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## Debtor-Creditor Relations—Arkansas Fraudulent Transfer Act

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# NOTES

**DEBTOR-CREDITOR RELATIONS—ARKANSAS FRAUDULENT TRANSFER ACT.** Act of April 14, 1987, No. 967, 1987 Ark. Acts 3282 (Adv. Leg. Ser.) (codified at ARK. CODE ANN. §§ 4-59-201 to -213 (Supp. 1987)).

In 1987 Arkansas became one of the first states to adopt the Uniform Fraudulent Transfer Act (UFTA).<sup>1</sup> Act 967 of 1987, known as the Arkansas Fraudulent Transfer Act (AFTA),<sup>2</sup> replaces all of Arkansas' earlier statutes on fraudulent conveyances.<sup>3</sup> The AFTA reaches both those transfers in which the debtor had actual intent to keep his property from falling into the hands of his creditors and those cases in which the presence of certain acts, conditions, or circumstances raise the presumption that a debtor's transfer of his property was fraudulent. Because creditors are entitled to the assets of a debtor in default, attempts by the debtor to transfer his property in derogation of the creditors' rights merit close scrutiny. The law of fraudulent conveyances provides equitable remedies, such as having the transfer set aside, for the creditor who has been prejudiced by such transfers.

Due to the multiplicity and variety of American laws on the voidability of fraudulent conveyances, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Fraudulent Conveyance Act (UFCA) in 1918.<sup>4</sup> Twenty-six jurisdictions subsequently adopted the Uniform Act.<sup>5</sup> In 1984 the Commis-

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1. UNIF. FRAUDULENT TRANSFER ACT, 7A U.L.A. 643 (1985). Other states enacting the UFTA are California, Florida, Hawaii, Idaho, Maine, Minnesota, Nevada, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Washington, and West Virginia. For citations to the UFTA in these jurisdictions, *see infra* note 95.

2. Act of April 14, 1987, No. 967, 1987 Ark. Acts 3282 (Adv. Leg. Ser.) (codified at ARK. CODE ANN. §§ 4-59-201 to -213 (Supp. 1987)).

3. ARK. CODE ANN. §§ 4-59-201 to -208 (repealed 1987).

4. UNIF. FRAUDULENT CONVEYANCE ACT, 7A U.L.A. 427, 427 (1985).

5. Eighteen of those states and territories retain the UFCA: Arizona (ARIZ. REV. STAT. ANN. §§ 44-1001 to -1013 (1967 & Supp. 1986)); Delaware (DEL. CODE ANN. tit. 6, §§ 1301-1312 (1975)); Maryland (MD. COM. LAW CODE ANN. §§ 15-201 to -214 (1983 & Supp. 1986)); Massachusetts (MASS. GEN. LAWS ANN. ch. 109A, §§ 1-13 (West 1958)); Michigan (MICH. COMP. LAWS ANN. §§ 566.11-23 (West 1967)); Montana (MONT. CODE ANN. §§ 31-2-301 to -325 (1987)); Nebraska (NEB. REV. STAT. §§ 36-601 to -613 (1984)); New Hampshire

sioners approved a revision of the UFCA, in order to incorporate the law's evolution since 1918,<sup>6</sup> especially in light of certain provisions of the Bankruptcy Code and the Uniform Commercial Code.<sup>7</sup> Arkansas adopted this new uniform act, the UFTA, virtually verbatim.

The law governing fraudulent conveyances of property has a long history, going back to the days of the Romans. The Code of Emperor Justinian provided relief to sixth century Roman creditors whose debtors attempted to avoid their obligations.<sup>8</sup> As for Anglo-American treatment of the subject, the law governing fraudulent conveyances dates from the reign of Queen Elizabeth I. The Statute of 13 Elizabeth invalidated any transaction in which the debtor had actual intent "to delay, hinder or defraud creditors."<sup>9</sup> Actual subjective intent to defraud was not so easily proven, however. As an aid to determining the existence of such intent, the English courts soon began to recognize certain objective evidence of fraudulent intent, also known as "badges of fraud."<sup>10</sup>

Whether they appear singly or in concert, the "badges of fraud" address a wide assortment of situations, including: transfers to spouses or other near relatives;<sup>11</sup> transfers made by a debtor who is, or

(N.H. REV. STAT. ANN. §§ 545:1-12 (1974)); New Jersey (N.J. STAT. ANN. §§ 25:2-7 to :2-19 (West 1940 & Supp. 1987)); New Mexico (N.M. STAT. ANN. §§ 56-10-1 to -13 (1986)); New York (N.Y. DEBT. & CRED. LAW §§ 270-281 (McKinney 1945 & Supp. 1988)); Ohio (OHIO REV. CODE ANN. §§ 1336.01-.12 (Anderson 1979)); Pennsylvania (39 PA. CONS. STAT. ANN. §§ 351-363 (Purdon 1954)); Tennessee (TENN. CODE ANN. §§ 66-3-301 to -314 (1982)); Utah (UTAH CODE ANN. 1953 §§ 25-1-1 to -16 (1984 & Supp. 1987)); Virgin Islands (V.I. CODE ANN. tit. 28, §§ 201-12 (1976)); Wisconsin (WIS. STAT. ANN. §§ 242.01-.13 (West 1987)); Wyoming (WYO. STAT. 1977 §§ 34-14-101 to -113 (1977 & Supp. 1987)).

