent or the debtor became insolvent as a result of the transfer.<sup>157</sup> The statutes are similar in two ways. First, only a present creditor of the debtor may attempt to avoid an alleged fraudulent transfer under either statute.<sup>158</sup> Secondly, both statutes require that the transfer at issue involve some degree of inadequate consideration and that the debtor be insolvent at the time of the transfer or become insolvent as a result of the transfer.<sup>159</sup> In this regard, the term "insolvency" under either statute contemplates the situation where a debtor's liabilities exceed her assets.<sup>160</sup> Despite these similarities, however, Virginia Code section 55-81 and UFTA section 5(a) also have some noteworthy differences.

One such difference is that the statutes rely on different measuring rods in order to test the adequacy of the consideration received in exchange for the transfer or obligation. Virginia Code section 55-81 couches the issue in terms of "consideration deemed valuable in law," whereas UFTA section 5(a) is concerned with

---

157. Compare VA. CODE ANN. § 55-81 (Repl. Vol. 2007 & Cum. Supp. 2011) (providing that the creditor of an insolvent debtor may avoid a transfer not made for consideration deemed valuable in the law), with UNIF. FRAUDULENT TRANSFER ACT § 5(a), 7A pt. 2 U.L.A. 129 (2006) (providing that the creditor of an insolvent debtor may avoid a transfer not made for consideration of reasonably equivalent value).

158. Compare VA. CODE ANN. § 55-81 (Repl. Vol. 2007 & Cum. Supp. 2011) (stating that a transfer made by an insolvent debtor for consideration not deemed valuable in the law shall not be void as to subsequent creditors or purchasers), with UNIF. FRAUDULENT TRANSFER ACT § 5(a), 7A pt. 2 U.L.A. 129 (2006) (stating that only 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" may avoid a transfer under that provision).

159. Compare VA. CODE ANN. § 55-81 (Repl. Vol. 2007 & Cum. Supp. 2011) (providing that the creditor of an insolvent debtor may avoid a transfer not made for consideration deemed valuable in the law), with UNIF. FRAUDULENT TRANSFER ACT § 5(a), 7A pt. 2 U.L.A. 129 (2006) (providing the creditor of an insolvent debtor may avoid a transfer not made for consideration of reasonably equivalent value).

160. *Hudson v. Hudson*, 249 Va. 335, 340-41, 455 S.E.2d 14, 17 (1995); UNIF. FRAUDULENT TRANSFER ACT § 2(a), 7A pt. 2 U.L.A. 37 (2006).

“reasonably equivalent value.”<sup>161</sup> The difference in these two standards extends beyond their terminology. Section 3(a)’s “reasonably equivalent value” language is based on the standard found in section 548(d)(2)(A) of the Bankruptcy Code.<sup>162</sup> This standard is not defined or applied by use of a bright line rule.<sup>163</sup> Rather than rely on a rigid mathematical calculation, courts typically look at the facts of each case and determine reasonably equivalent value by examining factors such as the good faith of the transferee, the fair market value of the asset transferred, the percentage of fair market value paid for the asset, and whether the transferor and transferee agreed on the terms of the transfer as the result of “arms-length” bargaining between a willing buyer and a willing seller.<sup>164</sup>

As ambiguous as section 5(a)’s reasonably equivalent standard may be, it can be argued that it is an elevated standard of consideration in comparison to Virginia Code section 55-81’s “consideration deemed valuable in law” standard. Although there is no Virginia authority available which directly compares section 5(a)’s standard with Virginia Code section 55-81’s standard, several federal cases compare section 548’s “reasonably equivalent value”

161. Compare VA. CODE ANN. § 55-81 (Repl. Vol. & Cum. Supp. 2011), with UNIF. FRAUDULENT TRANSFER ACT § 5(a), 7A pt. 2 U.L.A. 129 (2006).

162. UNIF. FRAUDULENT TRANSFER ACT § 3 cmt. 2, 7A pt. 2 U.L.A. 47 (2006).

163. Lindquist v. JNG Corp. (*In re Lindell*), 334 B.R. 249, 255–56 (Bankr. D. Minn. 2005) (“There is no bright line rule used to determine when reasonably equivalent value is given.”); see also Barber v. Golden Seed Co., 129 F.3d 382, 387 (7th Cir. 1997) (noting that “the standard for [r]easonable equivalence should depend on all the facts of each case” (citing *In re Bundles*, 856 F.2d 815, 824 (7th Cir. 1988))); *In re Northgate Computer Sys., Inc.*, 240 B.R. 328, 365 (Bankr. D. Minn. 1999); cf. *In re Lindell*, 334 B.R. at 255 (“When evaluating a transfer for reasonable equivalency under 11 U.S.C. § 548(a)(1)(B)(I) a court must examine the entire situation.” (citing *Jacoway v. Anderson (In re Ozark Rest. Equip. Co.)*, 850 F.2d 342, 344–45 (8th Cir. 1988))).

164. *Cooper v. Ashley Commc’ns, Inc. (In re Morris Comm’ns NC, Inc.)*, 914 F.2d 458, 466–67 (4th Cir. 1990). While “reasonably equivalent value” is not synonymous with fair market value, fair market value is significant to determining reasonably equivalent value. *In re Bundles*, 856 F.2d at 824; see also *Brandt v. Vidia Corp. (In re 3DFX Interactive, Inc.)*, 389 B.R. 842, 882 (Bankr. N.D. Cal. 2008) (“Fair market value . . . is what a hypothetical willing buyer and seller agree upon when possessed of relevant facts.”). Although the UFTA does not provide a clear definition for “reasonably equivalent value,” it does establish that:

For the purposes of [s]ections 4(a)(2) and 5, 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.

UNIF. FRAUDULENT TRANSFER ACT § 3(b), 7A pt. 2 U.L.A. 47 (2006).

standard with Virginia's consideration deemed valuable in the law" standard.<sup>165</sup> As noted above, these comparisons are relevant to the issue because section 5(a) adopted its standard from section 548 of the Bankruptcy Code.<sup>166</sup> Accordingly, it is not uncommon for courts in jurisdictions that have adopted the UFTA to turn to bankruptcy opinions in analyzing a "reasonably equivalent value" issue under the UFTA.<sup>167</sup> Bankruptcy courts that have compared the Bankruptcy's Code's "reasonably equivalent value" standard with section 55-81's "consideration deemed valuable in law" standard have concluded the two standards are not the same.<sup>168</sup> As one court observed, in order for a creditor to avoid a transfer under Virginia Code section 55-81 "there must have been no 'consideration deemed valuable in law,' which is not required to be reasonably equivalent to whatever has been exchanged. Consideration under section 55-81 requires only that something of value was gained."<sup>169</sup>

Accordingly, if this interpretation of "consideration deemed valuable in the law" is correct, section 55-81 offers more protection than section 5(a) to the proponent of an allegedly fraudulent transfer because the consideration involved in the transfer need not have monetary value or be reasonably equivalent in value to

---

165. See *C-T of Va., Inc. v. Euroshoe Assoc. Ltd.*, 953 F.2d 637, at \*2-4 (4th Cir. 1992) (unpublished table decision) (full text available in LEXIS, No. 91-1578, 1992 U.S. App. LEXIS 1029 (4th Cir. Jan. 29, 1992)); *Smith v. Porter (In re Carr & Porter, L.L.C.)*, 416 B.R. 239, 261-62 (Bankr. E.D. Va. 2009); *Schnelling v. Crawford (In re James River Coal Co.)*, 360 B.R. 139, 167 (Bankr. E.D. Va. 2007).

166. UNIF. FRAUDULENT TRANSFER ACT § 3 cmt. 2, 7A pt. 2 U.L.A. 47 (2006).

167. See, e.g., *Apollo Real Estate Inv. Fund, IV, L.P. v. Gelber*, 935 N.E.2d 963, 976 (Ill. App. Ct. 2010); *CB Richard Ellis, Inc. v. CLGP, L.L.C.*, No. 09CA1368, 2010 Colo. App. LEXIS 1050, at \*9-11 (July 22, 2010) (stating that bankruptcy opinions are one of three sources the court draws on to interpret the UFTA).

