A Practitioner's Primer On The Pennsylvania Uniform Fraudulent Transfer Act

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TABLE OF CONTENTS

ABSTRACT

The Pennsylvania Uniform Fraudulent Transfer Act ("PUFTA") protects unsecured creditors in the event that a debtor transfers an asset or incurs an obligation either with actual or constructive fraudulent intent to defraud a creditor. Consider the following scenarios. You are a litigation attorney who expects to recover a significant judgment against a defendant on behalf of your client, but the defendant transfers the bulk of its assets to a third party before judgment is entered in an attempt to be "judgment proof." Or, you are a transactional attorney whose cash-strapped, corporate client has several large creditors and seeks your input on whether it may guaranty a loan extended by a creditor to its subsidiary. In both of these scenarios, PUFTA potentially would be implicated and would be determinative of whether the transactions can be enforced or avoided.

PUFTA is now ripe for reappraisal. For the first time in more than thirty years, the Uniform Law Commission has approved several changes to the Uniform Fraudulent Transfer Act ("UFTA"), which is now known as the Uniform Voidable Transactions Act.[2] Critically, these changes do not materially alter the UFTA; rather, they primarily seek to clarify certain points that were not clearly addressed under the UFTA.[3] Consequently, PUFTA will continue, by and large, to exist in its current form, and much of the case law interpreting PUFTA will not be disturbed.

The purpose of this article is to serve as an introduction to PUFTA and provide context for the recently adopted changes to the statute. It accomplishes this objective in four ways.

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2. The name of the UFTA has been changed to the Uniform Voidable Transactions Act ("UVTA"). Despite the name change, the provisions of the UFTA largely remain intact.

3. Where appropriate, this article will note provisions of the UVTA that modify the UFTA. It is not the purpose of this article, however, to analyze each change under the UVTA, particularly to the extent that the Official Comments have been "supplemented and otherwise refreshed." Uniform Voidable Transactions Act, Prefatory Note (2014 Amendments) (2014).

First, it briefly traces the evolution of fraudulent transfer law in Pennsylvania to highlight concepts from prior cases that are no longer good law. Second, it summarily sets forth the rules of construction that apply to interpretation of PUFTA. Third, it sequentially summarizes and explains the ten sections of PUFTA, as well as the Pennsylvania Bar Committee Comments, to give a comprehensive overview of the operative provisions of the Act. Fourth, as part of its analysis of each section of PUFTA, it critically examines the interpretation of the statute by state and federal courts in Pennsylvania and elsewhere in order to identify various issues that potentially may arise under the PUFTA and UFTA in general. Through this analysis, practitioners should understand not only the basic provisions of PUFTA, but appreciate many of the finer points of the statute.

I. THE EVOLUTION OF FRAUDULENT TRANSFER LAW IN PENNSYLVANIA

The Pennsylvania General Assembly enacted PUFTA in 1993,[4] or approximately nine years after the Uniform Law Commission first drafted the Uniform Act in 1984.[5] When the General Assembly enacted PUFTA, it repealed the Pennsylvania Uniform Fraudulent Conveyance Act ("PUFCA"), which had been enacted in 1921, and Statute of 13 Elizabeth,[6] which was an early predecessor of the PUFCA that had been recognized in Pennsylvania since the early 1800s.[7]

Although there are substantial similarities between PUFTA and the PUFCA, there are also significant differences.

Although there are substantial similarities between PUFTA and the PUFCA, there are also significant differences.[8] It is important for practitioners to appreciate these differences because prior cases interpreting the PUFCA are not necessarily persuasive authority in a fraudulent transfer case under PUFTA, particularly if those cases decide issues that have been obviated by the enactment of PUFTA.[9] With this in mind, practitioners should be mindful of the following ways in which PUFTA differs from the PUFCA:

- PUFTA does not utilize the same definition of "insolvency" as the PUFCA. As has been observed, PUFTA arguably makes it more difficult for a creditor to prove insolvency.[10]
- PUFTA does not employ the burden-shifting framework that was commonly applied in constructive fraud cases under the PUFCA. As the claimant, the creditor bears the burden of avoiding a transfer or obligation on the basis of constructive fraud.
- PUFTA does not include "good faith" as part of the definition of "reasonably equivalent value." A showing of constructive fraud, therefore, does not turn on the subjective intent of the transferee as it did under the "fair consideration" test of the PUFCA.
- PUFTA contains an express statute of limitations provision, whereas the PUFCA had none. The inclusion of the provision resolves uncertainty as to the applicable statute of limitations.[11]

4. 1993 Pa. SB 1015 (December 3, 1993).

5. http://www.uniformlaws.org/ActSummary.aspx?title=Fraudulent+Transfer+Act (last viewed December 1, 2014).

6. Section 3 of SB 1015, Section 3; *see also* 12 Pa.C.S. §5101, cmt. 1 ("Pursuant to the repealer in the act enacting this chapter, this chapter replaces the Pennsylvania Uniform Fraudulent Conveyance Act. . . . This chapter also replaces the Statute of 13 Eliz. ch. 5, formerly published as an appendix to Pa. Stat. Ann. tit. 39, ch. 2 (Purdon 1954), to the extent it was in force in Pennsylvania.").

7. *See, e.g., Numan* v. *Kapp*, 5 Binn. 73, 76 (Pa. 1812) ("It is beyond all doubt, that a deed, made with the purpose or intent to delay, hinder, or defraud creditors of their lawful actions and demands, is utterly void, both at common law and under the statute of 13 Elizabeth.").

8. It is not the purpose of this article to provide a historical overview of the law of fraudulent transfer or analyze every difference between PUFTA and the PUFCA. For an excellent discussion of these subjects, see Robert J. Ridge and Ellen G. McGlone, "A Practitioner's Guide to Pennsylvania's Newly Adopted Uniform Fraudulent Transfer Act," 99 Dick. L. Rev. 117 (Fall 1994).

9. *See, e.g., Fid. Bond & Mortg.* v. *Brand*, 371 B.R. 708, 717 (E.D. Pa. 2007) ("Because there is no case law fixing the burden of proof in constructive fraud claims under the PUFTA does not mean that cases construing the earlier PUFCA dictate the standard.").

10. Ridge and McGlone, 99 Dick. L. Rev. at 129 ("Because the 'balance sheet' test is narrower than the insolvency test found in the Pa. UFCA, establishing insolvency will be more difficult under the Pa. UFTA than under the Pa. UFCA.").