Eight states have repealed the UFCA, replacing it with the UFTA. See *infra* note 95.

6. For a good overview of the UFTA see Kennedy, *The Uniform Fraudulent Transfer Act*, 18 U.C.C. L.J. 195 (1986). Professor Kennedy served as the reporter to the Act's drafting committee.

7. UFTA prefatory note, 7A U.L.A. at 639-40.

8. See 1 G. GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* § 60 (rev. ed. 1940); Radin, *Fraudulent Conveyances at Roman Law*, 18 VA. L. REV. 109 (1931).

9. 13 Eliz., ch. 5 (1570).

10. In *Twyne's Case*, 76 Eng. Rep. 809 (Star Chamber 1601), Lord Coke enumerated several factors indicating the debtor's fraudulent intent to convey all of his property to *Twyne*. The "badges" included the transfer of all the debtor's property, both real and personal, the debtor's continued possession of the property, the secrecy of the transfer, the pendency of litigation, the transfer made in trust for the benefit of the debtor, and the recitation in the deed that the transfer was made honestly. *Id.* at 812-14. See also *Harris v. Shaw*, 224 Ark. 150, 154, 272 S.W.2d 53, 55 (1954) (discussing "badges or indicia of fraud").

11. See *In re Baugh*, 60 Bankr. 102, 106 (Bankr. E.D. Ark. 1986); *Ralston Purina Co. v. Davis*, 256 Ark. 972, 975, 511 S.W.2d 482, 484 (1974); *Southern Lumber Co. v. Riley*, 224 Ark. 298, 303, 273 S.W.2d 848, 852 (1954); *Lessman v. Dawson*, 14 Ark. App. 285, 289, 687 S.W.2d 860, 863 (1985).

is rendered thereby, insolvent;<sup>12</sup> transfers made for less than fair consideration;<sup>13</sup> transfers after which the transferor retains possession or beneficial use of the property;<sup>14</sup> transfers of all or most of the debtor's property, leaving virtually nothing for creditors;<sup>15</sup> transfers made while litigation is pending;<sup>16</sup> and secret or concealed transfers.<sup>17</sup>

In America, the states either adopted the Statute of 13 Elizabeth as part of their common law, or they enacted similar legislation.<sup>18</sup> As a natural part of the growth of fraudulent conveyance law, however, jurisdictions began to differ in their interpretations of intent and in the weight given to governing factors.<sup>19</sup> Despite the Statute of 13 Elizabeth's focus on actual intent of the transferor, courts eventually developed conclusive presumptions of fraud based on the presence or combination of certain factors.<sup>20</sup>

The increasing diversity of laws and presumptions influenced the National Conference of Commissioners on Uniform State Laws to draft a uniform act that would resolve such differences.<sup>21</sup> The drafters of the UFCA focused on defining insolvency, establishing consistent procedural steps, and clarifying the application of fraudulent conveyances law to instances of constructive fraud, where there was

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12. See *Rees v. Craighead Inv. Co.*, 251 Ark. 336, 341, 472 S.W.2d 92, 96 (1971) (defining insolvency); *Brady v. Irby*, 101 Ark. 573, 578, 142 S.W. 1124, 1125 (1912).

13. See *Ouachita Elec. Coop. Corp. v. Evans-St. Clair*, 12 Ark. App. 171, 180, 672 S.W.2d 660, 665 (1984) (finding adequate consideration but discussing "inadequacy of price so gross that it shocks the conscience"); *Ralston Purina Co. v. Davis*, 256 Ark. 972, 975, 511 S.W.2d 482, 484 (1974).

14. See *Rush v. Smith*, 239 Ark. 706, 709, 394 S.W.2d 613, 616 (1965); *Wasson v. Lightle*, 188 Ark. 440, 445, 66 S.W.2d 652, 653 (1933).

15. See *Reeves v. Sherwood*, 45 Ark. 520, 523 (1885).

16. See *Bumpass v. McGehee*, 247 F. 306, 308 (8th Cir. 1917); *In re Baugh*, 60 Bankr. 102, 105 (Bankr. E.D. Ark. 1986).

17. See *Weatherly v. Massey-Ferguson, Inc.*, 245 Ark. 317, 320-21, 432 S.W.2d 18, 20-21 (1968); *McConnell v. Hopkins*, 86 Ark. 225, 230, 110 S.W. 1039, 1041 (1908).