168. See *In re Carr & Porter, L.L.C.*, 416 B.R. at 261-62; *In re James River Coal Co.*, 360 B.R. at 167.

169. *In re Carr & Porter, L.L.C.*, 416 B.R. at 273 (citing *In re James River Coal Co.*, 360 B.R. at 167; *Wellington Apt., L.L.C. v. Clotworthy (In re Wellington Apt., L.L.C.)*, 350 B.R. 213, 245 (Bankr. E.D. Va. 2006)). The basis for the court's holding in *Smith* can be traced back to a 1992 decision by the United States Court of Appeals for the Fourth Circuit, *C-T of Virginia, Inc.*, No. 91-1578, 1992 U.S. App. LEXIS 1029 (4th Cir. Jan. 29, 1992). The case focused on the question whether section 55-80's "consideration deemed valuable in the law" standard could be equated to the "reasonably equivalent value" standard of the Bankruptcy Code. *Id.* at \*4. Noting that no Virginia court had previously decided the question, the Fourth Circuit relied on a West Virginia case involving the same issue decided under section 55-81. *Id.* (citing *Inspiration Coal, Inc. v. Mullins*, 690 F. Supp. 1502, 1505 (W.D. Va. 1988)). Relying on *Inspiration Coal*, the court concluded that section 55-81 does not require the consideration involved in the transfer have economic value or meet the reasonably equivalent value standard. *Id.*



the interest transferred.<sup>170</sup> Rather, it simply must have some legally cognizable value. One bankruptcy court indicated the importance of the distinction in *In re Carr & Porter, L.L.C.*<sup>171</sup> The debtor in *Carr* was a Virginia professional limited liability company engaged in the practice of law.<sup>172</sup> Porter originally acted as the sole owner and managing member of the firm.<sup>173</sup> Porter subsequently entered into a purchase agreement with two employees of the firm.<sup>174</sup> The purchase agreement provided that Porter would withdraw from the debtor as an equity partner, his equity interest would be purchased by the debtor at a price of \$1 million (paid in installments), he would continue to work for the debtor with compensation to be determined on his realized fees, and the two employees involved in the purchase agreement would guarantee the debtor's payment.<sup>175</sup> The firm eventually filed bankruptcy, but not before paying Porter \$255,500 pursuant to the purchase agreement.<sup>176</sup> The bankruptcy trustee challenged these transfers to Porter as fraudulent, in violation of Virginia Code section 55-81.<sup>177</sup>

The trustee argued that the purchase agreement lacked adequate consideration necessary to meet the "consideration deemed valuable in [the] law" standard under Virginia Code section 55-81.<sup>178</sup> Specifically, the trustee argued the debtor did not receive any new value from Porter as a result of the agreement, yet still incurred significant financial expense.<sup>179</sup> In approaching this argument, the court began its analysis by noting that Virginia Code section 55-81's "consideration deemed valuable at law" standard "differs substantially from the more familiar standard of [reasonably equivalent value]."<sup>180</sup> Unlike the latter, the former is satisfied by a transfer of "any valuable consideration received by the

---

170. See *C-T of Va., Inc.*, 1992 U.S. App. LEXIS 1029, at \*4 (finding that as long as something is gained, that is sufficient consideration to prevent avoiding a transfer pursuant to Virginia Code section 55-81).

171. *In re Carr & Porter, L.L.C.*, 416 B.R. at 261–63.

172. *Id.* at 242.

173. *Id.*

174. *Id.*

175. *Id.* at 242–43.

176. *Id.* at 243–44 & n.3.

177. *Id.* at 242.

178. See *id.* at 243–44, 261 (quoting VA. CODE ANN. § 55-81 (Repl. Vol. 2007 & Cum. Supp. 2011)).

179. See *id.* at 243 n.2.

180. *Id.* at 261.

transferor.”<sup>181</sup> Although the court agreed that Porter did not provide new value to the firm, it noted that because of the purchase agreement, “the [d]ebtor continued its existence with all of its substantial financial assets of cash, accounts, and work in progress, as well as its intangible—but nonetheless valuable—assets, such as its established client relationships and goodwill.”<sup>182</sup> Accordingly, the court concluded that “[g]iven the absence of the necessity of equivalency of consideration under Virginia Code § 55-81, the employment agreements of the [d]ebtor with Tribble and Porter alone are sufficient to legally establish that the [d]ebtor received ‘consideration deemed valuable at law’ as a result of the transaction with Porter.”<sup>183</sup> Thus, the court’s discussion of the issue indicates that it may have found Porter’s consideration to the debtor inadequate had it been scrutinized under section 548’s “reasonably equivalent value” standard.<sup>184</sup>

As with Virginia Code section 55-80, Virginia Code section 55-81 does in one respect offer more favorable treatment than UFTA section 5(a) to creditors seeking to avoid a purportedly fraudulent transfer. The statute of limitations for bringing a section 5(a) action is identified in section 9(b), which provides that a creditor must bring such an action “within [four] years after the transfer was made or the obligation was incurred.”<sup>185</sup> On the other hand, Virginia Code section 55-81 is subject to the statute of limitations identified in Virginia Code section 8.01-253.<sup>186</sup> Section 8.01-253 requires that a creditor attempting to avoid a transfer pursuant to section 55-81 must bring the action “within five years from its recordation, and if not so recorded within five years from the time the same was or should have been discovered.”<sup>187</sup> Thus, section 8.01-253 permits a creditor more time to bring an avoidance action if the transfer is recorded and, if not recorded, tolls the running of the statute of limitations until the creditor should have

---

181. *Id.* (quoting *Shaia v. Meyer (In re Meyer)*, 244 F.3d 352, 355 (4th Cir. 2001)).

182. *Id.* at 263.

183. *Id.* (emphasis added) (citing *Adams Labs., Inc. v. Garrett (In re Adams Labs., Inc.)*, 3 B.R. 495, 502–03 (Bankr. E.D. Va. 1980)).

184. *Id.*

185. UNIF. FRAUDULENT TRANSFER ACT § 9(b), 7A pt. 2 U.L.A. 194 (2006).

186. VA. CODE ANN. § 8.01-253 (Repl. Vol. 2007 & Cum. Supp. 2011).

187. *Id.*

reasonably discovered the transfer.<sup>188</sup> In regards to the statute of limitations, section 9(b) of the UFTA does not offer the same protection to creditors because it does not account for the situation in which creditors, through no fault of their own, do not become aware of the transfer until the statute of limitations has lapsed.<sup>189</sup> Indeed, if the drafters of the UFTA intended to offer such protection to creditors bringing a section 5(a) action, they would have expressly included it in section 9(b) as they did in section 9(a) for creditors bringing an action under section 4(a)(1).<sup>190</sup>

B. *Section 4(a)(2): The UFTA Provision Without a Virginia Counterpart*

The preceding section of this article identified the two primary Virginia statutes addressing fraudulent transfers and compared them to their UFTA counterparts. It identified the differences between the two and demonstrated how those differences may benefit or harm creditors asserting a cause of action pursuant to Virginia Code section 55-80 or Virginia Code section 55-81. The focus of this article will now shift to an analysis of a different UFTA provision—section 4(a)(2). Unlike section 4(a)(1) or section 5(a), there is no comparable Virginia statute that governs fraudulent transfers in the same manner as section 4(a)(2). Part III.B(1) of this article identifies which transfers section 4(a)(2) applies to, and what a creditor must prove to avoid a given transfer pursuant to that provision. Part III.B(2) compares section 4(a)(2) with Virginia Code sections 55-80 and 55-81 to determine if the absence of a section 4(a)(2) counterpart in the Virginia Code generates any practical differences between Virginia fraudulent transfer law and the UFTA.

---

188. *See id.* However, the mere lack of knowledge that the transfer was made without adequate consideration is not sufficient to toll the statute of limitations. *Vashon v. Barrett*, 99 Va. 344, 348, 38 S.E. 200, 202 (1901). The lack of knowledge must proceed from the fraud of the grantee. *Id.*

189. *See* UNIF. FRAUDULENT TRANSFER ACT § 9(b), 7A pt. 2 U.L.A. 194 (2006) (failing to provide a tolling provision of any kind).

190. For example, section 9(a) allows for a cause of action to be brought after the four-year period under certain circumstances. *Id.* § 9(a), 7A pt. 2 U.L.A. 194 (2006). It follows that, if the drafters of the UFTA intended for this additional protection to be available to creditors asserting a section 5(a) claim, they would have included it in section 9(b). Accordingly, the absence of any such provision in section 9(b) is properly read as an absolute four-year statute of limitations.