11. *See generally id.*

These differences are highlighted at the outset of this article so that practitioners can appreciate that fraudulent transfer law under PUFTA is similar, but not identical, to fraudulent conveyance law under the PUFCA. Practitioners, therefore, should be mindful of these differences when applying the statutory language of PUFTA.

II. RULES OF CONSTRUCTION

Besides the differences between PUFTA and the PUFCA, practitioners also should be cognizant of the rules of construction that guide interpretation of the statute. Specifically, because PUFTA is a uniform law, its interpretation is informed by 1 Pa.C.S. §1927,[12] which requires that the statute be interpreted in a manner that is consistent with the interpretation of other states that also have enacted the statute.[13] In addition, pursuant to 1 Pa.C.S. §1939, the detailed Committee Comment ("Comment") that follows each section of PUFTA is not only informative, but it bears directly on the interpretation of the statute.[14] Accordingly, although the text of each section is paramount, other considerations are also relevant to construing PUFTA.

III. PUFTA'S KEY PROVISIONS

In contrast to the Bankruptcy Code, PUFTA is deceptively concise. The entire statutory scheme consists of only ten sections. Although PUFTA is straightforward in some respects, it is not in others. Many of PUFTA's nuances are actually highlighted by the Comment that accompanies each section of the statute. The Comment also identifies and explains the "nonuniform" aspects of each section and the Comment to the extent that it deviates from the UFTA.[15]

A. Definitions[16] – Section 5101

Section 5101 defines many of the terms that are used frequently throughout PUFTA. Many of the definitions are derived from the Bankruptcy Code.[17] Taken together, these terms form the foundation of the statute, as they basically set forth who can recover, who is liable, and the conduct that is actionable. Consequently, unless the terms that are defined in Section 5101 are understood, it is not possible to comprehend the other sections of PUFTA.

At its core, PUFTA is concerned with preventing a debtor from transferring property to the detriment of an unsecured creditor who has a claim against the debtor. To this end, Section 5101 defines a "creditor" as "[a] person who has a claim" and a "debtor" as "a person who is liable on a claim." A "claim," in turn, is broadly defined as "[a] right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured,"[18] and "[l]iability on a claim" is known as a "debt." The definitions of both "claim" and "debt," which primarily refer to unsecured obligations,[19] are adopted from Section 101 of the Bankruptcy Code.

Upon understanding that PUFTA generally applies where a "creditor" has a "claim" against a "debtor," it is next necessary to appreciate the conduct that PUFTA is intended to prohibit. As the Comment explains, PUFTA is concerned only with the "transfer" of "assets."[20] Accordingly, Section 5101(b) defines a "transfer" as:

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12. 12 Pa.C.S. §5101, cmt. 1.
13. 1 Pa.C.S. §1927 ("Statutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.").
14. *See* 12 Pa.C.S. §5101, cmt. 1; *see also Brand*, 371 B.R. at 718 ("Because the Committee Comments were written by the drafters of the PUFTA in connection with the enactment of the statute and the Legislature had access to them prior to passing the legislation, the comments inform the meaning and operation of the PUFTA's provisions.").
15. Unless relevant, this article will not attempt to summarize or explain these "nonuniform features," which can be found at the end of the Comment for each section.
16. Section III.A defines most, but not all, of the terms set forth in Section 5101. For ease of reference, defined terms appear in quotation marks throughout this section.
17. *See* 12 Pa.C.S. §5101, cmt. 3, 5, 7, and 10. Where provisions of PUFTA mirror provisions of the Bankruptcy Code, courts endeavor to construe the provisions between the two statutes harmoniously. *See Fid. Bond & Mortg.* v. *Brand*, 371 B.R. 708, 719 (E.D. Pa. 2007) ("[C]onsistency between [PUFTA and the Bankruptcy Code] was a goal of those who drafted the PUFTA and who have since interpreted it.").
18. 12 Pa.C.S. §5101(b). As the Comment further explains, the expansive definition of "claim" includes "the holder of an unliquidated tort claim or contingent claim." *Id.*, cmt. 3.
19. *Id.*, cmt. 3.
20. 12 Pa.C.S. §5101, cmt. 1.

> Every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset. The term includes payment of money, release, lease and creation of a lien or other encumbrance.[21]

Whereas the definition of "conveyance" under the UFCA did not expressly include "involuntary" transfers such as mortgage and lien foreclosures,[22] the definition of "transfer" under PUFTA does. Additionally, as this broad definition clearly states, a "transfer" is not limited to the divestiture of an "asset," but also includes the creation of an "interest in an asset,"[23] such as an Article 9 security interest or an interest under a mortgage or deed of trust.[24]

Limiting the scope of liability under PUFTA to the "transfer" of "assets" is consistent with the objective of the statute. Specifically, because PUFTA is primarily concerned with protecting unsecured creditors, certain "property" that otherwise could not be reached by the "creditor" is specifically excluded from the definition of "asset."[25] As such, although Section 5101(b) defines "property" broadly as "[a]nything that may be the subject of ownership,"[26] and such "property" need not necessarily be related to the "claim" of the "creditor" in order to be considered an "asset" within the meaning of PUFTA,[27] the definition of "asset" under Section 5101(b) specifically excepts the following:

> (1) property to the extent it is encumbered by a valid lien;
> (2) property to the extent it is generally exempt under nonbankruptcy law; or
> (3) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.[28]

The Comment to Section 5101 offers further insight into each one of these exceptions.

Regarding the first exception, Section 5101(b) defines a "valid lien" as "[a] lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process

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21. 12 Pa.C.S. §5101(b). It should be noted that, under certain circumstances, a debtor can be deemed to make a "transfer" to him or herself, notwithstanding the fact that common sense would seem to dictate that a transfer requires a third party. *See Titus* v. *Shearer*, 498 B.R. 508, 522 (W.D. Pa. 2013) (declining to overrule bankruptcy court's "ruling that [debtor] could be both a transferor and a transferee" where husband transferred individual assets to bank account held with wife as tenants by entireties); *accord In re Channon*, 424 B.R. 895, 900 (Bankr. D.N.M. 2010) ("The conversion of non-exempt assets into exempt asset is a 'transfer' as that term is used in UFTA.").

22. Courts, however, had regularly interpreted such transfers as falling within the purview of the UFCA. 12 Pa.C.S. §5101, cmt. 10.

