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The Uniform Voidable Transactions Act: Why Transfers to Self-Settled Spendthrift Trusts by Settlors in Non-APT States Are Not Voidable Transfers *Per Se*

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INTRODUCTION

In 2014, the Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws, adopted amendments to the Uniform Fraudulent Transfer Act (UFTA) and ''refreshed'' the UFTA's official comments (the Comments). Among other things, the amendments renamed the UFTA as the Uniform Voidable Transactions Act (UVTA) and added a new §10[1] that provides that the law of an individual's residence is to be the governing law concerning whether such individual has made a voidable transfer. The true impact of §10 is most felt with respect to self-settled spendthrift trusts (SSSTs) (which are most often referred to as ''asset-protection trusts'' (APTs)) where the settlor of an irrevocable trust remains a permissible recipient of the income and principal from such trust.

Unfortunately, the revisions to the Comments state that a transfer to an SSST is a voidable transfer *per se* and, therefore, an individual who lives in a state that does not recognize the APT[2] (a Non-SSST State) cannot protect assets from even a mere potential future (and unknown) creditor by creating an APT in a state that recognizes APTs (an SSST State).[3] Inasmuch as such comments are erroneous and do not in any way reflect the actual state of the law in this regard, states considering adopting the UVTA should delete and disavow the comments and replace them with language that reflects the actual state of the law.

We will use the term ''UFTA'' when referring to pre-UVTA law and the term ''UVTA'' when referring to the 2014 amendments and to the laws of states that have adopted such amendments. Additionally, because the effect of the erroneous comments extends to lifetime marital deduction trusts, lifetime credit shelter trusts, charitable remainder trusts, grantor retained annuity trusts, and qualified personal residence trusts, all self-settled spendthrift trusts, as well as to APTs, this article will refer to self-settled spendthrift trusts (SSSTs), in general, and not simply to APTs.

[1] Unless otherwise specified, section references throughout this article refer to sections of the UVTA.

[2] The authors intend that, in an effort to succinctly denote certain issues, they may refer to a jurisdiction that does not ''recognize'' an SSST or an APT as a ''Non-SSST State''; such phrase is intended to mean that the particular state does not recognize the creditor protection afforded to the settlor of the APT, thereby allowing the creditors of the settlor to reach the assets held in the trust even though the trust is irrevocable. *See, e.g.,* Unif. Trust Code §505(a) (amended 2010).

[3] As explained later in this article, APTs have only existed in the United States since 1997 when Alaska adopted Alaska Stat. §34.40.110. It is noted that a state that recognizes the validity of APTs has, obviously, modified its law in this regard.

BACKGROUND

Throughout the history of SSSTs, primarily for those SSSTs created by individuals who are domiciled in a Non-SSST state, creditors have consistently argued that the transfer to the SSST is a violation of the domiciliary state's fraudulent-transfer laws. Citing the domiciliary state's version of §4(a)(1) of the UFTA (or similar statute if the domiciliary state has not adopted the UFTA), the creditor often argued that the transfer was done with actual intent to hinder, delay, or defraud the debtor's creditors.[4] The debtor's defense was that the debtor was free to create the SSST in the SSST State so long as the requisite contacts to the SSST State were present, and, under the laws of the SSST State, a transfer to an SSST was valid and authorized. Further, unless the creditor could prove that the debtor's transfer to the SSST was intended to avoid that specific creditor, the SSST State's laws would prohibit the trustee of the SSST from satisfying the debt.[5] As a result, the two states' laws appeared to be in conflict so there was no definitive law upon which a court could rely.

Creation of §10

In 2012, the ULC formed a committee (Committee) to draft amendments to the UFTA.[6] Edwin E. Smith, Esq., was the Chair; Professor Kenneth C. Kettering

[4] UFTA §4(a)(1) (1984), prior to its modification by the UVTA, provides as follows:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> > (1) with actual intent to hinder, delay, or defraud any creditor of the debtor. . .

[5] See, for example, Del. Code Ann. tit. 12, §3572(a), which provides as follows:

> §3572 Avoidance of qualified dispositions.
>
> (a) Notwithstanding any other provision of this Code, no action of any kind, including, without limitation, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity for an attachment or other provisional remedy against property that is the subject of a qualified disposition or for avoidance of a qualified disposition unless such action shall be brought pursuant to the provisions of §1304 or §1305 of Title 6 and, in the case of a creditor whose claim arose after a qualified disposition, *unless the qualified disposition was made with actual intent to defraud such creditor*. The Court of Chancery shall have exclusive jurisdiction over any action brought with respect to a qualified disposition. (Emphasis added.)

[6] The text of the UFTA may be viewed at www.uniformlaws.org/shared/docs/Fraudulent Transfer/

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was the Reporter. As referenced above, in addition to renaming the UFTA, the UVTA contains a new §10 that focused on the question of which state's law determines whether a voidable transfer has occurred when contacts with multiple states are involved.[7] For an individual debtor, §10(b) provides that:

> A claim for relief in the nature of a claim for relief under this [Act] is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.[8]

In this regard, §10(a) provides that:

> A debtor who is an individual is located at the individual's principal residence. . .[9]

Apparent Intent Behind §10

Hence, although the question of which state's law was the applicable law before the UVTA was often unclear, the determination of whether an individual has made a voidable transfer in a state that has enacted the UVTA is clearly based on the law of the state of the debtor's principal residence.

Connecting the Dots in the Comments

Specifically, the final paragraph of Comment 8 under §4 of the UVTA (which section specifies the transfers that shall be deemed voidable), says:

> Because the laws of different jurisdictions differ in their tolerance of particular creditor-thwarting devices, choice of law considerations may be important in interpreting §4(a)(1) as in force in a given jurisdiction. For example. . .the language of §4(a)(1) historically has been interpreted to render voidable a transfer to a self-settled spendthrift trust. Suppose that jurisdiction X, in which this Act is in force, also has in force a statute permitting an individual to establish a self-settled spendthrift trust and transfer assets thereto, subject to stated conditions. If an individual Debtor whose principal residence is in X establishes such a trust and transfers assets thereto, then under §10 of this Act the voidable transfer law of X applies to that transfer. That transfer cannot be considered voidable in itself under §4(a)(1) as in force in X, for the legislature of X, having authorized the establishment of such trusts, must have expected them to be used.. . .By contrast, if Debtor's principal residence is in jurisdiction Y, which also has enacted this Act but has no legislation validating such trusts, and if Debtor establishes such a trust under the law of X and transfers assets to it, then the result would be different. Under §10 of this Act, the voidable transfer law of Y would apply to the transfer. If Y follows the historical interpretation referred to in Comment 2, the transfer would be voidable under §4(a)(1) as in force in Y.[10]

In this regard, Comment 2 under §4 of the UVTA provides in pertinent part:

> Section 4, unlike §5, protects creditors of a debtor whose claims arise after as well as before the debtor made or incurred the challenged transfer or obligation. Similarly, there is no requirement in §4(a)(1) that the intent referred to be directed at a creditor existing or identified at the time of transfer or incurrence. For example, promptly after the invention in Pennsylvania of the spendthrift trust, the assets and beneficial interest of which are immune from attachment by the beneficiary's creditors, courts held that a debtor's establishment of a spendthrift trust for the debtor's own benefit is a voidable transfer under the Statute of 13 Elizabeth, without regard to whether the transaction is directed at an existing or identified creditor. . .[11]

Therefore, the gist of Comment 8 under §4 of the UVTA, in light of the historic interpretation referred to in Comment 2, is the following: Suppose that New York, which has not adopted SSST legislation, adopts the UVTA. If a New York resident thereafter creates an SSST in Delaware (which is an SSST State and also permits a nonresident of Delaware to create such trusts),[12] pursuant to §10 of the UVTA, New York law would apply as if the UVTA had been enacted in

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UFTA_Final_1984.pdf (last visited June 6, 2017). The jurisdictions that have enacted the UFTA (currently 45) are listed at www.uniformlaws.org/LegislativeFactSheet.aspx?title=Fraudulent Transfer Act (1984) (last visited June 6, 2017).

[7] UVTA §10 (2014). The text of the UVTA may be viewed at http://www.uniformlaws.org/shared/docs/Fraudulent%20Transfer/2014_AUVTA_Final%20Act_2016mar8.pdf (last visited June 6, 2017). The jurisdictions that have enacted the UVTA (currently 15) are listed at http://www.uniformlaws.org/Act.aspx?title=Voidable%20Transactions%20Act%20Amendments%20(2014)%20-%20Formerly%20Fraudulent%20Transfer%20Act (last visited June 6, 2017).

[8] UVTA §10(b) (2014).

[9] UVTA §10(a) (2014).

[10] UVTA §4 cmt. 8 (2014).

[11] UVTA §4 cmt. 2 (2014).

[12] For example, pursuant to Del. Code Ann. tit. 12, §3570(8), this is accomplished in large part through the simple expedient of

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Delaware. As a consequence, the creation of the SSST would be deemed a voidable transfer *per se*, thereby undoing all transfers to the SSST, and every creditor — even a completely unanticipated future creditor — would be able to enforce claims against the trust's assets.

Is this really what was intended by the enactment of §10 and all referencing Comments? As noted, when adopting the UVTA, the Reporter took the opportunity to ''refresh'' the Comments. If, upon analyzing §10 and all referencing Comments, the intention behind such provisions were unclear, the Reporter, in his ''white paper'' discussing the UVTA and the Comments, left no doubt as to the intentions by stating the following:

> The avoidance laws of some jurisdictions are substantially debased by comparison with the UVTA. That is notably so in ''asset havens'' that have eviscerated, or completely expunged, their avoidance laws, commonly as part of a package of local laws that facilitate the local formation of so-called ''asset-protection trusts'' by persons seeking to shield their assets from their creditors. . .Section 10 reflects the committee's conclusion, which was to include no escape hatch in the statutory text. It addresses asset tourism through a comment stating that a debtor's ''principal residence,'' ''place of business,'' or ''chief executive office'' should be determined on the basis of genuine and sustained activity, not on the basis of artificial manipulations.[13]

DISSECTING SSST LAW — TRUST LAW OR VOIDABLE TRANSFER LAW?

Regrettably, the Reporter's comments about SSSTs appear to reflect his individual disapproval of these vehicles and, perhaps on that basis, seriously misstate the law. The result that follows from Comment 8 is flawed in two important respects.

First, the law does not provide that a transfer to an SSST is a voidable transfer *per se*, but rather that the transfer must still be proven to have been made either with an intent to hinder, delay, or defraud creditors or in connection with the debtor's insolvency.

Second, the applicable law in connection with the question of the creditor protection afforded through a transfer to a trust, including an SSST, has historically been determined (including under the Pennsylvania cases referenced in comment 2 under §4 of the Comments) under Chapter 10 (§267–§282) of the Second Restatement of Conflict of Laws,[14] and not fraudulent-transfer law (including the UFTA and the UVTA).

ORIGINS IN ENGLISH LAW — THE STATUTE OF HENRY VII VERSUS THE STATUTE OF ELIZABETH I

The rules that allow creditors to set aside voidable transfers began with a single statute, called the Statute of Elizabeth,[15] which was enacted in England in 1571 during the reign of Queen Elizabeth I, the last Tudor monarch. However, the ability of creditors to reach the assets of SSSTs comes from an entirely different English statute[16] — one which was enacted *almost a century earlier* during the reign of Queen Elizabeth's forebear, King Henry VII.[17]

This distinction plays an important role in understanding the origins of current law. Professor Erwin N. Griswold explained this distinction in 1947:

> Many states have expressly reenacted the substance of a statute which was first passed in England in 1487. This statute provided that ''All deeds of gift of goods and chattels, made or to be made in trust to the use of that person or persons that made the same deed or gift, be void and of none effect.'' In its original form the statute applies in terms only to gifts of goods and chattels, and it has been held that it applies only to gifts made for the sole benefit of the settlor. It was not directed against trusts made with fraudulent intent, but was a prohibition of trusts for the benefit of the settlor on the ground that such a trust was against public policy. All trusts to which a statute of this type applies are invalid against the claims of any creditor, whether the trusts are spendthrift trusts or not.[18]

Hence, there was no need for the later-enacted Statute of Elizabeth to cover the potential abuses of

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naming a Delaware-sitused trustee as at least one of the trustees of the trust.

[13] Kenneth C. Kettering, *The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act*, 70 Bus. Law. 777, 800–01 (Summer 2015) (cited as the ''White Paper'').

[14] Restatement (Second) of Conflict of Laws §267–§282 (1971).

[15] Statute of 13 Eliz. I, c.5 (1571).

[16] Statute 3 Hen. VII, c.4 (1487).

[17] History notes that it was King Henry VII who founded the Tudor dynasty in 1485 when he and his forces defeated the infamous King Richard III (who was the last Plantagenet ruler) and his supporters at the battle of Bosworth Field, thus ending the War of the Roses.

[18] Erwin N. Griswold, *Spendthrift Trusts* §473 at 539–40 (2d ed. 1947) (footnotes omitted).

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SSSTs because that issue already had been addressed almost a century earlier!

