Insights: Alerts

New York's Uniform Voidable Transactions Act

JANUARY 16, 2020 Written by Alfred S. Lurey

On December 6, 2019, the governor of New York signed into law the New York Uniform Voidable Transactions Act ("NYUVTA"). N.Y. DEBT. & CRED. §§ 270-281. Until the occurrence of that event, New York had adhered for 95 years to the Uniform Fraudulent Conveyance Act ("NYUFCA") and had refrained from replacing it with the Uniform Fraudulent Transfer Act ("UFTA"), which was adopted by virtually all of the other states as a replacement of the Uniform Fraudulent Conveyance Act ("UFCA"). NYUVTA, like the Uniform Voidable Transactions Act ("UVTA") of other states that have adopted it, is patterned after UFTA. Thus, with respect to transfers made and obligations incurred on or after April 4, 2020 (the effective date of NYUVTA), New York's fraudulent transfer (voidable transaction) law will be much more in tune with the fraudulent transfer (voidable transaction) laws of the vast majority of the other states in this country.

Importantly, "fair consideration," as defined in NYUFCA, will no longer be the standard applied in the constructive fraudulent transfer context when New York law governs. Instead, the "reasonably equivalent value" standard – the applicable standard under the Bankruptcy Code, UFTA, and UVTA – will apply in cases where constructive fraudulent transfer claims (or, perhaps more correctly in the state law context, constructive voidable transaction claims) are being asserted under New York law. This is significant because the "fair consideration" standard under NYUFCA included a good faith requirement. In particular, even if a transferee or obligee gave value that was a fair equivalent for the transfer made or the obligation undertaken by the debtor, the transfer or obligation still could be avoided as constructively fraudulent under NYUFCA, if the transferee or obligee was found not to have acted in good faith. In contrast, under UFTA and UVTA, the good faith of a transferee that has given reasonably equivalent value appears not to be implicated in the constructively fraudulent transfer or constructively voidable transaction context.

Of major significance, under the new act (see section 278), the general reach-back period for voidable transaction claims is reduced from six years to four years, consistent with UFTA and UVTA. In addition, the discovery rule with respect to intentional fraudulent transfers, if applicable, extends the limitations period for only one year after the transfer or obligation was or could reasonably have been discovered by the claimant. Under section 278, a claim for relief under NYUVTA is *extinguished* if a suit on the claim is not brought within the applicable limitations period.

The new law provides greater certainty about which jurisdiction's law governs voidable transaction claims. Section 279(b) provides that such a claim is governed by the local law of the jurisdiction where the debtor is located when the transfer is made or the obligation is incurred. A debtor which is an organization is deemed to be located at its place of business if it has only one place of business. If it has more, it is deemed to be located at its chief executive office. An individual is deemed to be located at his or her principal residence.

Under the old act, the burden of proving that an *intentional* fraudulent transfer had occurred was governed by a "clear and convincing" standard. Under the new law, all burdens of proof, including as to intentional fraudulent transfers, are subject to a preponderance of the evidence standard.

Under the new act, a person is irrebuttably presumed to have given reasonably equivalent value if the person

acquires an interest of the debtor in an asset pursuant to a regularly conducted, non-collusive 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.

Insofar as insiders are concerned, section 274(b) of the new act provides: "A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent." The reach-back period for a 274(b) claim is one year. This provision raises the question of whether there ever could be an advantage to be gained in a bankruptcy case in pursuing a section 274(b) claim in addition to, or in lieu of, an insider preference claim under section 547(b)(4)(B) of the Bankruptcy Code, which also has a one-year reach-back period. Under section 547(b), even with respect to claims against an insider for transfers made during the extended preference period (the period between 90 days and one year before the filing of the bankruptcy case), it is unnecessary to prove that the insider had reasonable cause to believe that the debtor was insolvent.

Of relevance to the question posed above, section 277(f) of NYUVTA provides certain defenses to a section 274(b) claim, some of which are similar to defenses under section 547(c) of the Bankruptcy Code. In particular, an insider is insulated from a section 274(b) claim to the extent it gave new value to the debtor after the transfer was made, except to the extent the new value was secured by a valid lien. This defense is similar to the section 547(c)(4) subsequent new value defense under the Bankruptcy Code. An insider also is insulated from a section 274(b) claim if the transfer was made in the ordinary course of business or financial affairs of the debtor and the insider. This defense bears some similarity to the section 547(c)(2) ordinary course of business defense under the Bankruptcy Code.

Additionally, in contrast with the insider preference rules under the Bankruptcy Code, an insider is insulated from a section 274(b) claim if the challenged transfer was made in a good faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as antecedent debt of the debtor. This appears to protect a lien granted to an insider to secure antecedent debt so long as it also secures present value given by the insider to the debtor in a good faith effort to rehabilitate the debtor.

Insofar as the question posed above is concerned, however, the new act appears not to provide a defense to an insider similar to the contemporaneous exchange for new value defense under section 547(c)(1) of the Bankruptcy Code. Therefore, a transfer to an insider that might be shielded from preference avoidance under section 547(c)(1) of the Bankruptcy Code (such as a substitution of collateral) might nevertheless be exposed to avoidance under section 274(b) of NYUVTA.

Furthermore, while section 547(c)(2) of the Bankruptcy Code insulates a transfer in payment of a debt from preference avoidance to the extent the transfer was (i) made in the ordinary course of business or financial affairs of the debtor and the transferee (the subjective test), or (ii) made according to ordinary business terms (the objective test), NYUVTA (section 277(f)(2)) seems to incorporate only the subjective test as a potential defense for an insider to a section 274(b) claim. Therefore, an insider who escapes preference liability under the Bankruptcy Code by passing the objective test arguably may nevertheless be exposed to an avoidance claim under NYUVTA if it cannot pass the subjective test.

New York's enactment of UVTA promotes consistency with the fraudulent transfer or voidable transaction laws in

force in the vast majority of the other states in this country.

Related People



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