23. 12 Pa.C.S. §5101(b); *see also id*. (defining "lien" as "[a] charge against or an interest in property to secure payment of a debt or performance of an obligation," including "a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common law lien or a statutory lien"). Incidentally, the term "lien," as used in the definition of "transfer," should not be confused with "valid lien," as used in the exception for property "encumbered by a valid lien" that is part of the definition of "asset." *See* Section III.A, *infra* (stating that "property" that is subject to "valid lien" is excluded from definition of "asset"); *see also Phillips* v. *Phillips*, A13-0699, 2014 Minn. App. Unpub. LEXIS 190 at 9–11 (Minn. Ct. App. Mar. 10, 2014) (rejecting argument that grant of subsequently perfected security interest in physical assets was not actionable as fraudulent transfer under Section 8(e)(2) of UFTA, which states that "enforcement of a security interest" is not a fraudulent transfer).

24. *See, e.g., Nat'l City Bank* v. *Lockwood Auto Group, Inc*. (*In re Lockwood Auto Group, Inc*.), 370 B.R. 658, 663 (Bankr. W.D. Pa. 2007) ("The granting of a security interest in the assets of the Debtor is a transfer subject to avoidance [under Section 5107 of PUFTA."); *accord First Nat'l Bank* v. *Hooper*, 104 S.W.3d 83, 86 (Tex. 2003) ("What was transferred here, though, was not an asset or service whose value was subject to dispute, but a lien that had a defined value when it was created. That is, the deed of trust did not convey the pipeline to the Bank but merely perfected a security interest in the pipeline up to the amount of Thornton's debt."); *Phillips* v. *Phillips*, A13-0699, 2014 Minn. App. Unpub. LEXIS 190 (Minn. Ct. App. Mar. 10, 2014) (reversing trial court finding that grant of security interest in physical assets was not actionable in light of Section 8(e)(2), which states that "enforcement of a security interest" is not a "fraudulent" transfer).

25. 12 Pa.C.S. §5101, cmt. 2 ("[I]t is . . . appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of 'asset' for the purposes of this chapter."); *see also id*. ("The fact that a particular creditor may reach generally exempt property by resorting to judicial process does not warrant its inclusion as an asset in determining whether the debtor is insolvent.").

26. 12 Pa.C.S. §5101(b).

27. *Id*., cmt. 2 ("The definition in this chapter, unlike that in the earlier Act, does not, however, require a determination that the property is liable for the debts of the debtor. Thus, an unliquidated claim for damages resulting from personal injury or a contingent claim of a surety for reimbursement, contribution or subrogation may be counted as an asset for the purpose of determining whether the holder of the claim is solvent as a debtor under 12 Pa.C.S. §5102, although applicable law may not allow such an asset to be levied on and sold by a creditor."); *see also id*., cmt. 9 ("In particular, but without limitation, governmental licenses and permits that contribute to the value of the holder in general should be deemed 'property' of the holder, whether or not transferable, regardless of whether such items are deemed 'property' for other purposes (e.g., *regardless of whether such an item may be the subject of execution*, or whether such an item is deemed a withdrawable privilege, rather than a property right, as against the issuing authority).") (emphasis added); *cf. FCC* v. *Airadigm Communs*. (*In re Airadigm Communs*.), 396 B.R. 747, 753 (W.D. Wis. 2007) ("A creditor other than the FCC cannot hold a lien in an FCC license, but can only acquire rights in proceeds from the sale of a license to a third party.").

28. 12 Pa.C.S. §5101(b).

or proceedings."[29] Only "to the extent" that such a lien exists, however, is the "property" excepted as an "asset,"[30] meaning that "property" that is otherwise encumbered with a "valid lien" is an "asset" only if there is equity in the "property" in excess of the amount of the encumbering lien.[31]

With respect to the second exception, "nonbankruptcy law" is defined as "the law of a state or federal law that is not part of the Bankruptcy Code, Title 11 of the United States Code."[32] This exception essentially provides that "property" that is exempt under state[33] or federal law is not an "asset" within the meaning of PUFTA, regardless of the property's exemption status under bankruptcy law.[34]

As for the third exception, "property" that is held as tenants by the entireties is generally exempt from execution where the "creditor" holds a "claim" against only one spouse.[35] Accordingly, for this reason, entireties property generally is not considered an "asset" for purposes of PUFTA.[36]

Although Section 5101(b) defines specifically what constitutes an "asset" for fraudulent transfer purposes, the Comment to Section 5101 explains that PUFTA is not intended to displace "other law," including "a common law of fraudulent transfer."[37] Consequently, the rights between a "creditor" and a "debtor" are not always determined by reference to PUFTA alone.[38]

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29. 12 Pa.C.S. §5101(b). "A valid lien includes an equitable lien that may not be defeated by a judicial lien creditor." 12 Pa.C.S. §5101, cmt. 11.

30. 12 Pa.C.S. §5101, cmt. 2 ("Property encumbered by a valid lien is excluded from the definition of 'asset' only 'to the extent' the property is so encumbered. For example, in the case of property encumbered by a lien securing a contingent obligation, such as a guaranty, in general it would be appropriate to value the obligation by discounting its face amount to reflect the probability that the guaranty will ever be called upon."); *see also* 12 Pa.C.S. §5102, Cmt (1) (excluding "property" subject to "valid lien" from "insolvency" computation).

31. *See, e.g., Epperson* v. *Entm't Express, Inc.*, 338 F.Supp. 2d 328, 342 (D. Conn. 2004) ("[I]f there is a 'valid lien' on property that exceeds the value of the property, the property cannot be considered an 'asset,' and there can be no 'transfer' under the UFTA."); *In re 1701 Commerce, LLC*, 511 B.R. 812, 826–35 (Bankr. N.D. Tex. 2014) (analyzing whether transferred property encumbered by valid junior and senior liens had any equity at time of transfer for purposes of bringing debtor's transfer of property within scope of Texas UFTA).

32. 12 Pa.C.S. §5101, cmt. 2.