Application to the Restatements of Trusts and the Uniform Trust Code

The Restatements of Trusts incorporate this historic rule against SSSTs (the Historic Self-Settled Trust Rule). The pertinent provision of the Second Restatement of Trusts provides:

> Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest.[19]

Existing and subsequent creditors may reach a settlor-beneficiary's interest regardless of whether the creation of the trust was a fraudulent transfer:

> The rules stated in this Section are applicable although the transfer is not a fraudulent conveyance. The interest of the settlor-beneficiary can be reached by subsequent creditors as well as by those who were creditors at the time of the creation of the trust, and it is immaterial that the settlor-beneficiary had no intention to defraud his creditors.[20]

Similarly, the relevant section of the Third Restatement provides:

> A restraint on the voluntary and involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid.[21]

Like the Second Restatement, the Third Restatement provides that, ''the rule of this subsection does not depend on the settlor having made a transfer in fraud of creditors.''[22]

The comparable rule in the Uniform Trust Code (UTC) is §505(a)(2), which provides, in pertinent part:

> SECTION 505. CREDITOR'S CLAIM AGAINST SETTLOR.
>
> (a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:
>
> . . .
>
> (2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit...[23]

Again, a fraudulent-transfer showing is not required:

> This section does not address possible rights against a settlor who was insolvent at the time of the trust's creation or was rendered insolvent by the transfer of property to the trust. This subject is instead left to the State's law on fraudulent transfers.[24]

To summarize, the Historic Self-Settled Trust Rule stands for the proposition that a transfer by the settlor to a trust for the benefit of the settlor is *reachable* by the settlor's creditors. This infers that the transfer itself is a valid transfer, but that it is ineffective in insulating the assets from the settlor's creditors. Accordingly, the Historic Self-Settled Trust Rule continues to be applicable, generally, under *modern trust law* (with the exception of those states that have chosen to permit SSSTs to be created under their respective laws).[25]

What is missing from this historical analysis is the phrase ''voidable transfer *per se*.'' Voidable transfer *per se* means that the entire transaction is a nullity. As stated above, the Historic Self-Settled Trust Rule does not provide that the transaction is a nullity. The transfer is valid, but the settlor's creditors may reach the assets held in the trust. The most interesting element to the ''voidable transfer *per se*'' argument is that no statutory provision of the UFTA or the UVTA provides that a transfer to an SSST is a voidable transfer *per se*. To the best of the authors' collective knowledge, no statute exists that declares a transfer to an SSST to be a voidable transfer *per se*. Instead, creditors' rights *vis-à-vis* SSSTs are governed by *trust* law and *not voidable-transfer law*.

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[19] Restatement (Second) of Trusts §156 (1959).

[20] Restatement (Second) of Trusts §156 cmt. a (1959).

[21] Restatement (Third) of Trusts §58(2) (2003). *See* Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, 3 *Scott and Ascher on Trusts* §15.4–§15.4.4 at 951–989 (5th ed. 2007); Helene S. Shapo, George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* §223 at 423–491 (3d ed. 2007).

[22] Restatement (Third) of Trusts §58(2) cmt. e (2003).

[23] UTC §505(a)(2) (amended 2010). The text of the UTC may be viewed at www.uniformlaws.org/shared/docs/trust_code/UTC_Final_2016may24.pdf (last visited June 6, 2017). The jurisdictions that have enacted the UTC (currently 32) are listed at www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust Code (last visited June 6, 2017).

[24] UTC §505(a)(2) cmt. (amended 2010).

[25] Notably, as of July 1, 2017, 17 states — Alaska, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming — authorize some form of domestic APT. The District of Columbia and every other state (except Connecticut, where the question is governed by case law) follow the Historic Self-Settled Trust Rule and have a trust statute that either is adopted from, or resembles, UTC §505 and authorizes creditors to reach the settlor's retained interest or the assets of an SSST, at least under its own law, irrespective of whether the transfer funding the trust was a voidable transfer.

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HISTORICAL CASE LAW ANALYSIS — FLAWED ARGUMENTS FOR SUPPORT

In an attempt to support the proposition that established law provides that a transfer to an SSST is a voidable transfer *per se*, Comment 2 under §4 of the UVTA cites to three Pennsylvania cases from the nineteenth century; to wit, *Mackason's Appeal*,[26] *Ghormley v. Smith*,[27] and *Patrick v. Smith*[28] (the 19th-Century Decisions). The problem with reliance on the 19th-Century Decisions is that Pennsylvania's version of the UFTA,[29] enacted in 1993, does *not* provide that a transfer to an SSST is a voidable transfer *per se*. Moreover, in 2010, Pennsylvania enacted UTC §505(a)(2) to the effect that ''[a] judgment creditor or assignee of the settlor of an irrevocable trust may reach the maximum amount that can be distributed to or for the settlor's benefit,''[30] thereby obviating through its trust law any need for a transfer to an SSST created under Pennsylvania law to be deemed a voidable transfer *per se*. Clearly if the Pennsylvania legislature deemed a transfer to an SSST to be a voidable transfer *per se*, it would have so provided in its version of UTC §505. It did not. That, in and of itself, should invalidate any reliance on the 19th-Century Decisions in determining the legal effect of transfers to an SSST.

Subsequent to the release of the UVTA and the Comments, the White Paper similarly cited early cases from Missouri,[31] Tennessee,[32] and Virginia[33] in support of the Comment's approach.[34] As in Pennsylvania, however, whatever precedential effect those decisions may have had no longer exists. Again, this is because neither Missouri's nor Tennessee's versions of the UFTA,[35] or Virginia's idiosyncratic voidable conveyance statute,[36] actually states that a transfer to an SSST is a voidable transfer *per se*. In addition, all three states now permit APTs.[37]

[26] 42 Pa. 330, 338–39 (1862).

[27] 21 A. 135, 137 (Pa. 1891).

[28] 2 Pa. Super. 113, 199 (1896).

[29] 12 Pa. Cons. Stat. §5101–§5110.

[30] 20 Pa. Cons. Stat. §7745(2).

[31] *Jamison v. Miss. Valley Tr. Co.*, 207 S.W. 788, 789 (Mo. 1918).

[32] *Menken Co. v. Brinkley*, 31 S.W. 92, 94–95 (Tenn. 1895).

[33] *Petty v. Moores Brook Sanitarium*, 67 S.E. 355, 356–57 (Va. 1910).

[34] White Paper, above n. 13, at 802 n. 110.

[35] Mo. Rev. Stat. §428.005–§428.059; Tenn. Code Ann. §66-3-301–§66-3-313.

[36] Va. Code Ann. §55-80–§55-105.

[37] Mo. Rev. Stat. §456.5-505(3); Tenn. Code Ann. §35-16-101–§35-16-112; Va. Code Ann. §64.2-747, §64.2-745.1–§64.2-745.2.

RECENT CASE ANALYSIS ACTUALLY SUPPORTS HISTORIC SELF-SETTLED TRUST RULE

In addition, recent cases in other jurisdictions also demonstrate that the creditor protection afforded by an SSST is an issue that is to be resolved using trust law principles, and that the transfers of property funding such trusts are not to be deemed voidable transfers *per se*.