## 1. Understanding Section 4(a)(2)

### a. Actual Intent to Hinder, Delay, or Defraud Not Required

Section 4(a)(1) and section 4(a)(2) of the UFTA identify two situations in which “[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.”<sup>191</sup> Specifically, a transfer made by a debtor will be fraudulent as to a present or future creditor under section 4(a)(1) “if the debtor made the transfer . . . with actual intent to hinder, delay, or defraud” any of his or her creditors.<sup>192</sup> Similar to section 5(a), section 4(a)(2) addresses situations in which the debtor makes the transfer “without receiving a reasonably equivalent value in exchange for the transfer or obligation.”<sup>193</sup> However, section 5(a) requires the transfer at issue not be for a reasonably equivalent value, and that the debtor be insolvent at the time of the transfer or be rendered insolvent by the transfer.<sup>194</sup> Section 4(a)(2), on the other hand, does not require the debtor be insolvent at any time in order for the creditor to sustain her cause of action.<sup>195</sup> Rather, to trigger section 4(a)(2), the alleged fraudulent transfer must have been for less than a reasonably equivalent value and the debtor must have either: (a) been engaged or “about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small” as they related to the business or transaction; or (b) “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 [as a result of the transfer].”<sup>196</sup>

Before comparing section 4(a)(2) against Virginia’s fraudulent transfer statute and attempting to identify their differences, it is necessary to perform a comparative analysis of the statutory language contained in sections 4(a)(1) and 4(a)(2). Section 4(a)(1), by

---

191. *Id.* § 4(a), 7A pt. 2 U.L.A. 58.

192. *Id.*

193. *Id.* § 4(a)(2), 7A pt. 2 U.L.A. 58.

194. *Id.* § 5(a), 7A pt. 2 U.L.A. 129.

195. *Id.* § 4(a)(2), 7A pt. 2 U.L.A. 58.

196. *Id.*

its plain language, applies to any transfer in which a debtor makes a transfer with the requisite “intent to hinder, delay, or defraud any creditor of the debtor.”<sup>197</sup> Section 4(a)(2) applies in situations involving badges of fraud from which a court could infer the actual intent to hinder, delay, or defraud creditors.<sup>198</sup> Indeed, section 4(b)—the provision in the UFTA enumerating the badges of fraud—recognizes that “[i]n determining actual intent under subsection (a)(1),” 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,” and whether the transfer involved “substantially all the debtor’s assets,” are both relevant factors to the issue.<sup>199</sup>

However, reading section 4(a)(2) as reaching transfers in which the debtor intended to hinder, delay, or defraud creates a statutory quagmire within the provision. One of the fundamental canons of statutory interpretation is that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”<sup>200</sup> If one reads the situations governed by section 4(a)(2) as ones that necessarily involve the “intent to hinder, delay, or defraud any creditor of the debtor,” section 4(a)(2) becomes a superfluous provision because, presumably, any transfer involving such intent is already governed by section 4(a)(1). Therefore, it follows that the UFTA con-

---

197. *Id.* § 4(a)(1), 7A pt. 2 U.L.A. 58.

198. Section 4(a)(2) applies to a transfer involving less than reasonably equivalent consideration and one in which the debtor is engaging “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 “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.” *Id.* § 4(a)(2), 7A pt. 2 U.L.A. 58. These situations strongly resemble badges of fraud. *See* Silagy v. Gagnon (*In re Gabor*), 280 B.R. 149, 158 (Bankr. N.D. Ohio 2002) (recognizing that badges of fraud include a transfer “in the face of actual or threatened litigation against debtor; at a time of insolvency or other unmanageable indebtedness; in the absence of fair consideration for the transfer; and to a transferee enjoying a special relationship to the debtor”).

199. UNIF. FRAUDULENT TRANSFER ACT § 4(b), 7A pt. 2 U.L.A. 58–59 (2006); *see also* Walbrun v. Babbitt, 83 U.S. (16 Wall.) 577 (1872) (holding sale by insolvent retail shop owner of all of his inventory in a single transaction to be fraudulent); Lumpkins v. McPhee, 286 P.2d 299 (N.M. 1955) (holding that although a transfer of all assets is said to indicate fraud, transfer was not fraudulent because full consideration was paid and transferor surrendered possession).

200. *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *see also* *Puello v. Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324, 331 (2d Cir. 2007) (refusing to apply one statutory provision’s definition of a term to another statutory provision where the former’s definition “would render [part of the latter’s] definition superfluous”).

templates that it is at least possible that a transfer involving inadequate consideration “for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction,” can occur without the “intent to hinder, delay, or defraud” any of his creditors. This is also true for a debtor engaging in a business or transaction who “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.”<sup>201</sup>

One method of reconciling section 4(a)(1) and section 4(a)(2) is to read a subjective element into section 4(a)(2) that examines whether the debtor transferor acted with good faith when engaging in a section 4(a)(2) transfer. Such a definition would be similar to the original Uniform Commercial Code article 9 “honesty in fact” definition of good faith where, no matter how patently unreasonable the act, a transferor acts in good faith so long as she subjectively believes she is not engaging in conduct that violates the rights of any creditor.<sup>202</sup> However, it is unlikely the drafters of the UFTA intended section 4(a)(2) to be applied in this manner. In discussing the role of good faith in relation to section 4(a)(2), comment 2 to section 4 explains:

Section 4(a)(2) is derived from §§ 5 and 6 of the Uniform Fraudulent Conveyance Act but substitutes “reasonably equivalent value” for “fair consideration.” The transferee’s good faith was an element of “fair consideration” as defined in § 3 of the Uniform Fraudulent Conveyance Act, and lack of fair consideration was one of the elements of a fraudulent transfer as defined in four sections of the Uniform Act. The transferee’s good faith is irrelevant to a determination of the adequacy of the consideration under this Act . . . .<sup>203</sup>

Thus, although comment 2 does not conclusively rule out the possibility that the debtor transferor’s subjective good faith plays some role in a section 4(a)(2) transfer analysis, neither the plain statutory language nor the comments interpreting the provision indicate that the such good faith is relevant to analyzing a transfer under section 4(a)(1).

---

201. UNIF. FRAUDULENT TRANSFER ACT § 4(a), 7A pt. 2 U.L.A. 58 (2006).

202. U.C.C. § 9-102 (2008); *see also* Nat’l Hous. P’ship v. Mun. Capital Appreciation Partners I, L.P., 935 A.2d 300, 313 (D.C. 2007) (discussing acting in good faith as requiring an individual meet the “honesty in fact” standard).

203. UNIF. FRAUDULENT TRANSFER ACT § 4 cmt. 2, 7A pt. 2 U.L.A. 59 (2006).

The accepted reading of section 4(a)(2) is the exact opposite. Under this reading, certain transfers are constructively or per se fraudulent, regardless of the presence or absence of the debtor transferee's actual intent to hinder, delay, or defraud creditors when engaging in the transaction.<sup>204</sup> Thus, the creditor would not need to prove any nefarious intent on the part of the debtor as an element of his or her prima facie case.<sup>205</sup> Rather, the creditor seeking to avoid the transfer would merely need to prove that one of the situations set out in section 4(a)(2) occurred. Comment 5 to section 4 bolsters this proposition by noting that "[p]roof of the presence of certain badges in combination establishes fraud conclusively—without regard to the actual intent of the parties—when they concur as provided in [section] 4(a)(2)."<sup>206</sup> In other words, section 4(a)(2) allows for "[a] transfer [to] be set aside as constructively fraudulent even if the debtor had no actual intent to hinder, delay, or defraud any existing or future creditor."<sup>207</sup>

b. Section 4(a)(2)(i)'s Unreasonably Small Assets Requirement

Section 4(a)(2)(i) of the UFTA provides that a debtor's transfer for inadequate consideration is constructively fraudulent if the debtor "was engaged or about to engage in a business or a transaction for which the remaining assets were unreasonably small in relation to the business or transaction [at issue]."<sup>208</sup> The manner in which the provision should be applied (hereinafter the "unreasonably small assets" requirement) is the subject of some confusion among the courts.

Some courts view the language of section 4(a)(2)(i) as requiring the debtor to be engaged in or about to engage in a transaction

---

204. *Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008) (discussing the difference between the UFTA's actual fraud and constructive fraud provisions).

205. *Gen. Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1499 (11th Cir. 1997) (stating there is no need to prove fraudulent intent in a constructive fraudulent transfer action).

206. UNIF. FRAUDULENT TRANSFER ACT § 4 cmt. 5, 7A pt. 2 U.L.A. 60 (2006).

207. Edward T. Wahl, *Fraudulent Transfers and the Uniform Fraudulent Transfer Act: An Overview*, 2009 WL 2510912, at \*5 (Aug. 2009) (citing *Youngstown Osteopathic Hosp. Ass'n v. Pathways Ctr. for Geriatric Psychiatry, Inc.* (*In re Youngstown Osteopathic Hosp. Ass'n*), 280 B.R. 400, 409–12 (Bankr. N.D. Ohio 2002)).

208. UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2)(i), 7A pt. 2 U.L.A. 58 (2006).

that would render it insolvent.<sup>209</sup> Insolvency, as defined by the UFTA, means “the sum of the debtor’s debts is greater than all of the debtor’s assets at a fair valuation.”<sup>210</sup> This financial condition is generally known as “balance sheet insolvency.”<sup>211</sup> Other courts treat the “unreasonably small assets” requirement as different, although not necessarily exclusive, of insolvency.<sup>212</sup> Under this latter interpretation of the requirement, “unreasonably small assets” refers to a financial condition short of balance sheet insolvency.<sup>213</sup> Courts applying this standard are concerned with whether the transfer “left the [d]ebtor with an ‘inability to generate sufficient profits to sustain operations’” or placed the debtor “on the road to financial ruin.”<sup>214</sup> In other words, “the transferor is technically solvent but doomed to fail.”<sup>215</sup>

Of the two views, the latter is the better-reasoned approach to applying section 4(a)(2).<sup>216</sup> To equate the “unreasonably small assets” requirement of the provision to balance sheet insolvency violates two fundamental canons of statutory interpretation: (a) the use of different words within the same statute should be read as having different meanings; and (b) words defined in one part of a statute are presumed to carry the same definition throughout the statute.<sup>217</sup> Insolvency is defined in section 2(a) of the UFTA.<sup>218</sup> If

---

209. See, e.g., *United States v. Gleneagles Inv. Co.*, 565 F. Supp. 556, 577 (M.D. Pa. 1983) (treating the statute’s “unreasonably small assets” requirement as requiring proof of insolvency).

210. UNIF. FRAUDULENT TRANSFER ACT § 2(a), 7A pt. 2 U.L.A. 37 (2006).

211. BLACK’S LAW DICTIONARY 867 (9th ed. 2009).

212. *La. Indus. Coatings, Inc. v. Pertuit (In re La. Indus. Coatings, Inc.)*, 31 B.R. 688, 698 (Bankr. E.D. La. 1983) (noting that insolvency satisfies the “unreasonably small assets requirement,” and that a solvent debtor can also be left with “unreasonably small assets” as a result of the transfer).

213. *Fid. Bond & Mort. Co. v. Brand (In re Fid. Bond & Mort. Co.)*, 340 B.R. 266, 294 (Bankr. E.D. Pa. 2006).

214. *Id.* (quoting *Moody v. Sec. Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1070 (3d Cir. 1992)); *Daley v. Chang (In re Joy Recovery Tech. Corp.)*, 286 B.R. 54, 76 (N.D. Ill. 2002).

215. *MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 944 (S.D.N.Y. 1995).

216. See Lee B. Shepard, *Beyond Moody: A Re-Examination of Unreasonably Small Capital*, 57 HASTINGS L.J. 891, 906–12 (2006); Bruce A. Markell, *Toward True and Plain Dealing: A Theory of Fraudulent Transfers Involving Unreasonably Small Capital*, 21 IND. L. REV. 469, 492 (1988) (equating insolvency with unreasonably small assets “does violence to the carefully structured standing rules applicable to fraudulent transfers and achieves results inconsistent with the UFCA’s original intent”).

217. See, e.g., *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) (“It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.”); *Westminster Homes, Inc. v. Zoning Bd. of Adjustment*, 554 S.E.2d 634, 642 (N.C.



the drafters of the UFTA intended insolvency to be a requirement under section 4(a)(2)(i), they could have easily included a reference to “unreasonably small assets” in the section 2 definition of insolvency, or simply used the term insolvency in lieu of reference to “unreasonably small assets” in section 4(a)(2)(i). The fact that they did neither undermines the argument that the “unreasonably small assets” requirement is tantamount to insolvency.<sup>219</sup> This conclusion is further supported by the fact that the drafters of the UFTA expressly made insolvency a requirement to avoid a transfer under section 5(a).<sup>220</sup> If the drafters of the UFTA intended debtor insolvency to be the requisite financial condition necessary for a creditor to invoke section 4(a)(2)(i), they would have included it as an express requirement of the provision as they did with section 5(a).<sup>221</sup> The fact that they used different language in section 4(a)(2)(i) suggests the two standards are different.<sup>222</sup> Accordingly, this article proceeds under the assumption that the “reasonably small assets” requirement means something different than balance sheet insolvency.

### c. Section 4(a)(2)(ii)’s State of Mind Requirement

If a creditor cannot prove the debtor received inadequate consideration for the transfer at issue in combination with the requirements of section 4(a)(2)(i), the creditor may still avoid the transfer by proving the debtor received inadequate consideration for the transfer at issue in combination with the requirements of section 4(a)(2)(ii).<sup>223</sup> Section 4(a)(2)(ii) of the UFTA provides that a debtor’s transfer for inadequate consideration is constructively fraudulent if the debtor “intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts be-

---

2001) (“[W]ords that carry a specific definition in one part of a statute are presumed to carry that same definition in all other parts.”).

218. UNIF. FRAUDULENT TRANSFER ACT § 2(a), 7A pt. 2 U.L.A. 37 (2006).

219. *Salisbury v. Texas Commerce Bank-Houston, N.A. (In re WCC Holding Corp.)*, 171 B.R. 972, 986 (Bankr. N.D. Tex. 1994) (noting that the lack of reference to unreasonably small assets in the definition of insolvency supports the conclusion that the two are not interchangeable).

220. UNIF. FRAUDULENT TRANSFER ACT § 5(a), 7A pt. 2 U.L.A. 129 (2006).

221. See *In re WCC Holding Corp.*, 171 B.R. at 986 (citations omitted) (“The concept of unreasonably small assets is separate and distinct from insolvency. If these concepts were interchangeable, one would expect the [l]egislature to have employed the same language.”).

222. *Id.*

223. UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2)(ii), 7A pt. 2 U.L.A. 58 (2006).

yond his [or her] ability to pay as they became due.”<sup>224</sup> Before comparing section 4(a)(2)(ii) to Virginia Code sections 55-80 and 55-81, it is important to distinguish how, if at all, the situation contemplated by section 4(a)(2)(ii) is different than insolvency and what transfers the provision purports to avoid.

It is tempting to read section 4(a)(2)(ii) as referring to insolvency, given that courts in the past have used the term “equitable insolvency” to refer to the financial condition in which the debtor is unable to pay debts as they mature (hereinafter, this article will use the term “equitable insolvency” in this context).<sup>225</sup> This temptation is only strengthened by the fact that, in referring to insolvency, other statutory bodies define insolvency in accordance with equitable insolvency.<sup>226</sup> The UFTA, however, uses the term insolvency to refer to a very narrow and specific financial condition. Anywhere the terms “insolvent” or “insolvency” appear in the UFTA, they should be read as referring to balance sheet insolvency (where the debtor’s liabilities exceed her assets). They should not be read to include equitable insolvency (the inability to pay debts as they become due). Such a conclusion is warranted because the UFTA does not incorporate the concept of equitable insolvency into its definition of “insolvent.”<sup>227</sup> The fact that the UFTA contemplates use of the term insolvency in the context of balance sheet insolvency<sup>228</sup> weighs against the conclusion that section 4(a)(2)(ii) is meant to be interpreted as referencing insolvency. Another factor weighing against such a reading is that to read the relevant language—“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”—as being tanta-

---

224. *Id.*

225. *See, e.g.,* Larrimer v. Feeney, 192 A.2d 351, 353 (Pa. 1963) (discussing the meaning of insolvency in the context of equity and in the context of bankruptcy).

226. *Ametek, Inc. v. Storage Tech. Corp. (In re Storage Tech. Corp.)*, 48 B.R. 862, 864 (Bank. D. Colo. 1985) (noting the Uniform Commercial Code uses insolvency in the context of equitable insolvency).

227. *See* UNIF. FRAUDULENT TRANSFER ACT § 2(a), 7A pt. 2 U.L.A. 37 (2006). However, it is worth noting that section 2(b) creates a rebuttable presumption of insolvency if a debtor “is generally not paying his [or her] debts as they become due.” *Id.* § 2(a) cmt. 2, 7A pt. 2 U.L.A. 38.

228. *First Fed. Sav. & Loan Ass’n v. Napoleon*, 701 N.E.2d 350, 354 n.4 (Mass. 1998) (“Though the general test for insolvency under the UFTA is balance sheet insolvency, the UFTA borrows, as a presumption, this test for involuntary adjudication under the Bankruptcy Code. Under the UFTA a debtor who is generally not paying his debts as they become due is presumed insolvent.”).

mount to insolvency renders section 4(a)(2)(ii) meaningless. Transfers made for inadequate consideration while the debtor is insolvent or that render the debtor insolvent are governed by section 5(a), and reading section 4(a)(2)(ii) as also referencing insolvency would mean that it governs the same transfers as section 5(a)—those made for inadequate consideration and that result in the debtor becoming insolvent.

Accordingly, there are at least two possible ways to read section 4(a)(2)(ii) in relation to the UFTA's definition of insolvency: (a) section 4(a)(2)(ii) reaches those situations where the debtor is equitably insolvent but not balance sheet insolvent; or (b) section 4(a)(2)(ii) shifts the focus of the court's inquiry from the financial condition of the debtor to the debtor's state of mind at the time the debtor engaged in the transaction. The sections below discuss each of these potential readings.