33. Statutory property exemptions under Pennsylvania law can be found at 42 Pa.C.S. §8124.

34. *See id.* ("The definition of an 'asset' thus does not include property that would be subject to administration for the benefit of creditors under the Bankruptcy code *unless it is subject under other applicable law, state or federal, to process for the collection of a creditor's claim against a single debtor*.") (emphasis added). For a list of the exemptions available under bankruptcy law, see 11 U.S.C. Section 522(d). Additionally, for a discussion of the interplay between state law and bankruptcy law exemptions, see *In re Earned Income Tax Credit Exemption Constitutional Challenge Cases*, 477 B.R. 791, 798 (Bankr. D. Kan. 2012). *See also In re Roca*, 404 B.R. 531 (Bankr. D. Ariz. 2009) (distinguishing between fraudulent transfer action under Arizona UFTA and fraudulent transfer action under Section 548 of Bankruptcy Code and declining to find that state law exemption that would have taken property outside of scope of Arizona UFTA precluded action under Section 548).

35. 12 Pa.C.S. §5101, cmt. 2 ("[I]n nearly half the states such an interest can not be subjected to liability for a debt unless it is an obligation owned jointly by the debtor with his or her cotenant by the entirety. The definition in this chapter requires exclusion of interests in property held by tenants by the entirety that are not subject to collection process by a creditor without a right to proceed against both tenants by the entirety as joint debtors.") (citations omitted); *see also Murphey* v. *C.I.T. Corp.*, 33 A.2d 16 (Pa. 1943) (holding that transfer of property held as tenants by the entireties was not fraudulent conveyance, despite creditor holding judgment against husband); *Klebach* v. *Mellon Bank, N.A.*, 565 A.2d 448 (Pa. Super. Ct. 1989) ("[If only *one* spouse is a debtor], the judgment creditor has only a *potential* lien against property held by the entireties based on the debtor spouse's expectancy to become sole owner.") (emphasis in original). For a discussion of the uncertainty surrounding whether a judgment creditor holds an inchoate lien against property held as tenants by the entireties under Pennsylvania law, see *In re Hope*, 77 B.R. 470 (Bankr. E.D. Pa. 1987). Also, for a discussion of the issue of whether a spouse's wages that are deposited into a direct deposit account held as tenants by the entireties is an "asset" within the meaning of PUFTA, see *Titus* v. *Shearer*, 498 B.R. 508, 522 (W.D. Pa. 2013).

36. *But see* 12 Pa.C.S. §5101, cmt. 2 ("[T]he holder of an unsecured claim enforceable against tenants by the entirety is not precluded by this chapter from pursuing a remedy against a disposition of property held by the entirety that hinders, delays or defrauds the holder of such a claim.").

37. 12 Pa.C.S. §5101, cmt. 2. As a practical matter, however, "[t]here are few reported cases in any jurisdiction dealing with fraudulent transfer of property that does not constitute an 'asset' as defined in this chapter, and the extent, if any, to which a common law of fraudulent transfers, derived from the principles underlying the Statute of 13 Elizabeth as historically developed, may be appropriately invoked in such circumstances is left to judicial development." *Id.*

38. *See, e.g., Rush Univ. Med. Ctr.* v. *Sessions*, 980 N.E.2d 45, 52 (Ill. 2012) ("The common law and the statute are supplementary, not contradictory. Both laws have a general purpose of protecting creditors. But the common law 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.").

B. Insolvency – Section 5102

The "general rule" for "insolvency" under PUFTA,[39] which is derived from the Bankruptcy Code, can be stated simply: "[a] debtor is insolvent if, at fair valuations, the sum of the debtor's debts is greater than all of the debtor's assets."[40] This "rule" also applies to the solvency of a partnership,[41] with the only difference being that, consistent with bankruptcy law,[42] the general partner's "assets" are included as part of the valuation to reflect the general partner's liability under partnership law.[43]

Notably, the provision addressing the "insolvency" of partnerships has been removed from Section 2 of the UVTA. As stated in the Prefatory Note to the 2014 Amendments, the primary reason why subsection (c) has been removed is because it is fundamentally inconsistent with the approach to insolvency for nonpartnership debtors set forth in subsection (a). Specifically, insofar as partners of a partnership are akin to guarantors of a non-partnership debtor, it is inconsistent to include the assets of the partners as part of the solvency calculation, particularly when the assets of the guarantors of a nonpartnership debtor are not considered for purposes of the solvency calculation under subsection (a). Moreover, a second reason for the change is that not all partners are liable for the debts of the partnership under modern partnership statutes, making it improper to include the partner's individual "net worth" as part of the solvency calculation.[44]

Notwithstanding this change, the "rule" otherwise continues to be that only "property" that satisfies the definition of an "asset" is considered for purposes of determining the value of the debtor's "assets."[45] Said another way, "property" that falls within one of the three exceptions to the definition of "assets" is not included as part of the "debtor's assets" when evaluating the solvency of the debtor. Also excluded under subsection (d) is property that has been fraudulently transferred by the debtor and cannot be recovered without avoiding the transfer.[46] Notably, this includes the "asset" that is the subject of the creditor's fraudulent transfer action.[47]

As a corollary, under subsection (e), "debt" that is secured by a "valid lien" on "property" is excluded from the valuation of the "debtor's debts."[48] Excluding such "property" from the "insolvency" computation ensures the definition of "insolvency" is consistent with the scope and purpose of PUFTA. Indeed, it would be incongruous to allow an unsecured creditor to include secured "debt" as part of the "debtor's debts" for purposes of evaluating "insolvency," even though the "property" securing that "debt" would be excluded from the definition of an "asset" under PUFTA and therefore could not be reached by the unsecured creditor to satisfy his or her claim.[49]

The standard for determining "insolvency" under PUFTA is "balance sheet insolvency"—i.e., "debts in excess of assets, each valued appropriately."[50] In adopting this standard, the drafters of PUFTA sought to clarify the standard under the UFCA. That statute did not clearly

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39. Perhaps one of the common misconceptions about PUFTA is that "insolvency" is required to sustain a claim. It is not. *See United States* v. *Rocky Mt. Holdings, Inc*., 782 F.Supp. 2d 106, 120 n.8 (E.D. Pa. 2011) ("PUFTA does not require insolvency."); *see also Leibersohn* v. *Campus Crusade for Christ, Inc*. (*In re C.F. Foods, L.P.*), 280 B.R. 103, 115 n.30 (Bankr. E.D. Pa. 2002) ("[T]he test for constructive fraud under §5104(a)(2) of PUFTA does not require a finding of insolvency. The Transfers can be deemed constructively fraudulent, even without an analysis of the Debtor's balance sheet solvency."). As will be explored more fully in the sections that follow, "insolvency" is but one of many considerations that may be taken into account when determining whether a debtor has fraudulently transferred an "asset."