Rush University

In *Rush University Medical Center v. Sessions*,[38] the Illinois Supreme Court (referred to in this section as the ''Court'') set aside transfers to an offshore trust that were frustrating a creditor's ability to enforce a large charitable pledge of the debtor. The issue was whether the debtor's trust was invalid *vis-à-vis.* the creditor's claim under the Historic Self-Settled Trust Rule or whether Illinois's adoption of the UFTA had supplanted that rule, in which event the creditor would have been required to prove that transfers to the trust were fraudulent transfers.

The Court first noted that Illinois's adoption of the UFTA generally supplemented — and did not supplant — common-law principles and found no irreconcilable difference between the Historic Self-Settled Trust Rule and the UFTA.[39] The Court then contrasted the purposes of the UFTA and the Historic Self-Settled Trust Rule. Regarding the UFTA, it said:

> It has been stated that the general purpose of the Act is to ''protect a debtor's unsecured creditors from unfair reductions in the debtor's estate to which creditors usually look to security.''[40]

In contrast, the Court described the purpose of the Historic Self-Settled Trust Rule as follows:

> The common law rule also has a general purpose of protecting creditors, but it addresses the specific situation where an interest is retained in a self-settled trust with a spendthrift provision. ''Traditional law is that if a settlor creates a trust for the settlor's own benefit and inserts a spendthrift clause, the clause is void as to the then-existing and future creditors, and creditors can reach the settlor's interest under the trust. And the rule is applicable although the transfer is not a fraudulent conveyance and it is immaterial

[38] 980 N.E.2d 45 (Ill. 2012).

[39] *Id.* at 51–52.

[40] *Id.* at 52 (citation and internal quotation marks omitted).

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that the settlor-beneficiary had no intention to defraud his creditors.[41]

The Court reconciled the two doctrines as follows:

> Both laws have a general purpose of protecting creditors. But the common law [rule] focuses on the additional matter of the interest *retained* by the settlor of a specific kind of trust, and not simply the fraudulent *transfer* of an asset or the fraudulent *incurring* of a debt, as does the statute. Additionally, the Act and the common law rule each operate in some circumstances where the other does not, thus negating any inference that the common law rule would render the Act superfluous. The Act is effective, but the common law rule is not, in a much larger sphere, which includes both situations that do not involve trusts and in connection with transfers into trusts that are not for the settlor's benefit because they permit distributions only to other persons.[42]

Importantly, the Court continued:

> We also do not find any displacement of the common law rule by the language in section 5 of the Act, as it is not a fraudulent *transfer* of funds that renders the trust void as to creditors under the common law, but rather it is the spendthrift provision in the self-settled trust and the settlor's *retention* of the benefits that renders the trust void as to creditors.[43]

The *Rush University* decision illustrates that the Historic Self-Settled Trust Rule is alive and well in Illinois and in many other states notwithstanding enactment of the UFTA (or, now, the UVTA). This means that statutes of limitations, fraudulent-transfer rules, and burdens of proof will be of no avail to a trustee who defends an SSST created under the law of a state that does not yet have SSST legislation. Under the law of a state that does have such legislation, a creditor must prove the necessary facts underlying the claim of a voidable transfer in connection with the funding of the trust — and not merely allege that all transfers to self-settled spendthrift trusts are voidable transfers *per se*.

In re Huber

In *Waldron v. Huber (In re Huber)*,[44] the Bankruptcy Court for the Western District of Washington (referenced in this section as the ''Court'') allowed a Washington bankruptcy trustee to access the assets of an Alaska APT created by a Washington resident.

The first issue that the Court had to decide was whether to apply Alaska or Washington law to the trust. Regarding this issue, the Court began:

> In federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules. In applying federal choice of law rules, courts in the Ninth Circuit follow the approach of the Restatement (Second) of Conflict of Laws (1971).[45]

The Court continued by quoting §270(a) of the Second Restatement of Conflicts of Laws[46] (referred to in this section as the ''Restatement''), which provides:

> An inter vivos trust of interests in movables is valid if valid
>
> (a) under the local law of the state designated by the settlor to govern the validity of the trust, provided that this state has a substantial relation to the trust and that the application of its law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship under the principles stated in §6.[47]

The Court then applied the above principles to the case at hand:

> Under the Restatement, the Debtor's choice of Alaska law designated in the Trust should be upheld if Alaska has a substantial relation to the Trust. Restatement §270(a). Comment b provides that a state has a substantial relation to a trust if at the time the trust is created: (1) the trustee or settlor is domiciled in the state; (2) the assets are located in the state; and (3) the beneficiaries are domiciled in the state. These contacts with the state are not exclusive. In the instant case, it is undisputed that at the time the Trust was created, the settlor was not domiciled in Alaska, the assets were not located in Alaska, and the beneficiaries were not domiciled in Alaska. The only relation to Alaska was that it was

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[41] *Id.* at 52 (footnote, citation, and internal quotation marks omitted).

[42] *Id.* at 52 (emphasis in original).

[43] *Id.* at 53 (emphasis in original).

[44] 493 B.R. 798 (Bankr. W.D. Wash. 2013).

[45] *Id.* at 807.

[46] *Id.* at 807.

[47] Restatement (Second) of Conflict of Laws §270 (1971).

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> the location in which the Trust was to be administered and the location of one of the trustees, AUSA.
>
> Conversely, it is undisputed that at the time the Trust was created, the Debtor resided in Washington; all of the property placed into the Trust, except a $10,000 certificate of deposit, was transferred to the Trust from Washington; the creditors of the Debtor were located in Washington; the Trust beneficiaries were Washington residents; and the attorney who prepared the Trust documents and transferred the assets into the Trust was located in Washington. Accordingly, while Alaska had only a minimal relation to the Trust, using the test set forth in Comment b, Washington had a substantial relation to the Trust when the Trust was created.[48]

Having determined that Washington rather than Alaska had the most substantial relation to the trust, the Court continued:

> Additionally, Washington State has a strong public policy against self-settled asset protection trusts. Specifically, pursuant to RCW 19.36.020, transfers made to self-settled trusts are void as against existing or future creditors. This statute has been in existence for well over a century, as it was first enacted in 1854.[49]

The Court concluded:

> [I]n accordance with §270 of the Restatement, this Court will disregard the settlor's choice of Alaska law, which is obviously more favorable to him, and will apply Washington law in determining the Trustee's claim regarding validity of the Trust.[50]