The first possible reading of section 4(a)(2)(ii) is that it is meant to enable creditors to avoid transfers that left the debtor balance sheet solvent but nevertheless rendered the debtor "equitably insolvent."<sup>229</sup> However, this interpretation is problematic for several reasons. As noted above, section 2(b) creates a rebuttable presumption of balance sheet insolvency when the debtor is equitably insolvent.<sup>230</sup> Recall that under section 5(a), a transfer made for inadequate consideration while the debtor is insolvent or that renders the debtor insolvent can be avoided by present creditors.<sup>231</sup> Section 2(b) enables a creditor to create a presumption of insolvency by demonstrating the debtor is not paying debts as they become due and, accordingly, provides an alternate method for creditors to carry their burden and prove the insolvency element of section 5(a).<sup>232</sup> In this regard, however, the drafters of the UFTA contemplated that the debtor or other proponent of a given transfer could overcome this presumption and defend the transfer's validity by showing the debtor to be balance sheet solvent

---

229. *See* *Waste Mgmt., Inc. v. Danis Indus. Corp.*, No. 3:00CV256, 2009 U.S. Dist. LEXIS 14045, at \*96 n.53 (S.D. Ohio Feb. 10, 2009) (equating the language of section 4(a)(2)(ii) with insolvency).

230. UNIF. FRAUDULENT TRANSFER ACT § 2 cmt. 2, 7A pt. 2 U.L.A. 37 (2006).

231. *See* *Mo. Highway & Transp. Comm'n v. Overall*, 53 S.W.3d 222, 226 (Mo. App. 2001).

232. 1992 Republican Senate-House Dinner Comm. v. *Carolina's Pride Seafood, Inc.*, 858 F. Supp. 243, 249–50 (D.D.C. 1994).

even though the debtor failed to pay the debts as they became due.<sup>233</sup>

It seems illogical that a debtor's failure to pay her debts as they become due creates a rebuttable presumption of section 5(a)'s insolvency element, yet equitable insolvency in itself serves as a "substitute" for section 4(a)(2)(ii)'s insolvency element, when the only other difference between the two provisions is that section 4(a)(2)(ii) is available to future creditors and section 5(a) is not.<sup>234</sup> In other words, section 2(b)'s presumption of insolvency becomes meaningless because any creditor relying on the presumption to prove section 5(a)'s insolvency requirement could simply use the same fact of the debtor not paying debts as they become due to avoid the transfer under section 4(a)(2)(ii). Thus, a creditor would be ill-advised to ever make use of section 5(a) when section 4(a)(2)(ii) would allow the creditor to establish its case in a manner that would not allow the proponent of the transfer to rebut the presumption establishing one element of the creditor's claim by use of the same facts. Additionally, such a reading blurs the distinction between sections 4(a)(2)(i) and 4(a)(2)(ii) because there seems to be little difference between a transfer leading to equitable insolvency and a transfer leading to a debtor being left with unreasonably small assets.<sup>235</sup> Accordingly, this reading of the statute should be rejected.

The second possible reading of section 4(a)(2)(ii) is that the provision is concerned with the debtor's subjective intent when she made the transfer for inadequate consideration, not the debtor's financial condition.<sup>236</sup> A careful reading of section 4(a)(2)(ii) reveals that the statute does not require the transfer *actually* cause the debtor to incur "debts beyond his or her ability to pay as they became due."<sup>237</sup> Rather, the provision only requires the debtor "*intended to incur, or believed or reasonably should have believed that [she] would incur, debts beyond [her] ability to pay*

---

233. UNIF. FRAUDULENT TRANSFER ACT § 2 cmt. 2, 7A pt. 2 U.L.A. 37 (2006).

234. Compare *id.* § 4(a)(2)(ii), 7A pt. 2 U.L.A. 58, with *id.* § 5(a), 7A pt. 2 U.L.A. 129.

235. *Fid. Bond & Mort. Co v. Brand (In re Fid. Bond & Mort. Co.)*, 340 B.R. 266, 294 (E.D. Pa. 2006) (explaining that the unreasonably small assets requirement of section 4(a)(2)(i) refers to the situation where a debtor has insufficient profits to sustain its operations).

236. *Village Del Rio, Ltd. v. Colina Del Rio, L.P.*, No. SA-07-CA-947-XR, 2009 U.S. Dist. 47714, at \*14 n.18 (W.D. Tex. June 8, 2009) (explaining that section 4(a)(2)(ii) does not necessarily require a showing of insolvency).

237. UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2)(ii), 7A pt. 2 U.L.A. 58 (2006).

as they became due.”<sup>238</sup> In other words, a creditor attempting to avoid a transfer pursuant to section 4(a)(2)(ii) must establish that a debtor engaged in a transfer in which he intended, believed or reasonably should have believed would result in an accumulation of debt beyond that which he could honor.<sup>239</sup> Section 4(a)(2)(ii) does not require that the debtor’s transfer actually result in equitable insolvency (although proving equitable insolvency would be relevant to proving the debtor’s state of mind when engaging in the transfer).<sup>240</sup> If the creditor’s burden under section 4(a)(2)(ii) is perceived in this manner, it follows that the creditor can meet the burden by satisfying either a subjective test (the “intended” and “believed” language) or an objective test (the “reasonably should have believed” language).<sup>241</sup>

Understanding section 4(a)(2)(ii) as being concerned with the debtor’s intent as opposed to the debtor’s financial condition is the better-reasoned approach because: (a) such an interpretation draws a clear line between section 4(a)(2)(i) transfers and section 4(a)(2)(ii) transfers; (b) such an interpretation draws a clear line between section 5(a) transfers and section 4(a)(2)(ii) transfers; (c) such an interpretation gives section 2(b)’s rebuttable presumption of insolvency substantive value as opposed to rendering it meaningless; and (d) such an interpretation offers greater protection to creditors in that they need not wait until the debtor is in financial ruin to have sufficient evidence to avoid a fraudulent transfer made for less than valuable consideration and that significantly increases the debtor’s financial liabilities.

Despite the many reasons supporting reading section 4(a)(2)(ii) as being concerned with the debtor’s intent, this reading also carries its inconsistency issue. Namely, section 4(a)(1) governs transfers made by a debtor “with actual intent to hinder, delay, or defraud any creditor.”<sup>242</sup> Section 4(a)(2)(ii) governs transfers by a debtor “intended to incur, or believed or reasonably should have believed that it would incur, debts beyond [the debtor’s] ability to

---

238. *Id.* (emphasis added).

239. *See id.*

240. *See id.*; *see also* CB Richard Ellis Inc. v. CLGP, L.L.C., No. 09CA1368, 2010 Colo. App. LEXIS 1050, at \*20–21 (July 22, 2010) (explaining section 4(a)(2)(ii) requires the court to inquire into the debtor’s state of mind).

241. *CB Richard Ellis, Inc.*, Colo. App. LEXIS 1050, at \*21–22; *see also* UNIF. FRAUDULENT TRANSFER ACT § 4(a)(ii), 7A pt. 2 U.L.A. 58 (2006).

242. UNIF. FRAUDULENT TRANSFER ACT § 4(a)(1), 7A pt. 2 U.L.A. 58 (2006).

pay as they became due.”<sup>243</sup> In order for the latter not to be rendered superfluous by the former, one must operate under the assumption that there is some difference between the two.<sup>244</sup> One difference is that section 4(a)(1) requires a creditor to establish “actual intent,” whereas section 4(a)(2)(ii) enables a creditor to prevail by reference to an objective test—a reasonable debtor would have believed the transfer would create debts exhausting the debtor’s financial resources.<sup>245</sup> For the subjective test in section 4(a)(2)(ii) to have any substantive value, however, the debtor intending or believing that a transfer would cause it to “incur debts beyond his ability to pay as they became due” must in some way be categorically different than the debtor intending to “to hinder, delay, or defraud any creditor of the debtor.”<sup>246</sup> Otherwise, the two provisions operate to address the exact same situation and one becomes unnecessary in light of the other.<sup>247</sup>

The resolution to this issue is found in understanding that while there may be some overlap in the sense that some transfers could likely be avoided under either provision, the substantive difference between the statutes is how each provision allows a creditor to prove its case. More often than not, creditors establish fraudulent intent by proving that any given combination of badges of fraud accompanied the transfer, allowing the court to infer the presence of actual intent.<sup>248</sup>

Thus, if one conceptualizes the creditor’s section 4(a)(1) burden of proof in a formulaic sense, it could be depicted in the following manner: *any badge of fraud + any badge of fraud + any badge of fraud = potentially sufficient evidence to establish actual intent.*<sup>249</sup> Notice that the requirements for proving the desired conclusion are not defined and the outcome is not certain.<sup>250</sup> However, if one

---

243. *Id.* § 4(a)(2)(ii), 7A pt. 2 U.L.A. 58.