40. 12 Pa.C.S. §5102(a).

41. 12 Pa.C.S. §5102(c).

42. 12 Pa.C.S. §5102, cmt. 3 (citing 11 U.S.C. §101(32)(B)).

43. *See* 15 Pa.C.S. §8327 (stating liability of partners in partnership).

44. *See* Uniform Voidable Transactions Act, Prefatory Note (2014 Amendments) (2014).

45. 12 Pa.C.S. §5102, cmt. 1 ("[E]xempt property is excluded from the computation of the value of the assets.").

46. 12 Pa.C.S. §5102(d).

47. *See Shearer* v. *Oberdick* (*In re Oberdick*), 490 B.R. 687, 701–02 (Bankr. W.D. Pa. 2013) ("[T]he Debtor's compensation from MUS could not be counted as an asset for purposes of an insolvency analysis *because such compensation is itself the subject of this action*.") (emphasis added).

48. *Id*. §5102(e).

49. *See also id*. §5102, cmt. 5 ("[Subsection (e)] makes clear the purpose not to render a person insolvent under this section by counting as a debt an obligation secured by property of the debtor that is not counted as an asset."); *accord Sergeant* v. *G.R.D. Invs. L.L.C*. (*In re Schaefer*), 331 B.R. 401, 417 (Bankr. N.D. Iowa 2005) ("Solvency that is based on exempt property is no better than insolvency to a creditor, because the property is not available without affirmative action by the debtor. If a creditor cannot reach the property through some sort of legal process, we hold that the property cannot be used to show solvency.") (citation and internal quotations omitted).

50. 12 Pa.C.S. §5102, cmt. 1.

delineate between "balance sheet insolvency" and "equity insolvency," which generally refers to a debtor's inability to make payments as they become due.[51]

When analyzing "balance sheet insolvency," the method of valuation is critical,[52] particularly since the Comment makes explicitly clear that book value is not determinative even when the debtor's financial statements are GAAP-compliant.[53] Section 5102 generally contemplates only a "fair valuation" of "debts and assets" without mandating any particular method of valuation.[54] This is because the appropriate method of valuation typically will vary on a case-by-case basis.[55] Nonetheless, it is generally the position of the Comment that "enterprise value" is the preferred method of valuation where the "enterprise will continue as a going concern."[56] The Comment further instructs that "[e]nterprise value should be determined by methods appropriate in the circumstances." In other words, discounts and multiples may be appropriate in calculating "enterprise value."[57]

In stating that "enterprise value" is typically the preferred method of valuation, the Comment is careful to distinguish "enterprise value" from other methods of valuation. For example, the Comment states that "[o]ften it would be appropriate not to attempt to determine the value of separate assets and debts."[58] The Third Circuit Court of Appeals has explained this method of valuation, which is more commonly known as the "asset-by-asset" method of valuation, in relation to "enterprise value" as follows:

> The test of solvency is whether . . . the company's assets exceeded its liabilities. There are two basic approaches to this evaluation: asset by asset evaluation, which ascribes value to each asset and determines solvency by comparing the sum of those assets to total liabilities, and enterprise valuation, which values the business as a going concern and includes intan-

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51. *Id*. As a practical matter, however, the difference between "balance sheet insolvency" and "equity insolvency" is often more easily stated than applied. *See VFB LLC* v. *Campbell Soup Co*., 482 F.3d 624, 634 (3d Cir. 2007) ("Because the district court did not err in concluding that VFI received reasonably equivalent value in the spin, we need not discuss the fine distinctions between balance-sheet insolvency, equitable insolvency and unreasonable undercapitalization.").

52. The part of Comment 1 addressing the role of "valuation" in determining "insolvency" is a non-uniform addition to the Comment. *See* 12 Pa.C.S. §5102, cmt. ("Significant nonuniform features of the comments."). Notably, an additional paragraph has been added to Comment 1 of the UVTA that can be read as being inconsistent with Pennsylvania's nonuniform addition. Specifically, the new paragraph addresses the relationship between "financial accounting standards [that] may permit or require fair value measurement of an asset or debt" and the concept of "fair valuation" as used in subsection (a). Uniform Voidable Transactions Act, Section 2, cmt. 1 (2014). Essentially, the paragraph explains that, even where accounting principles would require adjustments to an asset or a debt for purposes of determining "fair value" (e.g., adjusting a liability to account for risk of nonperformance by debtor), such adjustments should not be made under subsection (a), which is focused only on whether "the debtor will not be able to satisfy its liability." *See id*. Notwithstanding the fact that the risk of "nonperformance" should not be considered, the Comment does acknowledge that adjustments for "contingent debts" and reductions to "present value" for non-interest bearing debt" may be appropriate in "unusual circumstances." *See id*. These statements do not seem entirely consistent with the non-uniform additions to Comment 1 of Section 5102. Indeed, the non-uniform additions appear to suggest that it is the general rule, rather than an exception to the rule, to adjust the value of assets and debts. *Compare* 12 Pa.C.S. §5102(a), cmt. 1 ("As with valuation of assets, valuation of debts should take into account all relevant factors. For example, debt due in the future should not be valued at its face amount if the debt does not bear interest or bears interest at an inappropriately low rate. Rather, the face amount of such a debt should be discounted to its present value at an appropriate rate to reflect the time value of money."), *with* Uniform Voidable Transactions Act, Section 2, cmt. 1 ("*Only in unusual circumstances* would the 'fair valuation' for the purpose of subsection (a) of a liquidated debt be other than its face amount. Examples of such circumstances include . . . discounting the face amount of a non-interest-bearing debt that is due in the future in order to reduce the debt to its present value.") (emphasis added). To the extent that the new paragraph is inconsistent with the existing language in Comment 1 as adopted in Pennsylvania, it is not yet clear how the issue will be resolved.

53. 12 Pa.C.S. §5102, cmt. 1. PUFTA's position on this issue should be contrasted with that of the Pennsylvania Business Corporation Law, which allows a board of directors to consider "the book values of the assets and liabilities of the corporation" in assessing the propriety of shareholder distributions. *See* 15 Pa.C.S. §1551(c)(1). As explained *infra*, this inconsistency does not present a problem *per se* because PUFTA is not intended to supplant other statutes (e.g., Pennsylvania Business Corporation Law or U.C.C. Articles 2 and 9) addressing issues that may overlap with fraudulent transfer law. Simply put, because different statutes serve different purposes, there need not be uniformity among them in addressing issues that are common between the statutes. *See* 12 Pa.C.S. §5102, cmt. 1 ("In light of these diverse purposes, it is not necessary for the standards of this chapter describing the financial condition a corporation must have so that a distribution will not be constructively fraudulent under this chapter (set forth in this section and in 12 Pa.C.S. §§5104(a)(2) and 5105) to be identical to the standards of the BCL describing the financial condition a corporation must satisfy so that such distribution will be valid under the BCL.").