18. 1 G. GLENN, *supra* note 8, § 58. Arkansas' reception statute, ARK. CODE ANN. § 1-2-119 (1987), incorporated the Statute of Elizabeth into the state's common law without the necessity of further legislation.

19. For example, the validity of a gift made by a donor who thereafter became insolvent was upheld in the majority of jurisdictions, while Alabama and Kentucky considered such a gift to be voidable. UFCA prefatory note, 7A U.L.A. at 428.

20. See, e.g., *Simon v. Reynolds-Davis Grocery Co.*, 108 Ark. 164, 169, 156 S.W. 1015, 1016 (1913) (citing *Wilks v. Vaughan*, 73 Ark. 174, 179, 83 S.W. 913, 915 (1904) ("[C]onveyances made to members of the household and near relatives of any embarrassed debtor are looked upon with suspicion and scrutinized with care and when they are voluntary, they are *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors.")).

21. UFCA prefatory note, 7A U.L.A. at 428.

no actual or demonstrable fraudulent intent behind the transfer.<sup>22</sup>

While the UFCA received considerable attention from the commentators,<sup>23</sup> as well as enactment in a significant number of jurisdictions,<sup>24</sup> the National Conference of Commissioners nevertheless concluded that changes in bankruptcy, corporate, and commercial law since 1918 called for the creation of a new uniform act designed to take those changes into account.<sup>25</sup> The drafters particularly desired to harmonize the new uniform act with those provisions of the Bankruptcy Code and the Uniform Commercial Code that conflicted with the UFCA.<sup>26</sup>

Prior to the passage of the AFTA, Arkansas' fraudulent conveyance law, while statutory, was "substantially the same as the Statute of Elizabeth."<sup>27</sup> The basic provision mirrored the English statute by declaring that any conveyance or legal action undertaken "with the intent to hinder, delay or defraud creditors" was void.<sup>28</sup> Avoidance of the transfer required proof of fraudulent intent on the part of both the transferor and his transferee.<sup>29</sup> Only a creditor of the transferor could attack such a conveyance.<sup>30</sup> Arkansas creditors did not need to ob-

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22. See Alces & Dorr, *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U. ILL. L. REV. 527, 532-33.

23. See, e.g., Bridgman, *Uniform Fraudulent Conveyance Act in Minnesota*, 7 MINN. L. REV. 453 (1923); Glenn, *Uniform Fraudulent Conveyance Act; Rights of Creditor Without Judgment*, 30 COLUM. L. REV. 202 (1930); McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404 (1933); Radin, *Fraudulent Conveyances in California and the Uniform Fraudulent Conveyance Act*, 27 CALIF. L. REV. 1 (1938); Rose & Hunsinger, *Transfers in Fraud of Creditors, Ohio Law and the Uniform Act*, 9 OHIO ST. L.J. 571 (1948); Note, *Rights of Creditors Under the Uniform Fraudulent Conveyance Act*, 35 DICK. L. REV. 171 (1931); Recent Decisions, *Fraudulent Conveyances—Executory Consideration as Fair Consideration Under the Uniform Fraudulent Conveyance Act*, 39 MICH. L. REV. 654 (1941); Comment, *Uniform Fraudulent Conveyance Act in Pennsylvania*, 5 U. PITT. L. REV. 161 (1939).

24. See sources cited *supra* note 5.

25. UFTA prefatory note, 7A U.L.A. at 639-40.

26. See *id.* at 641-42. Conflicting provisions are those that dealt with definitions of key terms, with possible defenses for good faith transferees, insiders, or U.C.C. Article 9 secured parties, and with establishment of the time that a cause of action arises. For a more detailed discussion of the new uniform act's treatment of those provisions, see *infra* notes 43-59, 73-76, 85-87 and accompanying text.

27. Payne v. Bruton, 10 Ark. 53, 59 (1849). For a general discussion of former Arkansas law, see Comment, *Fraudulent Conveyances in Arkansas*, 19 ARK. L. REV. 149 (1965).

28. ARK. CODE ANN. § 4-59-204(a) (1987) (repealed 1987).

29. Bank of Sun Prairie v. Hovig, 218 F. Supp. 769, 775 (W.D. Ark. 1963); *In re Baugh*, 60 Bankr. 102, 105 (Bankr. E.D. Ark. 1986); Wright v. Aaron, 214 Ark. 254, 257, 215 S.W.2d 725, 726 (1948).