244. *See supra* note 189 and accompanying text.

245. *See* UNIF. FRAUDULENT TRANSFER ACT §§ 4(a)(1) & (a)(2)(ii), 7A pt. 2 U.L.A. 58 (2006); *CB Richard Ellis Inc.*, 2010 Colo. App. LEXIS 1050, at \*22.

246. *Compare* UNIF. FRAUDULENT TRANSFER ACT § 4(a)(1), 7A pt. 2 U.L.A. 58 (2006), *with id.* § 4(a)(2)(ii), 7A pt. 2 U.L.A. 58.

247. *See supra* notes 187–91 and accompanying text.

248. *See, e.g., Steel Co. v. Morgan Marshall Indus.*, 662 N.E.2d 595, 601 (Ill. App. Ct. 1996).

249. *See id.* at 602 (“[W]hen these ‘badges of fraud’ are present in sufficient number, this may give rise to an inference or presumption of fraud.”).

250. “There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guid-

conceptualizes the creditor's burden of proof under section 4(a)(2)(ii) in a formulaic sense, it could be depicted in the following manner: *specific badge of fraud (transfer for less than reasonably equivalent value) + specific badge of fraud (intent to incur debts beyond debtor's capability) = constructive fraud*. Notice now the elements are specifically defined and the outcome is certain. Thus, while some transfers could very well be avoided under both provisions, section 4(a)(2)(ii) offers a creditor an *alternate framework for a creditor to conclusively prove its case when specific badges of fraud are present*. Accordingly, when a creditor can show inadequate consideration for a transfer and the debtor's intent or belief that the transfer would result in excessive debt, the creditor can avoid the risk of the fact finder not inferring the actual intent of the debtor to hinder, delay, or defraud creditors by bringing a cause of action under section 4(a)(2)(ii).

## 2. UFTA Section 4(a)(2) and Virginia Code Section 55-80

In theory, section 4(a)(2) provides greater protection for creditors than section 55-80. This is because section 4(a)(2) lessens the creditor's burden of proof in specific situations, so the creditor does not have to prove the debtor possessed actual fraudulent intent. Rather, the creditor merely needs to prove that certain badges of fraud were concurrently present surrounding the transfer to conclusively establish fraud.<sup>251</sup> In other words, the primary advantage section 4(a)(2) offers to creditors, that Virginia Code section 55-80 does not, is that section 4(a)(2) eliminates the need for the court (or finder of fact) to infer fraudulent intent on part of the debtor from circumstantial evidence when specific badges of fraud are present. As shown below, the implications of this benefit extend beyond theory and can offer practical value to creditors.

The practical value offered by section 4(a)(2) is illustrated by the case of *Catron v. Bostic*.<sup>252</sup> *Bostic* involved creditors of a decedent attempting to avoid the decedent's purchase of his brother's farm as a fraudulent transfer.<sup>253</sup> Prior to his death, the decedent's

---

ance to the trial court, not compel a finding one way or the other." *Filip v. Bucurenciu*, 28 Cal. Rptr. 3d 884, 890 (Ct. App. 2005).

251. See text accompanying note 195.

252. *Catron v. Bostic*, 123 Va. 355, 96 S.E. 845 (1918).

253. *Id.* at 364-65, 96 S.E. at 848.

brother was convicted of involuntary manslaughter.<sup>254</sup> In anticipation of a corresponding civil suit for wrongful death, the brother negotiated the sale of his 160 acre farm to the decedent for \$6000—a price well beyond the value of the land.<sup>255</sup> The decedent paid \$2000 of the purchase price in cash and issued four \$1000 negotiable notes in his brother's name for the remainder of the price.<sup>256</sup> The brother endorsed and transferred the notes to his wife without consideration.<sup>257</sup> The decedent's brother and his wife then jointly conveyed the notes to an individual named Catron in exchange for \$3200.<sup>258</sup> After the decedent's death, the administrator of his estate sold all of the assets of his mercantile business and included the proceeds of those assets in the estate.<sup>259</sup> Catron alleged he was a bona fide creditor of the decedent and brought suit, seeking payment on the notes.<sup>260</sup>

The administrator and the decedent's creditors objected to payment of the notes on the ground that the underlying sale between the decedent and his brother was voidable as a fraudulent transfer.<sup>261</sup> The Supreme Court of Virginia held the transfers could not be avoided by the creditors because, while the record established that the decedent intended to defraud his brother's creditors when he purchased the farm, there was no evidence in the record that the decedent specifically intended to defraud his own creditors or the creditors of his business when he purchased the farm.<sup>262</sup> Accordingly, even though the decedent made a "bad bargain and agreed to pay more for the land than it is worth" to the detriment of his creditors, the absence of specific intent on part of the decedent prevented the creditors from avoiding the transfer under Virginia's fraudulent transfer statute.<sup>263</sup>

Analyzing *Bostic* under section 4(a)(2) illustrates why not having to demonstrate the intent of the debtor is beneficial for credi-

---

254. *Id.* at 364, 96 S.E. at 848.

255. *Id.* at 365, 96 S.E. at 848.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 363, 96 S.E. at 847.

260. *Id.*

261. *Id.* at 363, 365–66, 96 S.E. at 847, 848.

262. *Id.* at 368–69, 96 S.E. at 849.

263. *Id.* at 368, 96 S.E. at 849.



tors.<sup>264</sup> As noted above, avoidable transfers under section 4(a)(2) include transfers made: (a) without receipt of a reasonably equivalent value in exchange; and (b) when the debtor was engaged or about to engage in a transaction for which the remaining assets of the debtor were unreasonably small; or intended, believed, or reasonably should have been believed to incur debts beyond its ability to pay as those debts came due.<sup>265</sup> The facts of *Bostic* indicate that the decedent did not receive reasonably equivalent value when he bought the farm from his brother.<sup>266</sup> Although the opinion is not clear on the value of the farm at the time of the transfer, it is clear that the sale price did not result from arms-length negotiation, the decedent made a “bad bargain” and paid too much for the farm, and the sale acted to the detriment of the decedent’s other creditors.<sup>267</sup> Moreover, the facts indicate that the decedent should have reasonably believed that he would not have been able to pay the debts as they became due after the transfer.<sup>268</sup> The transfer took place in November of 1913 and the decedent passed away in March of 1914.<sup>269</sup> At the time of his death, the decedent owned some real estate and personal property valued at \$25.<sup>270</sup> He was, however, “considerably indebted,” and even his personal stocks were encumbered as collateral for the notes he issued in the purchase of his brother’s farm.<sup>271</sup>

Yet, despite these facts, the court found the record did not support a finding that the decedent intended to defraud his creditors by purchasing the farm.<sup>272</sup> Thus, those creditors could not avoid the sale.<sup>273</sup> It is possible, for the reasons identified above, that a court considering the same facts would have reached a different

---

264. See, e.g., *Gen. Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1499 (11th Cir. 1997) (stating there is no need to prove fraudulent intent in a constructive fraudulent transfer action if the debtor meets certain statutory factors).

265. UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2), 7A pt. 2 U.L.A. 58 (2006).

266. *Bostic*, 123 Va. at 369, 96 S.E. at 849.

267. *Id.* at 367, 369, 96 S.E. at 848, 849. The opinion does not provide a clear value for the farm at the time of the purchase. There was, however, some evidence that the decedent took out a mortgage on the farm for \$2000 after purchasing it. *Id.* at 366, 96 S.E. at 848. Although it is unclear if the mortgage represents the value of the land at that time, it is evidence that supports the inference that the debtor may have overpaid for the farm by as much 200% its value.

268. See *id.* at 358, 364–65, 96 S.E. at 846, 848.

269. *Id.* at 365, 96 S.E. at 848.

270. *Id.* at 358, 96 S.E. at 846.

271. *Id.*

272. *Id.* at 369, 96 S.E. at 849.