54. *Id*.

55. *See id*. ("Different bases of valuation may be appropriate depending upon the circumstances, and different methods of determining value on any particular basis may be appropriate depending upon the business engaged in by the debtor and other factors.").

56. *Id*.

57. *Id*.

58. *Id*.

> gibles such as relationships with customers and suppliers, and the name, profile, and reputation of the business.[59]

These methods of valuation stand in contrast to "liquidation value," which is also referenced in the Comment. Unlike the "asset" and "enterprise" approaches, "liquidation value" generally refers to the prompt sale of assets for less than fair market value where the debtor is unable to continue as a going concern.[60] As the Comment explains, however, it still may be proper to value "some or all of the assets" on an "asset" or "enterprise" basis even where "liquidation value" is appropriate, particularly if the assets can "be sold as one or more smaller going concerns. . . ."[61] As the foregoing suggests, the solvency inquiry is highly technical, typically making it the proper subject of expert testimony.[62]

Turning to the "liabilities" side of the balance sheet, the analysis is no less technical. According to the Comment, the valuation of "debts" should consider "all relevant factors."[63] Thus, future debt obligations should not be valued at book value, but instead should be reduced to their present value.[64] Similarly, separate and apart from reductions for present value, contingent liabilities (and contingent assets, for that matter) should be appropriately discounted to reflect the likelihood that they eventually will become due (or, in the case of assets, realized).[65] To illustrate this approach, the Comment gives the example of a guaranty executed by a debtor.[66] Specifically, the Comment explains that, for purposes of the debtor's solvency, the obligation should be valued as of the date that the guaranty is delivered (i.e., not the date of performance, which might never arrive) and should be discounted for present value.[67] In addition, the debt should further be reduced to account for the probability that the debt will become due and take into account the debtor's right to recover from the guarantee.[68]

Notwithstanding PUFTA's focus on "balance sheet solvency," the concept of "equity insolvency" has not been entirely eradicated from Section 5102. Subsection (b) of Section 5102 continues to recognize a "presumption of insolvency" when a debtor "is generally not paying the debtor's debts as they become due."[69] The reason why the presumption exists is because of the difficulty of proving that a debtor is "balance sheet" insolvent.[70] As the Comment explains, not only is the information needed to prove "balance sheet" insolvency typically in the possession of the debtor, but, practically speaking, insolvency usually involves the nonpayment of debts.[71]

Although not expressly stated,[72] the burden of proving that the debtor is not paying its debts at least arguably would seem to rest with the creditor in the first instance.[73] Evidence

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59. *In re PWS Holding Corp*., 228 F.3d 224, 233 (3d Cir. 2000). *But see* 12 Pa.C.S. §5102, cmt. 1 (stating that, under "asset" approach, "appropriate values [should be] ascribed to *goodwill* and to licenses, franchises, contracts and rights which are assignable or for which consent to assignment may reasonably be expected") (emphasis added).

60. *See* 12 Pa.C.S. §5103, cmt. 1 ("The definition of 'insolvency' in subsection (a) does not contain the words 'salable' or 'present,' thereby removing any possible implication that liquidation is the required or preferred basis of valuation or that, if liquidation value is appropriate in a particular case, a prompt liquidation is necessarily appropriate.").

61. *Id*.

62. *See, e.g., Fid. Bond & Mortg. Co.* v. *Brand* (*In re Fid. Bond & Mortg. Co.*),340 B.R. 266, 293 (Bankr. E.D. Pa.2006) (relying upon experts' valuations in determining solvency); *Shearer* v. *Oberdick* (*In re Oberdick*), 490 B.R. 687, 702 (Bankr. W.D. Pa. 2013) ("It would have been helpful to have had expert accounting testimony on the question of whether this indemnity claim should be counted as an asset of the Debtor for purposes of balance sheet insolvency."); *David Cutler Indus.* v. *Bank of Am*. (*In re David Cutler Indus*.), 502 B.R. 58, 75–76 (Bankr. E.D. Pa. 2013) (considering challenge to expert opinion on issue of insolvency).

63. *See* 12 Pa.C.S. §5103, cmt. 1.

64. *Id*.

65. *Id*.

66. *Id*.

67. *Id*.

68. *Id*.

69. 12 Pa.C.S. §5102(b). Incidentally, the concept of "equity insolvency" is also addressed under Section 5104(a)(2). *See* 12 Pa.C.S. §5102, cmt. 1.

70. 12 Pa.C.S. §5102, cmt. 2.

71. *Id*.

72. *See* 12 Pa.C.S. §5102, cmt. 6 ("Neither this chapter nor these comments comprehensively address such evidentiary and procedural matters as the standard of proof required to establish particular facts, allocation of the burden of proof and burden of persuasion, and the circumstances in which such burdens may shift.").

73. *See Fid. Bond & Mortg.* v. *Brand*, 371 B.R. 708, 718 n.15 (E.D. Pa. 2007) ("[O]nce the debtor [i.e., claimant in that case] proves that it is not paying its debts as they become due, it is presumed to be insolvent, and the burden of rebutting this presumption of insolvency shifts to the defendant."); *see also Continental Forest Indus.* v. *Workmen's Compensation Appeal Bd*. (*Hummel*), 613 A.2d 629, 633 (Pa. Cmwlth. 1992) ("A rebuttable presumption is a means by which a rule of substantive law is invoked to force the trier of fact to reach a given conclusion, *once the facts constituting its hypothesis are established*, absent contrary evidence.") (emphasis added) (quoting *Commonwealth* v. *Shaffer*, 447 Pa. 91, 105, 288 A.2d 727, 735 (1972)); *McDaniel* v. *Chrysler Corp*., No. G.D. 81-10835 and G.D. 80-28768, 36 Pa.D.&C.3d 89, 96 (Pa.C.P. 1983) ("Allegations in a complaint are merely that, allegations, and unless admitted and read into evidence, are not evidence in the case.").