30. Segraves v. Brooks, 123 Ark. 261, 265, 185 S.W. 260, 261 (1916) (citing Millington v. Hill, Fontaine & Co., 47 Ark. 301, 309, 1 S.W. 547, 549 (1886)); King v. Clay, 34 Ark. 291, 299-300 (1879).

tain a judgment of insolvency against the debtor before going into a court of equity to ask that the conveyance be set aside as fraudulent,<sup>31</sup> although at common law such a requisite existed.<sup>32</sup>

As to both existing creditors and subsequent purchasers, prior Arkansas law voided the gift or conveyance of personalty made "in trust to the use" of the transferor.<sup>33</sup> Such a transfer was conclusively fraudulent, since all it accomplished was the transfer of title from the debtor to a new owner, while the debtor was still able to use and enjoy the transferred property.<sup>34</sup>

Unlike the transferee who participated in the fraud,<sup>35</sup> a subsequent bona fide purchaser for value without notice of the fraud escaped the creditors' equitable claims on the property.<sup>36</sup> Since the purchaser was not involved in the fraudulent transaction, the courts protected his interest by returning to him the consideration he paid.<sup>37</sup>

"Good consideration," or in the case of gifts, actual surrender of possession, had to accompany every conveyance.<sup>38</sup> The courts found insufficient consideration if "gross disparity" existed between the actual value of the property and the amount received for it by the debtor.<sup>39</sup>

Even if properly recorded (for those transfers which required a filing), a conveyance made with intent to defraud creditors was voidable by those creditors.<sup>40</sup> Conversely, failure to record a transaction did not necessarily indicate fraud.<sup>41</sup> But as between the parties to the transfer themselves, and against anyone except the creditors, the transfer was valid.<sup>42</sup>

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31. ARK. CODE ANN. § 4-59-208 (1987) (repealed 1987).

32. See 1 G. GLENN, *supra* note 8, § 65.

33. ARK. CODE ANN. § 4-59-203 (1987) (repealed 1987).

34. See *Lukins v. Aird*, 73 U.S. (6 Wall.) 78, 79 (1867); *McConnell v. Hopkins*, 86 Ark. 225, 230-31, 110 S.W. 1039, 1041 (1908).

35. See *Smith v. Arkadelphia Milling Co.*, 143 Ark. 214, 220, 220 S.W. 49, 52 (1920); *Millington v. Hill, Fontaine & Co.*, 47 Ark. 301, 311, 1 S.W. 547, 550 (1886).

36. ARK. CODE ANN. §§ 4-59-201, -204(b) (1987) (repealed 1987). See *Rowland v. Ward*, 178 Ark. 851, 856, 12 S.W.2d 785, 787 (1929); *Swafford v. Ketchum*, 177 Ark. 1152, 1156, 9 S.W.2d 806, 807 (1928).

37. See *Merchants & Farmers Bank v. Harris*, 113 Ark. 100, 112, 167 S.W. 706, 709 (1914).

38. ARK. CODE ANN. § 4-59-205 (1987) (repealed 1987).

39. *Harmon v. McSpadden*, 174 Ark. 184, 190, 295 S.W. 353, 355 (1927).

40. ARK. CODE ANN. § 4-59-202 (1987) (repealed 1987).

41. See *Singfield v. Niemeyer*, 194 Ark. 1155, 108 S.W.2d 465, 467 (1937) (opinion omitted in Arkansas Reports).

42. See *Melvin v. Melvin*, 270 Ark. 522, 525, 606 S.W.2d 90, 92 (Ark. App. 1980) (citing *Maupin v. Gains*, 125 Ark. 181, 185, 188 S.W. 552, 554 (1916)) *alternate holding overruled*, *McCune v. Brown*, 8 Ark. App. 51, 648 S.W.2d 811 (1983).

The repealed statutes did not define any terms, nor did they distinguish between actual and constructive intent to defraud creditors. Where the previous statutes did not give definitive guidelines, case law supplied instruction. The AFTA, however, addresses many areas in which prior statutory law was silent.

The AFTA begins with definitions of key terms.<sup>43</sup> Many of the definitions derive from other pieces of legislation, although some are original to the Uniform Act.<sup>44</sup> Of particular interest are the definitions of "insolvent," "asset," and "value." Because the Act declares that certain transfers by "insolvent" debtors are fraudulent as to creditors,<sup>45</sup> the classification of a debtor as insolvent is of crucial importance.

Under the AFTA, a debtor is "insolvent" if the sum of his debts is greater than all of his fairly valued remaining assets.<sup>46</sup> Insolvent partnerships are those whose debts are greater than the sum of (1) the partnership's assets and (2) the amount that each general partner's outside assets exceed his outside debts.<sup>47</sup> A presumption of insolvency arises when a debtor is generally not paying his debts as they come due.<sup>48</sup> In determining whether the debtor is paying his debts on time, courts will consider the proportion of unpaid debts to the total number of obligations owed by the debtor, the length of time the payment has been overdue, and the existence of any circumstances which would give the debtor a good faith reason to dispute or otherwise avoid payment of his debts.<sup>49</sup>

The debtor's "assets," for purposes of establishing insolvency, do not include any property that has been the subject of a fraudulent transfer.<sup>50</sup> Furthermore, when any property that is used to secure an obligation is not counted among the debtor's assets for purposes of determining insolvency, the obligation is not counted among his

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43. ARK. CODE ANN. §§ 4-59-201 to -203 (Supp. 1987).