As an aside, albeit an important one, the Court misapplied the Restatement, under which issues are divided into matters of validity, governed by §270, and construction, administration, and creditor rights, governed by other sections of the Restatement. Under this framework, matters of ''validity'' are confined to issues such as whether the trust violates the rule against perpetuities or the rule against accumulations.[51] In contrast, it is §273 of the Restatement[52] that deals specifically with the question of a creditor's ability to reach trust assets, and provides that the law designated by the settlor governs — without stated exception. Section 273 of the Restatement provides, in pertinent part, as follows:

> §273 Restraints on Alienation of Beneficiaries' Interests.
>
> Whether the interest of a beneficiary of a trust of movables is assignable by him and can be reached by his creditors is determined . . .
>
> > (b) in the case of an inter vivos trust, by the local law of the state, if any, in which the settlor has manifested an intention that the trust is to be administered, and otherwise by the local law of the state to which the administration of the trust is most substantially related.[53]

Having found that Washington law governed, the Court turned to Wash. Rev. Code §19.36.020,[54] which provides:

> That all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the existing or subsequent creditors of such person.[55]

The Court concluded:

> The Trust is admittedly a self-settled trust. In accordance with RCW §19.36.020, the Debtor's transfers of assets into the Trust were void as transfers made into a self-settled trust.[56]

Based on this conclusion alone, it would appear that, (a) the plain language of Wash. Rev. Code §19.36.020, by the use of the word ''void,'' adopts the ''voidable transfer *per se*'' approach, and (b) the Court agreed that all of the transfers into the Alaska APT were void. This, however, is incorrect. Read carefully, Wash. Rev. Code §19.36.020 is stating that the transfers are void as to existing or subsequent creditors, meaning that they are *reachable* by the creditors. If the transfers were voidable *per se*, the transfers would be void as to all parties, not just to the existing or subsequent creditors. Read differently, the transfers to the trust are valid, but not as to any existing or subsequent creditor, which is another way of stating that assets are reachable by such creditors. As to the second point, if that were the Court's conclusion, that would

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[48] *Huber*, 493 B.R. at 808–09 (citation and internal quotation marks omitted).

[49] *Id.* at 809 (citation omitted).

[50] *Id.* at 809.

[51] Restatement (Second) of Conflict of Laws §269 cmt. d (1971).

[52] Restatement (Second) of Conflict of Laws §273 (1971).

[53] Restatement (Second) of Conflict of Laws §273(d) (1971).

[54] *Huber*, 493 B.R. at 809.

[55] Wash. Rev. Code §19.36.020.

[56] *Huber*, 493 B.R. at 809.

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be the end of the opinion and analysis. Often, if a court is presented with two arguments, and it finds that a clear decision is reached on the first point, there is no need to discuss the second issue. This did not occur with the *Huber* decision. Instead, the Court continued with the next issue.

The bankruptcy trustee had also alternatively sought summary judgment arguing that transfers to the trust were voidable under §548(e)(1) of the Bankruptcy Code,[57] which provides:

> In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if
>
> (A) Such transfer was made to a self-settled trust or similar device;
>
> (B) Such transfer was by the debtor;
>
> (C) The debtor is a beneficiary of such trust or similar device; and
>
> (D) The debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.[58]

The parties agreed that the first three elements were satisfied and that the controversy involved the fourth element.[59] After analyzing various badges of fraud,[60] the Court determined:

> [T]he evidence presented by the Trustee supports an inference of actual fraudulent intent by the Debtor to hinder, delay, or defraud his current or future creditors, in violation of §548(e)(1)(D). The Trustee is entitled to summary judgment on this claim as a matter of law.[61]

Clearly, however, the above analysis regarding the actual fraudulent intent of the debtor to hinder, delay, or defraud his current or future creditors, would have been unnecessary if a transfer to an SSST constituted a voidable transfer *per se* under §548(e)(1) of the Bankruptcy Code.

The Court next turned to the bankruptcy trustee's contention that summary judgment was warranted because transfers to the trust constituted fraudulent transfers under §544(b)(1) of the Bankruptcy Code and Wash. Rev. Code §19.40.041(a).[62] Section 544(b)(1) of the Bankruptcy Code provides, in pertinent part, as follows:

> [T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law.[63]

Under §544(b)(1) of the Bankruptcy Code and applicable Washington law, the bankruptcy trustee could set transfers to the trust aside under Wash. Rev. Code §19.40.041(a)(1),[64] which provides:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;[65]

After analyzing badges of fraud,[66] the Court concluded:

> [V]iewing the evidence in the light most favorable to the Debtor, the Trustee has established that there is no genuine dispute as to any material fact, and the Trustee is entitled to summary judgment as a matter of law on its UFTA claim based on actual fraudulent intent.[67]

Again, the Court would not have had to go through this analysis if a transfer to an SSST were a fraudulent transfer *per se* under Washington's UFTA.

In re Mortensen

In *Battley v. Mortensen (In re Mortensen)*,[68] the Bankruptcy Court in the District of Alaska (referred to in this section as the ''Court'') considered, *inter alia*, the debtor's motion to reconsider a holding that the transfer of a parcel of Alaska real property to an

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[57] *Id.* at 811.

[58] 11 U.S.C. §548(e)(1).

[59] *Huber*, 493 B.R. at 811.

[60] *Id.* at 812–14.

[61] *Id.* at 814.

[62] *Id.* at 814.

[63] 11 U.S.C. §544(b)(1).

[64] *Huber*, 493 B.R. at 814.

[65] Wash. Rev. Code §19.40.041(a)(1). Effective July 23, 2017, Washington will replace §19.40.041 with the corresponding provision of the UVTA (2017 Wash. S.B. 5085).

[66] *Huber*, 493 B.R. at 814–16.

[67] *Id.* at 816 (footnote omitted).

[68] Adv. No. A09-90036, 2011 BL 180087 (Bankr. D. Alaska July 8, 2011) (citation, footnotes, and internal quotation marks omitted). The prior opinions were *Battley v. Mortensen (In re Mortensen)*, Adv. No. A09-90036, 2011 BL 387653 (Bankr. D. Alaska Jan. 14, 2011), and *Battley v. Mortensen (In re Mortensen)*, Adv. No. A09-90036, 2011 BL 139744 (Bankr. D. Alaska May 26, 2011).