273. *Id.*

conclusion by applying section 4(a)(2) because the decedent's lack of fraudulent intent in purchasing the farm would no longer be relevant in the analysis.<sup>274</sup> Rather, the court's analysis would end once it determined: (a) the decedent received less than a reasonably equivalent value in the exchange; and (b) the decedent believed or should have reasonably believed he would not be able to pay his debts when they became due.<sup>275</sup> The joint presence of those badges of fraud would conclusively establish the sale of the farm as fraudulent under section 4(a)(2).<sup>276</sup>

### 3. UFTA Section 4(a)(2) and Virginia Code Section 55-81

Section 4(a)(2) is similar to Virginia Code section 55-81 in that neither statute requires the creditor challenging the transfer to prove the debtor actually intended to hinder, delay, or defraud its creditors when it engaged in the transfer. Section 4(a)(2), however, offers additional protections to creditors not offered by Virginia Code section 55-81. Those additional protections are: (a) the statute requires the debtor receive "reasonably equivalent value" in the exchange; (b) the statute may be asserted by both present and future creditors; and (c) the statute does not require the debtor be insolvent at any time to avoid the transfer.<sup>277</sup> The implications of the first benefit have already been identified in Part II.A(2), because the exact same benefit is available to creditors under section 5(a)(1). Accordingly, this section of the article bypasses analysis of the first benefit available to creditors bringing an action pursuant to section 4(a)(2) instead of Virginia Code section 55-81, and focuses on the second and third benefits.<sup>278</sup>

The second benefit section 4(a)(2) affords creditors, as compared to Virginia Code section 55-81, is availability to a broader range of creditors. Virginia Code section 55-81 enables debtors that existed at the time of the allegedly fraudulent transfer to at-

---

274. *See* Gen. Trading Inc. v. Yale Materials Handling Corp., 119 F.3d 1485, 1499 (11th Cir. 1997) (stating there is no need to prove fraudulent intent in a constructive fraudulent transfer action).

275. *Id.*

276. UNIF. FRAUDULENT TRANSFER ACT § 4 cmt. 5, 7A pt. 2 U.L.A. 60 (2006) ("Proof of 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 in § 4(a)(2) . . .").

277. *See id.* § 4(a)(2), 7A pt. 2 U.L.A. 58.

278. For a discussion of how a different "reasonably equivalent value" consideration standard or benefits creditors, see Part II(A)(2).

tempt to avoid the transfer as a violation of the provision.<sup>279</sup> The statute, however, specifically notes that a transfer that would be fraudulent to existing creditors under its terms “shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers.”<sup>280</sup> Such a limitation is not present in section 4(a)(2). Rather, the statute plainly allows any creditor to seek a cause of action under it, “whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred.”<sup>281</sup> Accordingly, future creditors of a debtor who made a transfer for inadequate consideration are able to avoid transfers under section 4(a)(2) that could have been reached under Virginia Code section 55-81 because of the statutory language limiting its availability to present creditors.

The final and most significant benefit creditors obtain from section 4(a)(2) that is not available under Virginia Code section 55-81 is that creditors asserting a cause of action under section 4(a)(2) need not prove the insolvency of the debtor to prevail.<sup>282</sup> Conversely, to prevail on a cause of action brought under Virginia Code section 55-81, the creditor must demonstrate the debtor was insolvent at the time of the transfer or that the debtor became insolvent as a result of the transfer.<sup>283</sup> In lieu of demonstrating the debtor’s insolvency at the time of the transfer or as a result of the transfer, section 4(a)(2) enables the creditor to avoid the transfer by showing the debtor received inadequate consideration and either: (a) engaged or was about to engage in a transaction for which the remaining assets of the debtor were unreasonably small; or (b) intended, believed, or reasonably should have believed, that it would incur debts beyond its ability to pay as those debts came due.<sup>284</sup> Each of these alternatives to insolvency ena-

---

279. VA. CODE ANN. § 55-81 (Repl. Vol. 2007 & Cum. Supp. 2011).

280. *Id.*

281. UNIF. FRAUDULENT TRANSFER ACT § 4(a), 7A pt. 2 U.L.A. 58 (2006).

282. *Village Del Rio, Ltd. v. Colina Del Rio, L.P.*, No. SA-07-CA-947-XR, 2009 U.S. Dist. LEXIS 47714, at \*14 n.18 (W.D. Tex. June 8, 2009) (explaining that section 4(a)(2) does not necessarily require a showing of insolvency).

283. VA. CODE ANN. § 55-81 (Repl. Vol. 2007 & Cum. Supp. 2011).

284. UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2), 7A pt. 2 U.L.A. 58 (2006). Note, however, that the creditor would need to establish one of these scenarios in conjunction with inadequate consideration, just as a creditor would need to show insolvency in conjunction with inadequate consideration under Virginia Code section 55-81.

bles a creditor to avoid certain transfers the creditor would not be able to avoid if relying on Virginia Code section 55-81. The specifics of their application are discussed below.

Section 4(a)(2)(i) protects creditors beyond Virginia Code section 55-81 by enabling them to avoid transfers that involved a significant amount of the debtor's assets for inadequate consideration, but after which the debtor remains balance sheet solvent.<sup>285</sup> However, the practical value of this added protection appears to be fairly limited. It is uncommon to find a case in which a court finds a debtor clearly solvent before or following a transfer that left the debtor with unreasonably small assets.<sup>286</sup> Accordingly, it would be inaccurate to perceive section 4(a)(2)(i) as creating relief for an entire class of creditors not accounted for by Virginia Code section 55-81. Rather, the benefit section 4(a)(2)(i) provides over Virginia Code section 55-81 is much narrower in that the issue of insolvency is no longer dispositive to the outcome of the case. Thus, as a practical matter, creditors receive a limited benefit from section 4(a)(2)(i) that they do not receive from Virginia Code section 55-81 in cases where the solvency status of the debtor at the time of the transfer is questionable.<sup>287</sup> A creditor bringing a Virginia Code section 55-81 action in such a case would need to carry its burden of proving the insolvency of the debtor by clear and convincing evidence.<sup>288</sup> A creditor bringing the same under section 4(a)(2)(i), however, would be able to focus less on the insolvency issue and direct the court to the poor financial condition of the debtor following the transfer.<sup>289</sup> Indeed, contrary to a credi-

---

285. See *MFS/Sun Life High-Trust Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 944 (S.D.N.Y. 1995) (citations omitted).

286. Although rare, there are some cases that generate such a fact pattern. See, e.g., *Daly v. Fusco (In re All-Type Printing, Inc.)*, 274 B.R. 316, 321 (Bankr. D. Conn. 2002) (finding the debtor clearly balance sheet solvent but nonetheless operating with unreasonably small capital).

287. See, e.g., *Devon Mobile Commc'ns Liquidation Trust v. Adelphia Commc'ns Corp. (In re Adelphia Commc'n Corp.)*, No. 04-03192, 2006 Bankr. LEXIS 4600, at \*12 (Bankr. S.D.N.Y. Mar. 6, 2006) (explaining that even if the debtor manages to show solvency, the creditor can prevail on a section 4(a)(2)(i) cause of action); *Ferrari v. Barclays Bus. Credit, Inc. (In re Morse Tool, Inc.)*, 148 B.R. 97, 132-33 (Bankr. D. Mass. 1992) (declining to make a finding as to solvency but still finding transfer left debtor with unreasonably small assets).

288. *Noramco Intern. v. Charlie's Pizza, Ltd.*, 55 Va. Cir. 47, 47 (2001) (Fairfax County) (stating the burden for Virginia Code sections 55-80 and 55-81 is clear and convincing evidence).

289. See, e.g., *Vadnais Lumber Supply, Inc. v. Byrne (In re Vadnais Lumber Supply, Inc.)*, 100 B.R. 127, 139 (Bankr. D. Mass. 1989) (explaining that, while the solvency status

tor bringing an action pursuant to section 55-81, a creditor attempting to avoid a transfer pursuant to section 4(a)(2)(i) need only show the “transaction leaves a [debtor] with unreasonably small capital [by] creat[ing] *an unreasonable risk of insolvency, not necessarily a likelihood of insolvency.*”<sup>290</sup>

Section 4(a)(2)(ii) offers protection to creditors beyond Virginia Code section 55-81 in that it enables creditors to avoid transfers made by a solvent debtor for inadequate consideration if the court determines the debtor had the requisite intent at the time of the transfer. Under this provision, the creditor need not prove the debtor actually intended to hinder, delay, or defraud its creditors.<sup>291</sup> Rather the creditor must prove the debtor “intended to incur, or believed or reasonably should have believed that [it] would incur, debts beyond [its] ability to pay as they came due [as a result of the transfer].”<sup>292</sup> The creditor can meet this burden by showing the debtor subjectively believed at the time of the transfer that “its subsequent creditors would be injured, [meaning] that the debtor would be unable to pay such debts as they matured.”<sup>293</sup> Conversely, the creditor can also meet this burden by use of an objective test and showing the debtor should have reasonably believed at the time of the transfer that the transfer would “incur, debts beyond [its] ability to pay as they became due.”<sup>294</sup> The primary advantage a creditor realizes under section 4(a)(2)(ii) is that it does not have under Virginia Code section 55-80 is that section 4(a)(2)(ii) enables the court to look at the debtor’s state of mind at the time of the transfer as opposed to the debtor’s financial condition.