44. The Bankruptcy Code is the source of definitions for "affiliate," "claim," "debt," "insider," "insolvent," "lien," "relative," "transfer," and "value." 11 U.S.C. §§ 101, 548(d)(2)(A) (1982). The Uniform Fraudulent Conveyance Act provided definitions for "assets" and "creditor." UFCA § 1, 7A U.L.A. at 430. The terms "person" and "property" come from the Uniform Commercial Code, U.C.C. § 1-201(30) (1978), and the Uniform Probate Code. U.P.C. § 1-201(33) (1982). The definitions of "debtor" and "valid lien" are new. UFTA § 1 comments 1-13, § 2 comment 1, and § 3 comment 2, 7A U.L.A. at 645-48, 650-51.

45. ARK. CODE ANN. § 4-59-205 (Supp. 1987).

46. *Id.* § 4-59-202(a).

47. *Id.* § 4-59-202(c).

48. *Id.* § 4-59-202(b).

49. UFTA § 2 comment 2, 7A U.L.A. at 648-49.

50. ARK. CODE ANN. § 4-59-202(d) (Supp. 1987).

debts.<sup>51</sup> Finally, the definition of “assets” excludes property that is subject to a lien or exempt under nonbankruptcy law as well as interests in a tenancy by the entirety where the creditor does not have a claim against the tenants as joint debtors.<sup>52</sup>

“Value” refers not just to consideration given for an obligation, but also to the sufficiency of that consideration.<sup>53</sup> The AFTA does not expressly define “value,” but the term encompasses the transfer of property as well as the satisfaction or security of a debt.<sup>54</sup> It does not include executory promises to pay.<sup>55</sup> “Value” is sufficient when it is “reasonably equivalent” to the value of the interest in the property being transferred.<sup>56</sup> In response to a widely-debated ruling by the Fifth Circuit in *Durrett v. Washington National Insurance Co.*,<sup>57</sup> the UFTA and AFTA expressly confirm the adequacy of consideration received when the debtor sells his property in a “regularly conducted, noncollusive foreclosure sale.”<sup>58</sup>

The UFTA includes in its definition of “value” the acquisition of a defaulting debtor’s deed of trust or security agreement pursuant to such a foreclosure sale or execution of a power of sale.<sup>59</sup> Arkansas, however, excludes the deed of trust and security agreement from the equivalent provision in the AFTA.<sup>60</sup> This omission is the only substantive change Arkansas made in the Uniform Act.<sup>61</sup>

The heart of the AFTA is contained in the sections describing transfers fraudulent to creditors. The AFTA distinguishes between two classes of potential plaintiffs—creditors whose claims predate the challenged transfer (“present creditors”) and creditors whose claims arise after the transfer in question (“future creditors”).<sup>62</sup> Section 4-59-204 applies to both classes, while the provisions of section 4-59-205

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51. *Id.* § 4-59-202(e).

52. *Id.* § 4-59-201(2); *see also* UFTA § 1 comment 2, 7A U.L.A. at 645-46.

53. ARK. CODE ANN. § 4-59-203 (Supp. 1987).

54. *Id.* § 4-59-203(a).

55. *Id.*

56. UFTA § 3 comment 3, 7A U.L.A. at 651.

57. 621 F.2d 201 (5th Cir. 1980) (holding that receipt of 57.7% of the fair market value at a foreclosure sale amounted to a fraudulent transfer). The court also noted that it was unable to find a case in which a transfer for less than 70% of the market value had been approved. *Id.* at 203.

58. ARK. CODE ANN. § 4-59-203(b) (Supp. 1987); *see also* UFTA § 3 comment 5, 7A U.L.A. at 652.

59. UFTA § 3(b), 7A U.L.A. at 650.

60. ARK. CODE ANN. § 4-59-203(b) (Supp. 1987).

61. *Compare* UFTA § 3(b), 7A U.L.A. at 650, *with* ARK. CODE ANN. § 4-59-203(b) (Supp. 1987).

62. ARK. CODE ANN. §§ 4-59-204, -205 (Supp. 1987).

apply only to present creditors.<sup>63</sup> Either class of creditor may seek relief whenever actual fraudulent intent is present, or whenever the debtor receives less than "reasonable equivalent value" for the property, and his remaining assets are too small—or imminent debts too large—for him to conduct his business or honor his obligations.<sup>64</sup>

In describing the category of transfers made "with actual intent to hinder, delay, or defraud any creditor," the AFTA echoes the language of the Statute of 13 Elizabeth.<sup>65</sup> Because actual intent is a subjective matter, not susceptible of easy proof, the AFTA lists eleven nonexclusive factors which, like the "badges of fraud," a court may consider in determining whether actual intent to harm creditors' interests existed.<sup>66</sup> The mere presence of one or more of these factors does not create a presumption of fraudulent intent, although it may be relevant to the proof of intent.<sup>67</sup> Courts should consider all relevant circumstances, not just the section 4-59-204(b) catalog, in evaluating the validity of a questionable transfer.<sup>68</sup> Furthermore, the catalog contains considerations that negate fraudulent intent as well as considerations that suggest it.<sup>69</sup>

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63. *Id.*

64. *Id.* § 4-59-204(a).