beyond the amount of debts and their nonpayment by the debtor is required to trigger the presumption.[74] In addition, the evidence needed to establish "general nonpayment of debts" on the part of the debtor will vary with the facts of each case, as there is no set criterion for what constitutes "nonpayment" and "late" payments for purposes of triggering the presumption.[75]

Once the presumption is triggered, however, the burden of proving solvency then shifts to the debtor, who must prove that the non-existence of insolvency under subjection (a) is more likely than not.[76] If such evidence is offered by the debtor, it does not eliminate the presumption because the presumption carries substantive evidentiary weight, which must be outweighed by the evidence of solvency offered by the debtor.[77]

Incidentally, it should not be overlooked that Section 5102 does not expressly state which party bears the burden of proving insolvency in cases that do not fall under subsection (b)—i.e., cases in which the debtor's solvency is at issue, but in which the presumption of insolvency has not been triggered. In fact, as the Comment to Section 5102 states, it is not the purpose of the chapter or the Comment to "comprehensively address such evidentiary and procedural matters as the standard of proof required to establish particular facts, allocation of the burden of proof and burden of persuasion, and the circumstances in which such burdens may shift."[78] Courts that have addressed this issue under PUFTA, however, have found that the burden rests with the creditor (i.e., the claimant).[79]

C. Value – Section 5103

The concept of "value" is critical to PUFTA and its objectives. The meaning of the term depends on the context in which it is used. Certain sections of PUFTA use the term in the traditional sense—i.e., the worth (or dollar value) that is associated with a particular asset or a "person" as determined by his/her/its aggregate assets and debts.[80] Other sections, however, use the term to refer more generally to that which a debtor receives in exchange for transferring an asset or undertaking an obligation.[81] Section 5103 is concerned with the latter.

The "general rule," which is adopted from Section 548 of the Bankruptcy Code,[82] is:

> Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. . . .[83]

In simple terms, this means that a debtor receives "value" for the transfer of an asset or an interest in an asset (e.g., security interest under U.C.C. Article 9) if he or she: (1) receives some

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74. 12 Pa.C.S. §5102, cmt. 2 ("In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged.").

75. *See id*. (citing various cases); *see also Mid Penn Bank* v. *Farhat*, 74 A.3d 149, 155–56 (Pa. Super. 2013) (holding that debtor was "insolvent" within meaning of Section 5102 for purposes of proving actual fraud under Section 5104(a)(1) where evidence adduced showed the debtor was not paying debts and had debts in excess of assets at or "shortly after" time of transfer).

76. 12 Pa.C.S. §5102, cmt. 2; *accord Balsamo* v. *Gruppo Ceramiche Ricchetti, S.P.A.*, 862 So. 2d 812, 814 (Fla. Dist. Ct. App. 4th Dist. 2003) ("Where failure to pay debts as they are due creates a presumption, such presumption may be logically rebutted by proof that the debtor is not insolvent. This may include proof that the sum of the debtor's debts is not greater than all of the debtor's assets or that other debts are being timely paid.").

77. 12 Pa.C.S. §5102, cmt. 2 (rejecting so-called "bursting bubble" theory of presumptions, "under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed"); *see also In re American Insulator Co*., 60 B.R. 752, 754 (Bankr. E.D. Pa. 1986) (explaining "bursting bubble" theory as applied to "insolvency" presumption, but declining to decide issue in light of conclusion that debtor was insolvent under either theory).

78. 12 Pa.C.S. §5102, cmt. 6.

79. *See generally Leibersohn* v. *Campus Crusade for Christ, Inc*. (*In re C.F. Foods, L.P.*), 280 B.R. 103, 115 (Bankr. E.D. Pa. 2002) ("[E]xcept when the statute expressly provides otherwise, there is no shifting burden of proof in a constructive fraud proceeding brought under §5104(a)(2) or §5105 of PUFTA and, therefore, the plaintiff carries the burden of proof on all elements by a preponderance of the evidence standard."); *see also Shubert* v. *Dawley* (*In re Dawley*), Bankruptcy No. 01-32215DWS, Adversary No. 02-0332, 2005 Bankr. LEXIS 1593 at *53–54 (Bankr. E.D. Pa.Aug. 10, 2005) ("[T]he burden of proof for establishing insolvency is no different under the UFTA than it is under §548, *i.e*., it belongs to the plaintiff.").

80. 12 Pa.C.S. §5103, cmt. 1.

81. *Id*.

82. 12 Pa.C.S. §5103, cmt. 2.

83. 12 Pa.C.S. §5103(a).

form of "property" from the transferee, *or* (2) satisfies or secures a pre-existing debt through the transfer of the asset or interest in an asset, respectively. So, for example, the transfer of an asset (e.g., money) by a debtor to satisfy a pre-existing guaranty is ordinarily for "value" because the "guaranty" is generally considered "antecedent debt."[84] Likewise, "value" is ordinarily deemed to have been given where a "transfer" in the form of a security interest is given to secure a pre-existing debt.[85] And in the case of an "obligation" (e.g., a guaranty), the debtor receives "value" if the obligation secures pre-existing debt, and the debtor receives a benefit for undertaking the obligation.[86]

Separate and apart from the issue of what may constitute "value," there is the question of whether that "value" is sufficient. As the Comment explains, the adequacy of the "value" given is measured by an objective standard.[87] This stands in contrast to the prior standard under the UFCA, which required a transferee to act in "good faith" when accepting a transfer.[88] Transferees often were found not to have acted in "good faith" where they were "insiders," even though the debt being satisfied was antecedent.[89] By eliminating the "good faith" element, Section 5103 rejects the premise that transfers to "insiders" are per se fraudulent, even when the "insiders" are aware of the debtor's financial condition.[90]

Significantly, subsection (a) does not set forth a standard for measuring "value,"[91] and, as a practical matter, what constitutes sufficient "value" is often the subject of expert testimony.[92] That said, subsection (a) goes on to state that an "unperformed promise" does not constitute "value" unless that promise is made in the ordinary course of the promisor's business to provide "support" for the debtor or another person.[93] As Comment 4 explains, "support" refers to

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84. *See Pereira* v. *WWRD US, LLC* (*In re Waterford Wedgwood USA, Inc.*), 500 B.R. 371, 381 (Bankr. S.D.N.Y. 2013) ("A guaranty is an antecedent debt, and thus courts recognize that payment on account of a pre-existing guaranty constitutes value."); *see also Silverman* v. *Paul's Landmark, Inc.* (*In re Nirvana Rest.*), 337 B.R. 495, 503–504 (Bankr. S.D.N.Y. 2006) (recognizing general proposition that guaranty qualifies as "antecedent debt," but holding that no value was given under New York fraudulent transfer law where indirect benefits enjoyed by debtor were speculative).