---

of the debtor at the time of the transfer was questionable, the transfer at issue clearly left the debtor with unreasonably small capital).

290. *Brandt v. Hicks, Muse & Co. (In re Healthco Int’l, Inc.)*, 208 B.R. 288, 302 (Bankr. D. Mass. 1997) (emphasis added).

291. *CB Richard Ellis, Inc. v. CLGP, L.L.C.*, No. 09CA1368, 2010 Colo. App. LEXIS 1050, at \*20–21 (July 22, 2010).

292. *Id.* at \*20 (quoting COLO. REV. STAT. § 38-8-105(b)(II) (2010)).

293. *ASARCO L.L.C. v. Ams. Mining Corp.*, 396 B.R. 278, 399 (Bankr. S.D. Tex. 2008) (quoting *Yoder v. T.E.L. Leasing, Inc. (In re Suburban Motor Freight, Inc.)*, 124 B.R. 984, 994 (Bankr. S.D. Ohio 1990)).

294. *CB Richard Ellis, Inc.*, 2010 Colo. App. LEXIS 1050, at \*20.

For a creditor to prevail under Virginia Code section 55-81, the debtor must be insolvent before engaging in the transfer or be rendered insolvent by the transfer.<sup>295</sup> To make this determination, the court looks to the debtor's financial condition as of the date of the transfer and, if the creditor has not proven the debtor was insolvent on that date, the creditor's claim under section 55-81 will fail.<sup>296</sup> Under section 4(a)(2)(ii), however, the intent to accumulate debts beyond the debtor's ability must be present at the time of the transfer, but not the actual financial condition itself.<sup>297</sup> Thus, instead of taking a snapshot of the debtor's financial condition at the time of the transfer and evaluating whether a debtor's liabilities exceeded its assets or whether the debtor could immediately pay his or her debts in full, the court will examine the debtor's projected income as of the time of the transfer and when various debts would become due.<sup>298</sup> If, based on that evidence, the court can infer the debtor either intended, believed, or should have believed that the transfer would incur debt beyond her ability to pay when those debts became due, the creditor will have provided sufficient evidence to avoid the transfer.<sup>299</sup>

As with section 4(a)(2)(i), however, the practical implications of the provision are fairly limited. The situation in which a debtor is found to be balance sheet solvent (thus placing it outside the reach of Virginia section 55-81), but where the debtor is found to have engaged in a constructively fraudulent transfer under section 4(a)(2)(i) is rare. Indeed, the most common situation in which section 4(a)(2)(ii) applies are cases in which the court finds the creditor has sufficiently proven the debtor was both insolvent at the time of the transfer and engaged in the transfer with the intent to incur debts that the debtor could not pay when they be-

---

295. *Lawyers Title Ins. Corp. v. P.R.T. Enters., Inc.*, 65 Va. Cir. 271, 277 (2004) (Norfolk City).

296. *Gold v. Laines (In re Laines)*, 352 B.R. 397, 402 n.6 (Bankr. E.D. Va. 2005) (stating that Virginia Code section 55-81 requires the debtor to be insolvent as of the date of the transfer for the transfer to be avoidable); *Va. Dep't of Taxation v. Nicolet*, 62 Va. Cir. 372, 373 (2003) (Richmond City) (explaining that Virginia Code section 55-81 could not be sustained because the Commonwealth did not prove the debtor's insolvency as of the date of the transfer at issue).

297. See *CB Richard Ellis, Inc.*, 2010 Colo. App. LEXIS 1050, at \*20-22.

298. See *id.*

299. *Id.* at \*20.

came due.<sup>300</sup> Section 4(a)(2)(ii) provides some additional protection to creditors beyond Virginia Code section 55-81 in the situation where the debtor is balance sheet solvent but is shown through circumstantial evidence to have engaged in a transfer with the intent to incur more debts than it can honor. The rarity in which a distinction is drawn between the two types of financial conditions, however, undermines the importance of the provision. Moreover, the practical significance of section 4(a)(2)(ii) as weighed against Virginia Code section 55-81 is further undermined by the reality that the evidence used to prove intent to incur debt beyond what the debtor could pay is often the same type of evidence relied on by creditors to prove a debtor's actual intent to hinder, delay, or defraud creditors.<sup>301</sup> Thus, even in the situation where the debtor is balance sheet solvent but circumstantial evidence exists that the debtor engaged in a transfer with the intent to incur more debts than the debtor could honor, a creditor could still make a colorable claim to avoid the transfer pursuant to Virginia Code section 55-80. Accordingly, section 4(a)(2)(ii) adds little, if anything, to Virginia's current body of fraudulent transfer law.

#### IV. CONCLUSION

Because of its significant place in both state and federal litigation, the UFTA currently provides courts with the clearest and most developed principles for resolving fraudulent transfer disputes. It is the law governing fraudulent transfers in the majority of U.S. jurisdictions.<sup>302</sup> Moreover, the drafters of the UFTA specifically designed it to meld with the Bankruptcy Code.<sup>303</sup> Even within the UFTA, however, there are still unsettled issues and conflicting interpretations of its provisions.<sup>304</sup>

---

300. See, e.g., *IGF Ins. Co. v. Cont'l Cas. Co.*, No. 1:01-cv-799-RLY-KPF, 2009 U.S. Dist. LEXIS 96714, at \*54 (S.D. Ind. Oct. 19, 2009); *ASARCO L.L.C. v. Ams. Mining Corp.*, 396 B.R. 278, 377-78 (Bankr. S.D. Tex. 2008).

301. In Virginia, the badges of fraud consist of: "(1) the relationship of the parties; (2) the grantor's insolvency; (3) pursuit of the grantor by creditors; (4) want of consideration; (5) retention of possession of the transferred property by the grantor; (6) incurring debt fraudulently after the transfer." *Dollar v. Dollar*, 27 Va. Cir. 474, 475 (1983) (Frederick County).

302. See *UFTA Legislative Fact Sheet*, *supra* note 8.

303. UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 4-7, prefatory note (2006).

304. See *supra* Part II.A-B.

Virginia's body of fraudulent transfer law, in contrast, consists of a small number of statutes.<sup>305</sup> Unlike the UFTA, which defines its terms in other internal statutes, Virginia's statutory terms are defined predominantly through case law. Even within Virginia's small statutory framework, however, there remain valid questions about the proper application of the statutes.<sup>306</sup> These areas of uncertainty—in both the UFTA and Virginia's fraudulent transfer statutes—simultaneously provide flexibility for attorneys to be creative in their litigation strategies and pitfalls for attorneys attempting to advise clients on the potential avoidability of a given transfer.

In the preceding sections, this article provided an analysis of various UFTA provisions in comparison with Virginia fraudulent transfer statutes. Although the statutes in Virginia remain largely unchanged from their roots in the 1800s, they generally address the same transfers addressed by the UFTA. The UFTA, however, provides some additional protection to creditors by including provisions that seemingly address certain types of transfers on which the Virginia statutes remain silent. Admittedly, some of these provisions appear to have more practical value than others when critically examined against the Virginia statutes. Regardless, it makes sense for Virginia to adopt the UFTA for at least three reasons. First, a more developed body of statutory fraudulent transfer law gives lawyers greater ability to identify fraudulent transfers prospectively (thus, protecting their clients' interests). Second, adopting the UFTA would better sync Virginia fraudulent transfer law with the Bankruptcy Code, thus offering greater predictability in bankruptcy litigation. Finally, adopting the UFTA would give Virginia a more developed body of fraudulent transfer law, thereby furthering the underlying purpose of all fraudulent transfer law—to prevent debtors from depriving their creditors of those assets to which creditors are rightfully entitled.

Accordingly, the General Assembly should once again consider a bill that would adopt the UFTA and repeal Virginia's current fraudulent transfer statutes. At a minimum, doing so would afford the General Assembly an opportunity to thoroughly examine whether Virginia's fraudulent transfer laws are sufficiently pro-

---

305. See VA. CODE ANN. §§ 55-80, -81, -82, -82.1 (Repl. Vol. 2007 & Cum. Supp. 2011).

306. See *supra* Part II.A–B.



tecting creditors in the modern commercial marketplace. Given that the question never reached a final resolution in the past, it seems wholly appropriate to revisit the issue presently, especially when viewed in light of Virginia's growing fraudulent transfer litigation and projected economic difficulties. It may very well be that Virginia does not need the UFTA because Virginia Code sections 55-80 and 55-81 already accomplish much of what the UFTA would do. However, knowing with certainty the truth of such a statement is sufficiently important to warrant more attention than the authors can provide in an article. It is one that should be considered, debated, and ultimately resolved by the policymakers of the commonwealth.