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Alaska APT should be set aside under §548(e)(1) of the Bankruptcy Code. The Court rejected the debtor's contention that the Court's prior ruling meant that the transfer was a voidable transfer *per se*:

> The defendants contend the essence of the court's ruling is that any transfer to a self-settled trust made within 10 years of the filing of a bankruptcy petition is a fraudulent conveyance. They base this contention on my finding that a settlor's expressed intention to protect assets placed into a self-settled trust from a beneficiary's potential future creditors can be evidence of an intent to defraud. I made this finding notwithstanding AS 34.40.110(b)(1), which specifies that a settlor's expressed intention to protect trust assets from a beneficiary's potential future creditors is not evidence of an intent to defraud.
>
> The defendants say the court should not use the creation of the trust itself as evidence of fraudulent intent, but should instead deal solely with the transfer of the property. However, when property is transferred to a self-settled trust with the intention of protecting it from creditors, and the trust's express purpose is to protect that asset from creditors, both the trust and the transfer manifest the same intent. In this case, I found that the trust's express purpose could provide evidence of fraudulent intent. However, it was not the only evidence upon which I based my decision.[69]

The Court analyzed the additional evidence as follows:

> The defendants contend there is scant evidence of Mortensen's actual intent to defraud his creditors. Mortensen's intent goes to the heart of this matter. Because this element is often difficult to prove with direct evidence, courts will look to circumstantial ''badges of fraud'' to determine fraudulent intent.
>
> Among the more common circumstantial indicia of fraudulent intent at the time of the transfer are: (1) actual or threatened litigation against the debtor; (2) a purported transfer of all or substantially all of the debtor's property; (3) insolvency or other unmanageable indebtedness on the part of the debtor; (4) a special relationship between the debtor and the transferee; and, after the transfer, (5) retention by the debtor of the property involved in the putative transfer.
>
> The defendants argue that when Mortensen placed the Seldovia property in trust he actually increased his vulnerability to creditors because he replaced an exempt homestead with non-exempt cash. I disagree. He placed most of the cash he received from his mother into the trust as well, insulating it from creditors' claims. In other words, substantially all of his property was transferred to the trust. . .
>
> Further, evidence at trial refutes Mortensen's claim that he was making all required payments on his debts when the Seldovia property was transferred. He had burned through a $100,000.00 annuity, and his credit card debt was between $49,711.00 and $85,000.00 when the trust was created. It was difficult to determine the true nature of Mortensen's finances; he was not a credible witness. Even accepting the defendants' contention that Mortensen's monthly expenses at that time were $3,000.00, rather than $5,000.00, he was still under water when he put the realty (and then the cash) into the trust. His existing creditors were never paid off, and his debts were already unmanageable when the property was transferred. The timeline provided by the plaintiff in his opposition highlights this point. Mortensen used the Seldovia property after he transferred it to the trust, but did not regularly pay rent to the trust. He also invested the funds he had transferred to the trust and lent funds to a friend for a vehicle purchase. Based on this evidence, I found sufficient badges of fraud to determine that Mortensen intended to hinder, delay and defraud his creditors when he transferred the Seldovia property to the trust.[70]

Like the Washington court in *Huber*, the Alaska court in *Mortensen* thus did not hold a transfer to the SSST to be a voidable transfer *per se* — instead, proof of the debtor's intent to hinder, delay, or defraud creditors was an essential element that must be present in order to reach such a conclusion.

Champalanne and *Mastro*

Other cases agree with this conclusion.

[69] *Mortensen*, Adv. No. A09-90036, 2011 BL 180087 (footnotes and internal quotation marks omitted).

[70] *Mortensen*, Adv. No. A09-90036, 2011 BL 180087 (footnotes and internal quotation marks omitted).

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Thus, in *Menotte v. Champalanne (In re Champalanne)*,[71] a federal bankruptcy judge in Florida wrote:

> The Defendants argue that the California Property Transfer was not fraudulent because under California law, the California Property remained subject to the claims of creditors after the transfer to the Family Trust. Even if that is a correct statement of California law, the transfer may nevertheless be avoidable if the Debtor acted with actual intent to hinder, delay, or defraud creditors.[72]

Finally, in *Rigby v. Mastro (In re Mastro)*,[73] a federal bankruptcy judge in Washington wrote:

> The LCY Trust is a self-settled trust. Thus, the transfers of assets into the LCY Trust by placing ownership of the assets in the LCY LLC Entities are void as transfers made into a self-settled trust, *and* avoidable as fraudulent transfers.[74]

WHY THIS IS A DISTINCTION WITH A DIFFERENCE!

The misclassification (as a voidable transfer *per se*) of the transfer of property by an individual located in a Non-SSST State to an SSST created under the law of an SSST State through the back-door device of a Comment to the UVTA, has important implications.

The first important point has been explained, as follows:

> [N]otwithstanding the language of the Uniform Fraudulent Transfer Act, the common law has drawn an important distinction between those future creditors whose claims were, or at least could have been, reasonably anticipated at the time of the transfer, and those future creditors who were not, and perhaps could not have been, contemplated by the debtor at the time of the transfer (which latter class of future creditors was referred to at the beginning of this article as "*potential future creditors*"). This is a logical distinction because it speaks to the question of whether, in effecting the transfer, the debtor could have possessed the required actual intent to hinder, delay or defraud creditors; specifically, the more remote the future creditor, the less likely that the debtor might be found to have had such intent.[75]

It is well-settled that individuals have a right to protect against future adversity. Citing a 19th century case where the holding still has relevance, in *Schreyer v. Scott*, the U.S. Supreme Court stated:

> Reverses came unexpectedly, while in the pursuit of his ordinary business, without any intention on his part to defraud his creditors, and it may be said that, without any fault on his part, except a want of human foresight, he became embarrassed and insolvent. It is not apparent that [the transferor] had in view, at the time of the execution of the deed to his wife, any such result, or that he in any way contributed to produce the result which followed, for the purpose of defrauding his creditors and enjoying the advantages to be derived from the provisions made for his wife. *Under such circumstances, the presumption of any fraudulent intent is rebutted, and it is manifest that he had done no more than any business man has a right to do, to provide against future misfortune when he is abundantly able to do so.*[76]

More recently, in connection with the question of whether to deny a bankruptcy debtor his discharge in bankruptcy due to the debtor having undertaken a fraudulent transfer, the Bankruptcy Court in the Central District of California in *Oberst v. Oberst (In re Oberst)*[77] stated that:

> If the debtor has a particular creditor or series of creditors in mind and is trying to remove his assets from their reach, this would be grounds to deny the discharge. If the debtor is merely looking to his future well-being, the discharge will be granted.[78]

Thus, the concept of a fraudulent transfer *per se* — even if the concept should only apply to transfers to SSSTs by individuals who reside in Non-SSST states — turns existing voidable transfer law on its head. The fact that such result is to be reached through the back-door device of a Comment, rather than the statute itself, is particularly inappropriate.

A second important implication involves the upending of the established conflict-of-laws rules that have long been used in determining whether creditors may

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[71] 425 B.R. 707 (Bankr. S.D. Fla. 2010).

[72] *Id.* at 713.

[73] 465 B.R. 576 (Bankr. W.D. Wash. 2011).

[74] *Id.* at 611–12 (emphasis added).

[75] Daniel S. Rubin, *Asset Protection Planning — Ethical? Legal? Obligatory?*, 48 Heckerling Inst. on Est. Plan ¶1802 at 18-4 (2014) (footnote omitted; emphasis in original).