65. *Id.* § 4-59-204(a)(1).

66. ARK. CODE ANN. § 4-59-204(b) provides:

In determining actual intent . . . , consideration may be given, among other factors, to whether:

- (1) the transfer or obligation was to an insider;
- (2) the debtor retained possession or control of the property transferred after the transfer;
- (3) the transfer or obligation was disclosed or concealed;
- (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (5) the transfer was of substantially all the debtor's assets;
- (6) the debtor absconded;
- (7) the debtor removed or concealed assets;
- (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

*Id.* § 4-59-204(b) (Supp. 1987).

67. UFTA § 4 comment 5, 7A U.L.A. at 654.

68. *Id.* § 4 comment 6, at 654-56 (*e.g.*, transfer of assets into corporations created solely for that purpose, joint possession of property by debtor and transferee, sale of all the assets of an insolvent debtor in a single transaction).

69. *See* ARK. CODE ANN. § 4-59-204(b)(3) (Supp. 1987) ("the transfer or obligation was

Section 4-59-205 conclusively establishes constructive fraud toward present creditors whenever an insolvent debtor transfers the property to anyone for less than “reasonably equivalent value,” or when he transfers property in satisfaction of a preexisting obligation to an insider who has reason to believe in the insolvency of the debtor.<sup>70</sup> This category of fraud exists without regard to the intent of the debtor and his transferee.<sup>71</sup>

Another significant provision of the AFTA concerns the accrual of a cause of action. In most cases, a cause of action arises under the AFTA as of the date of the completion of the challenged transfer.<sup>72</sup> The AFTA applies only to those transactions that fit one of the categories of section 4-59-206. For interests that must be perfected in order to preserve the priority rights of the debtor’s transferee over the claims of other parties, the transfer is considered complete as of the moment of perfection—whether by attachment of a security interest, transfer of possession, or filing for record.<sup>73</sup> Where such an interest is unperfected, the transfer is deemed complete as of the time immediately preceding any action undertaken to avoid it.<sup>74</sup> A debtor must have rights in the transferred property—not mere expectation interests—in order to trigger the Act.<sup>75</sup> Notice-filing or other recordation of an interest to be acquired at a future date is not a form of transfer that the AFTA addresses.<sup>76</sup>

A creditor must commence an action to avoid a transfer within four years after the transfer is completed.<sup>77</sup> There are two exceptions

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disclosed”) & § 4-59-204(b)(8) (“the value of the consideration received . . . was reasonably equivalent to the value of the asset transferred”).

70. *Id.* § 4-59-205. “Insiders” include relatives, partners, corporate directors and officers, affiliates, and managing agents of the debtor. *Id.* § 4-59-201(7).

71. In contrast to § 4-59-204, § 4-59-205 omits any mention of intent or any catalog of factors indicating intent. *Id.* §§ 4-59-204, -205.

72. *Id.* § 4-59-206. This provision is derived from the Bankruptcy Code, 11 U.S.C. § 548(d)(1) (1982). UFTA § 6 comment 1, 7A U.L.A. at 659.

73. ARK. CODE ANN. § 4-59-206(1)(i), (ii) (Supp. 1987). *See also* U.C.C. §§ 9-302, -304, -305 (1978) (perfection of security interest in personal property).

74. ARK. CODE ANN. § 4-59-206(2) (Supp. 1987).

75. *Id.* § 4-59-206(4).

76. UFTA § 6 comment 2, 7A U.L.A. at 659-60.

77. ARK. CODE ANN. § 4-59-209 (Supp. 1987). This section is designed to standardize the statutes of limitation as they apply to fraudulent transfers, regardless of who brings the action or who is named in the suit. *See also* UFTA § 9 comment 2, 7A U.L.A. at 666. Prior to passage of the AFTA, other statutory barriers governed fraudulent conveyance actions, with periods ranging from three years (replevin, ARK. CODE ANN. § 18-60-810(a)(6) (1987)) to five years (notes and instruments in writing, ARK. CODE ANN. § 16-56-111 (1987)) to ten years (actions based on judgments or decrees, ARK. CODE ANN. § 16-56-114 (1987)). *See also* Hesson, *The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations*, 32 CORNELL L.Q. 222 (1946). “In Arkansas

to the four-year statutory bar. If an insolvent debtor transferred the property to an insider who had notice of his transferor's insolvency, then existing creditors have only one year after the effective date of that transfer in which to bring suit.<sup>78</sup> And once the four-year period has passed, if actual fraudulent intent is thereafter discovered or discoverable, the claimant still has one year in which to bring suit.<sup>79</sup>