[76] *Schreyer v. Scott*, 134 U.S. 405, 414–15 (1890) (internal quotation marks omitted; emphasis added).

[77] 91 B.R. 97 (Bankr. C.D. Cal. 1988).

[78] *Id.* at 101.

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reach trust assets. As noted, the ability of creditors to reach trust assets, including SSST assets, has historically been based on trust law principles under the rules set forth in the Second Restatement of Conflict of Laws. To reiterate, under those rules, the law of the trust jurisdiction designated by the settlor would apply to validate the protections afforded by a properly designed and implemented APT arrangement, even in instances where the settlor is a resident of another state.

In fact, in some jurisdictions, a settlor's ability to designate the law of a particular jurisdiction as the governing law of the trust is expressly provided for by statute. For example, §7-1.10 of New York's Estates, Powers and Trusts Law provides:

> §7-1.10. Provision by non-domiciliary creator as to law to govern trust
>
> (a) Whenever a person, not domiciled in this state, creates a trust which provides that it shall be governed by the laws of this state, such provision shall be given effect in determining the validity, effect and interpretation of the disposition in such trust. . .

Interpreting a prior version of this statute, New York's highest court stated that ''[t]he statute makes [a settlor's] express declaration of intention [of controlling law] conclusive. . . .''[79]

Furthermore, although the prima facie ability of a New York domiciliary settlor to create a valid trust governed by the laws of a foreign jurisdiction is not expressly conferred by this statute, it *is* logically inferred and has been so recognized by the courts. For example, it was stated in *Matter of Matthiessen*,[80] that ''It is inconceivable that a state committed to [the policy of Estates, Powers and Trusts Law §7-1.10] would deny its own residents the corresponding right to establish trusts in other states. . . . [U]nder the law of this state, a New York resident may choose another state as the situs of a trust as freely as a non-resident may create a trust in New York.''

The introduction of Comment 8 under §4 of the UVTA creates a conflict whereby practitioners can no longer be certain as to whether the law of the jurisdiction set forth by the settlor in the trust instrument is to apply. We had thought that the purpose of statutory law was to negate uncertainty, rather than to introduce new uncertainties to established law.

SIGNIFICANCE OF THE COMMENTS AND BACKLASH

Commentators differ on the significance of the Comments. One commentator asserts that, ''[t]he Comments in short, are no more than a law journal article on steroids.''[81] Other commentators point out that courts are likely to refer to the Comments in interpreting §10 of the UVTA.[82]

Irrespective of which commentator is more correct, the fact remains that the Comments do not accurately interpret existing law and, on this basis alone, they should not have been included in the UVTA and should not be adopted by states enacting the UVTA.

During the UVTA drafting process, the Chair invited one of the authors of this article, Dick Nenno, to be an observer to the Committee (Observer), as Mr. Nenno has great familiarity with domestic APTs.[83] As described above, it would appear that the Comments were inserted with the objective of making it impossible for a resident of a Non-SSST State to establish an APT in an SSST State. Shortly after the Reporter issued the Comments, Mr. Nenno sent him the above authorities. Subsequently, though, in a communication to Mr. Nenno, the Reporter denied receiving the authorities until Mr. Nenno subsequently directed him to the message acknowledging their receipt. When Mr. Nenno attempted to press his points, the Reporter refused to allow Mr. Nenno to resume his discussion with the Committee. Mr. Nenno's subsequent efforts to pursue his points with the Chair and the then-President of the ULC also were unavailing.

We understand that the Chair and the Reporter now express surprise at the substantial push-back from the trusts and estates bar on these and other issues as they, and other members of the Committee, lobby for enactment of the UVTA around the country. It is also the authors' understanding that the Committee has refused to consider any revisions to the Comments notwithstanding the request of the Joint Editorial Board for Uniform Trust and Estate Acts, which, the authors were informed, was not consulted in connection with the UVTA's approval.

WHAT STATE LAW AND THE COMMENTS SHOULD SAY

At a minimum, we believe that a state considering enactment of the UVTA should drop all of Comment

[79] *Hutchison v. Ross*, 187 N.E. 65, 71 (N.Y. 1933).

[80] 87 N.Y.S.2d 787, 792 (N.Y. Sup. Ct. 1949).

[81] Jay D. Adkisson, *Jay Adkisson & the Reporter's Comments to the Uniform Voidable Transactions Act*, LISI Asset Protection Newsl. #319 (Apr. 11, 2016), www.leimbergservices.com.

[82] George D. Karibjanian, Gerard ''J.J.'' Wehle, Jr. & Robert L. Lancaster, *History Has Its Eyes on UVTA — A Response to Asset Protection Newsletter #319*, LISI Asset Protection Newsl. #320 (Apr. 18, 2016), www.leimbergservices.com.

[83] *See* Nenno & Sullivan, 868 T.M., *Domestic Asset Protection Trusts*. As covered more fully below, in his capacity as Observer, Mr. Nenno repeatedly raised the concerns described in this article and distributed authorities described herein. The Reporter, the Chair, the American Bar Association Advisors in attendance, the participating Commissioners, and the then-President of the ULC, all chose not to acknowledge their import.

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2 under §4 (except the first sentence) as well as the last paragraph of Comment 8 under §4. Such states should instead focus their attention on drafting statutes that negate the Comments.

For example, §10, while the bane of existence for asset-protection attorneys, is welcomed by the debtor-creditor bar. The key therefore is to create a statutory exception to allow a governing law provision to exist, but negate the effect on SSSTs. Section 8 of the UVTA provides for defenses, liability, and protection of the transferee or obligee. In the case of an SSST, this would be the trustee of the SSST. The first goal, therefore, should be to remove the possibility of the voidable-transfer-*per-se* presumption as to future creditors — in doing so, there should be no modification to other provisions of the UVTA as a means to protect creditors. If a creditor is to undo a transaction, let it happen in accordance with the UVTA state applying its current state law and other provisions of the UVTA and then determine whether the provisions of the laws of the SSST State allow for the satisfaction of the judgment. By doing so, this would force the creditor to demonstrate that the action securing the judgment would also be successful if brought in the SSST State; this would be a more difficult burden and is more in the spirit of acknowledging the Historic Self-Settled Trust Rule.

The model statutory language could resemble the following:

> §8 Defenses, Liability, and Protection of Transferee or Obligee.
>
> . . .
>
> (i) Notwithstanding the foregoing provisions of this Act:
>
> (1) Nothing in this Act shall deem as voidable *per se* the transfer of an asset by a debtor residing in this state to an entity or irrevocable trust that is formed and governed under the laws of foreign jurisdiction; provided, however, that such transfer may nevertheless be deemed voidable pursuant to other provisions of this Act.

There may be additional concerns that a judgment in a state that has adopted the UVTA could somehow mandate that the SSST satisfy the judgment. To negate this argument, additional statutory language should be added so that the judgment has to be able to be satisfied in accordance with the claims laws of the SSST State in order to be enforceable against the SSST. This principle should be understood under the laws of the SSST State, but it may be helpful to statutorily provide for this in a ''belt and suspenders'' approach. The statute should signify intent that the judgment not be applied to satisfy the basic test for attachability in another state unless it meets certain criteria. The statute should provide that a trustee of an SSST cannot be required to satisfy a judgment against the SSST's settlor unless the SSST State's laws allow for the attachment, or that, as to any trust or entity created before the action leading to the judgment, the transfer to the trust or entity is subject to another provision of the domiciliary state's UVTA. This way, all other UVTA remedies are preserved.

The model statutory language could resemble the following:

> ''§8 Defenses, Liability, and Protection of Transferee or Obligee.
>
> . . .
>
> (i) Notwithstanding the foregoing provisions of this Act:
>
> . . .
>
> (2) A judgment under this Act may not be satisfied or enforced against any entity, or an interest in such entity, owned by the debtor (or a trust that is revocable by the debtor) that is organized under the laws of a foreign jurisdiction, or against any irrevocable trust created by the debtor in which the debtor has retained a beneficial interest and which is governed under the laws of a foreign jurisdiction, unless:
>
> (i) The Claims Laws of the foreign jurisdiction governing such entity or trust, independent of the effect of the judgment under this Act, permit such judgment to be satisfied from, or enforced against, such entity, or interest in such entity, or trust; or
>
> (ii) (A) Such entity or trust was created before the particular transfer made, or obligation incurred, by the debtor resulting in such judgment, and
>
> (B) The assets held by such entity or trust were transferred by the debtor to such entity or

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trust in violation of another provision of this Act.[84]

Additionally, the Comments themselves could be modified. For example, Comment 2 might be revised to read as follows:

> 2. Section 4, unlike §5, protects creditors of a debtor whose claims arise after as well as before the debtor made or incurred the challenged transfer or obligation. Nevertheless, debtors are free to take steps to protect assets from claims that were neither in existence nor reasonably foreseeable at the time of a transfer. *Schreyer v. Scott*, 134 U.S. 405, 414–15 (1890); *Oberst v. Oberst (In re Oberst)*, 91 B.R. 97, 101 (Bankr. C.D. Cal. 1988).

Likewise, the final paragraph of Comment 8 might read as follows:

> The laws of different jurisdictions differ in their tolerance of particular creditor-protection devices. For example, creditors historically have been able to reach the settlor's retained interest in a self-settled spendthrift trust pursuant to the common-law doctrine prohibiting such trusts. Suppose that jurisdiction X, in which this Act is in force, also has in force a statute permitting an individual to establish a self-settled spendthrift trust and transfer assets thereto, subject to stated conditions. If an individual Debtor whose principal residence is in X establishes such a trust and transfers assets thereto, then under §10 of this Act, the voidable transfer law of X applies to that transfer and may serve to undo such transfer under §4 or §5 of this Act based on the facts at hand. If, instead Debtor's principal residence is in jurisdiction Y, which also has enacted this Act but has no legislation validating such trusts, and if Debtor establishes such a trust under the law of jurisdiction X and transfers assets to it, then the voidable transfer law of jurisdiction Y would apply to that transfer and may serve to undo such transfer under §4 or §5 of this Act based on the facts at hand; however, absent the finding of a voidable transfer under the law of jurisdiction Y, the ability of creditors to reach the assets of the trust is determinable not under the Act but rather as a question of trust law under the law of jurisdiction X pursuant to the principles set forth under Chapter 10 (§267–§282) of the Second Restatement of Conflict of Laws.

CONCLUSION

We acknowledge that some settlors will create SSSTs with improper motives, but we disapprove of the ULC's attempt to invalidate all SSSTs created by out-of-state settlors by taking the unprecedented step of classifying them as voidable transfers *per se* through the use of comments under the UVTA. If a settlor who resides in a state that has enacted the UVTA but does not yet have SSST legislation (which, of the states that have enacted the UVTA, excludes only Michigan and Utah), creates an SSST in an SSST State, the courts should apply the principles of §273 of the Second Restatement of Conflict of Laws in deciding which state's law governs. Absent a finding of intent to hinder, delay, or defraud creditors or, alternatively, a finding of insolvency, the creditor protection of such trusts should be upheld. In our opinion, courts in states that have enacted the UVTA with the Comments should ignore them; states adopting the UVTA should drop them; and the Drafting Committee should promptly revisit them.

One final thought. This article is primarily based on a commentary that Mr. Nenno and Mr. Rubin wrote last summer for Leimberg Information Services, Inc. (LISI).[85] In response, the Chair and the Reporter wrote a LISI commentary in which they adhered to their view that the Comments were in order.[86] Writing in his capacity of Technical Editor of the LISI asset-protection newsletters, Duncan E. Osborne, former President of the American College of Trust and Estate Counsel, and one of the most highly respected practi-

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[84] Both of the suggested statutes — Prop. §8(i)(1) and §8(i)(2), reference an ''entity'' as well as a trust. The purpose for this is to ensure that the UVTA cannot be used to impede another state's laws regarding single-member limited liability companies (SMLLCs). In many of the SSST States, charging order protection is also afforded to SMLLCs. *See, e.g.,* Del. Code Ann. tit. 6, §18-703. While this is a different area of the law, §10 of the UVTA and the Comments could conceivably be applied to force the satisfaction of a judgment against an SMLLC notwithstanding the charging order protection afforded by the SMLLC's governing law. If this route is to be taken, the adoption of Prop. §8(i)(3) should occur:

> (3) For purposes of this subsection (i), ''entity'' shall be defined as provided in [citation to particular state's limited liability company act] notwithstanding the fact that such entity is organized under the laws of a foreign jurisdiction.

[85] Dick Nenno & Dan Rubin, *Are Transfers to Self-Settled Spendthrift Trusts by Settlors in Non-APT States Voidable Transfers Per Se?*, LISI Asset Protection Newsl. #327 (Aug. 15, 2016), www.leimbergservices.com.

[86] Ken Kettering & Ed Smith, *Comments to Uniform Voidable Transactions Act Should Not Be Changed*, LISI Asset Protection Newsl. #329 (Aug. 25, 2016), www.leimbergservices.com.

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tioners in the asset-protection field, observed at the end of the Kettering-Smith commentary that:

> I have been studying the law of fraudulent transfers for over 45 years and have spent untold time not only with the statutes and the cases, but also with the works of Professor Robert Danforth and Professor Peter Alces. My conclusions from this intense involvement leave me firmly convinced of the positions of Mr. Rubin and Mr. Nenno.

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