Various forms of relief are available to the creditor who establishes a fraudulent transfer of property formerly held by his debtor. Remedies under the AFTA include avoidance of the transfer or obligation, injunctions against further disposition of the property, appointment of a receiver to manage the asset, attachment of the transferred asset,<sup>80</sup> or any other relief indicated by the circumstances.<sup>81</sup> Just as under the former law in Arkansas,<sup>82</sup> a creditor need not obtain a judgment against a debtor before proceeding under the AFTA.<sup>83</sup> When the desired remedy is avoidance of the transfer, a creditor's recovery is limited to a judgment for the value of the transferred asset or the amount of his claim, whichever is smaller.<sup>84</sup>

The AFTA recognizes three defenses that a transferee may raise against a creditor's claim. First, if the transferee took in good faith and for value, he is protected to the extent of the value given.<sup>85</sup> Second, the transferee is protected if the transfer resulted from the termination of a lease due to the debtor's default or from the enforcement of a U.C.C. Article 9 security interest.<sup>86</sup> Third, an insider-transferee may be protected by meeting certain criteria. He is protected (1) to the extent of new value given to the debtor *after* the transfer was made, unless the new value was secured by a valid lien; (2) if the transfer was made in the ordinary course of business of the debtor and

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the creditor may sue within ten years after obtaining judgment, the statutory time for enforcement of a judgment against the debtor's property. If he sues within that time he will not be barred unless the grantee has had adverse possession for the statutory period of seven years." *Id.* at 237 (citing *James v. Mallory*, 76 Ark. 509, 89 S.W. 472 (1905); *A. Baldwin & Co. v. Williams*, 74 Ark. 316, 86 S.W. 423 (1905)).

78. ARK. CODE ANN. § 4-59-209(c) (Supp. 1987). *See also id.* § 4-59-205(b).

79. *Id.* § 4-59-209(a).

80. Arkansas included an optional provision for attachment against the asset transferred or other property of the debtor, subject to the procedural safeguards contained in ARK. CODE ANN. §§ 16-110-201 to -211 (1987). *Id.* § 4-59-207(a)(2) (Supp. 1987). It is also possible to levy execution on a transferred asset or its proceeds, but this option requires a court order before it may be exercised. *Id.* § 4-59-207(b).

81. *Id.* § 4-59-207(a) (Supp. 1987).

82. *Id.* § 4-59-208 (1987) (repealed 1987). *See also supra* note 31 and accompanying text.

83. *See* UFTA § 7 comment 4, 7A U.L.A. at 661.

84. ARK. CODE ANN. § 4-59-208(b) (Supp. 1987).

85. *Id.* § 4-59-208(a), (d).

86. *Id.* § 4-59-208(e).

the insider; or (3) if the transfer was made pursuant to a good faith effort to help an insolvent debtor save himself from bankruptcy or the like.<sup>87</sup>

The AFTA is certain to affect the practice of fraudulent conveyance law in Arkansas. Structurally, its provisions fit into three broad groups: the definitions, the characterizations of voidable transfers, and the remedies and defenses of the parties. The definitions serve more to delineate the interrelationships or standing of the parties than to clarify fraudulent transfer terminology. A practitioner still needs to be cognizant of terms like antecedent debt, attachment, avoidance, encumbrance, fixture, foreclosure, and voidability before he can apply the provisions of the Act to a pending matter. Nonetheless, terms are now expressly defined that previously were subject to possible variant interpretations.

The definition of insolvency merits special note. One Arkansas case defined insolvency as "a lack of means to pay one's debts,"<sup>88</sup> distinguishing between actual insolvency and mere indebtedness of the debtor. The AFTA not only broadly defines insolvency (the sum of all the fairly valued assets of the debtor equaling less than the sum of all his debts), it also provides an "equitable" test of insolvency—presuming insolvency whenever a debtor does not pay his debts as they come due.<sup>89</sup>

The AFTA expands the scope of actual fraud by describing "badges of fraud" which case law had not previously seen as indicators of a debtor's subjective intent to defraud creditors. These factors include a transfer of virtually all of the debtor's assets, the voluntary absence of the debtor from the jurisdiction, transfers taking place shortly before or after the debtor incurs a substantial debt, and transfers of the essential assets of a business to a lienor who then transfers those assets to an insider of the debtor.<sup>90</sup>

A new form of voidable transfer is set forth in the AFTA, one that fraudulent conveyance law has heretofore categorized as a legitimate preferential transfer. An insolvent debtor exercises a "prefer-

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87. *Id.* § 4-59-208(f). The first and second defenses come from the Bankruptcy Code, 11 U.S.C. § 547(c)(2), (4) (1982). The third defense developed from a policy determination to encourage insiders who have previously extended credit to the debtor. The drafters of the UFTA felt that such insider-creditors should not be penalized for further extension of credit based on a good-faith attempt to help the debtor stave off bankruptcy. UFTA § 8 comment 6, 7A U.L.A. at 664-65.

88. *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769, 777 (W.D. Ark. 1963).

89. *See Alces & Dorr, supra* note 22, at 542.

90. ARK. CODE ANN. § 4-59-204(b)(5), (6), (10), (11) (Supp. 1987). *See also supra* note 66 and accompanying text.

ence" when he conveys property to one or more of his creditors in satisfaction of a debt, even though the effect of the transfer is to reduce the amount of property available for the claims of other creditors.<sup>91</sup> The invalidity of such a transfer is a familiar concept in the Bankruptcy Code,<sup>92</sup> but has not been included in state fraudulent conveyance law until now. Under the AFTA, a preferential transfer made to a knowledgeable insider while the debtor is insolvent is conclusively void as to existing creditors.<sup>93</sup> Prior case law held that the preference of one creditor over another did not in itself make the transfer to the preferred creditor void or voidable as a fraudulent conveyance.<sup>94</sup> If the preferred transferee is an insider, such conveyances will be subject to attack by other creditors.

Another effect of the AFTA is to bring Arkansas law into greater conformity with the law in other jurisdictions.<sup>95</sup> The realities of modern commerce mean that interstate transactions are common and that a debtor may be tempted to convey his property across state lines in order to confound his creditors. Creditors benefit when state laws are more uniform, as it is much easier to obtain relief in multi-state transactions.

The AFTA brings many changes and clarifications to the law of fraudulent conveyances. It not only gives Arkansas the advantages of a uniform law, but it in many ways simplifies and refines an area of the law which has been evolving since the seventeenth century. Unlike the UFCA, the UFTA is more than a recodification of fraudulent

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91. See *Gage v. Chastain*, 183 Ark. 641, 644-45, 37 S.W.2d 705, 706 (1931).

92. 11 U.S.C. § 547(b) (1982).

93. ARK. CODE ANN. § 4-59-205(b) (Supp. 1987); see also *supra* note 70.

94. *Nicklaus v. Peoples Bank & Trust Co.*, 258 F. Supp. 482 (E.D. Ark. 1965), *aff'd*, 369 F.2d 683 (8th Cir. 1966).

95. Arkansas joins the following fifteen states in enacting the UFTA: California (CAL. CIV. CODE §§ 3439.1-3439.12 (West Supp. 1988)) (UFCA repealed); Florida (FLA. STAT. ANN. §§ 726.101-.112 (West Supp. 1987)); Hawaii (HAW. REV. STAT. §§ 651C-1 to -10 (1985)); Idaho (IDAHO CODE §§ 55-910 to -921 (Cum. Supp. 1987)) (UFCA repealed); Maine (ME. REV. STAT. ANN. tit. 14, §§ 3571-3582 (Supp. 1987)); Minnesota (MINN. STAT. ANN. §§ 513.41-.51 (West Supp. 1988)) (UFCA repealed); Nevada (NEV. REV. STAT. ANN. §§ 112.010-.125 (Michie Supp. 1987)) (UFCA repealed); North Dakota (N.D. CENT. CODE §§ 13-02.1-01 to -10 (Supp. 1987)) (UFCA repealed); Oklahoma (OKLA. STAT. ANN. tit. 24, §§ 112-123 (West 1987)) (UFCA repealed); Oregon (OR. REV. STAT. §§ 95.200-.310 (1987)); Rhode Island (R.I. GEN. LAWS §§ 6-16-1 to -12 (Supp. 1987)); South Dakota (S.D. CODIFIED LAWS ANN. §§ 54-8A-1 to -12 (Supp. 1987)) (UFCA repealed); Texas (TEX. BUS. & COM. CODE ANN. §§ 24.001-.013 (Vernon 1987)); Washington (to be codified at WASH. REV. CODE §§ 19.40.011-.903) (effective date July 1, 1988) (UFCA repealed); and West Virginia (W. VA. CODE §§ 40-1A-1 to -12 (Supp. 1987)).

The AFTA also retains many points of correspondence with the UFCA. See *supra* note 5, for a list of the states retaining the previous Uniform Act.

conveyance law. The UFTA was designed to work with, not against, the Bankruptcy Code, and the adoption of the Uniform Act means that debtors and creditors can expect more consistent treatment of their transactions, whether in state court or in bankruptcy court.<sup>96</sup> The UFTA and AFTA take into account the inevitable overlap of fraudulent transfer statutes with federal bankruptcy laws, striving to consistently apply those elements of debtor-creditor law that also exist in other statutes. The AFTA is not so revolutionary as to give Arkansas courts cause for alarm, but the alert attorney should acquaint himself with those aspects of the Act that modify the practice of fraudulent transfer law in Arkansas.

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96. See Kennedy, *supra* note 6, at 203, 205, 208-09.