85. *See In re Anand*, 210 B.R. 456, 459 (Bankr. N.D. Ill. 1997), *aff'd* 239 B.R. 511, 517 (N.D. Ill. 1999). In fact, courts have held that the grant of a security interest (which is a "transfer" within the meaning of PUFTA) to secure an antecedent debt necessarily constitutes "reasonably equivalent value" since the amount of the secured interest should be equal to the amount of the underlying debt. *See id.* ("[A]s a matter of law collateralizing an antecedent debt cannot constitute less than reasonably equivalent value regardless of the value of the collateral."); *see also In re Kaplan Breslaw Ash, LLC*, 264 B.R. 309, 329 (Bankr. S.D.N.Y.2001) ("The debtor, notwithstanding the transfer of a security interest, can realize the value of the collateral in excess of the debt by selling the property or borrowing on a junior lien. The value of the property, beyond the amount of the debt, is therefore not lost to the debtor or other creditors as a result of the transfer."); *cf. DeGiacomo* v. *Raymond C. Green, Inc.* (*In re Inofin Inc.*), 512 B.R. 19, 79 (Bankr. D. Mass. 2014) ("[L]ending money to a debtor is giving value to that debtor; and a pre-existing obligation is value enough to support a later security interest.") (citations and internal quotations omitted).

86. It has been said that "[t]he typical example of an 'obligation' of the sort contemplated by the law of fraudulent transfers appears to be the debtor's having agreed to pay or guarantee a third party's debt, without having received equivalent value." *Bertram* v. *WFI Stadium, Inc.*, 41 A.3d 1239, 1244 n.9 (D.C. 2012). For the sake of simplicity, this article will not consider the "value" issues posed by a debtor who undertakes an "obligation" for the benefit of a third party, except to note that Comment 3 to Section 5106 states "the debtor may receive reasonably equivalent value in exchange for an obligation incurred even though the benefit to the debtor is indirect." 12 Pa.C.S. §5106, cmt. 3; *see also Mellon Bank, N.A.* v. *Metro Communications, Inc.*, 945 F.2d 635, 646 (3d Cir. 1991) ("Because Metro did not receive the proceeds of the acquisition loan, it did not receive any direct benefits from extending the guaranty and security interest collaterizing [sic] that guaranty."), *writ of certiorari denied, Committee of Unsecured Creditors* v. *Mellon Bank, N.A.*, 112 S. Ct. 1476 (U.S. 1992); *accord Silverman* v. *Paul's Landmark, Inc.* (*In re Nirvana Rest.*), 337 B.R. 495, 502 (Bankr. S.D.N.Y. 2006) ("A debtor can receive 'fair consideration' indirectly through a benefit conferred on a third party provided that the value of the benefit received by the debtor approximates the value of the property or obligation he has given up. Indirect benefits may include consideration flowing from the debtor to the guarantor, synergy, increased access to capital, safeguarding a source of supply and protecting customer relationships.") (citation and internal quotations omitted); *Solomon* v. *Stillwater Nat'l Bank & Trust Co.* (*In re Solomon*), 299 B.R. 626, 637–38 (B.A.P. 10th Cir. 2003) (considering whether individual debtor shareholders received "value" within meaning of Section 548 of Bankruptcy Code for guaranty securing loan to shareholders' corporation where loan proceeds were not paid to individual shareholders).

87. 12 Pa.C.S. §5103, cmt. 1.

88. *See id.*

89. *Id.*

90. *See id.*

91. *See* 12 Pa.C.S. §5103, cmt. 3. Comment 3 also explains that, in the case of the transfer of security under Article 9, there can be a discrepancy between the value of the interest transferred in the asset and the debt. This discrepancy is permissible because the transferee's (i.e., the secured party's) interest in the asset is limited to the amount of the debt obligation. *See generally* 13 Pa.C.S. §9615 (Application of proceeds of disposition; liability for deficiency and right to surplus).

92. *Heritage Realty Management* v. *Symbiot Snow Mgmt. Network, LLC*, C.A. No. 06-47 Erie, 2007 U.S. Dist. LEXIS 72818 (W.D. Pa. Sept. 28, 2007) ("Determining the value of the stock shares would likely require expert testimony, as even [transferor] was unable to estimate what the stock shares were worth.").

93. 12 Pa.C.S. §5103(b). Notably, this exception is not found in the Bankruptcy Code. *See* Section 11 U.S.C. 548(2)(a) ("'[V]alue' means property, or satisfaction or securing of a present or antecedent debt of the debtor, *but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor*.") (emphasis added).

services that are personal in nature to the debtor and specifically excludes commercial arrangements,[94] such as corporate guaranties and "keepwell" agreements between parent companies and their subsidiaries.[95] This narrow exception affords limited protection to debtors, while ensuring that they cannot transfer an asset or undertake an obligation to the detriment of unsecured creditors.

By including "unperformed promises" made in the ordinary course of the promisor's business in the definition of "value" under Section 5103(a), the drafters did not intend to suggest that all other forms of consideration may constitute "value." In much the same way that an "unperformed promise" that is personal to the debtor generally does not constitute "value," neither does love or affection.[96] Simply put, "[c]onsideration having no utility from a creditor's viewpoint does not satisfy the statutory definition [of "value"]."[97]

While subsection (a) sets forth the "general rule" of value, subsection (b) introduces the concept of "reasonably equivalent value." "Reasonably equivalent value" is a term of art that is relevant to determining whether an asset transfer is fraudulent under PUFTA.[98] Subsection (b) states that a transferee gives "reasonably equivalent value":

> if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or the exercise of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust or security agreement or pursuant to a regularly conducted, noncollusive execution sale.[99]

Essentially, subsection (b) establishes an irrebuttable presumption or rule of law that a transferee has given "reasonably equivalent value" for an asset that is acquired through one of these means.[100] The rationale behind the presumption is that "the price bid at a public foreclosure sale determines the fair value of the property sold."[101]

Notwithstanding the presumption set forth in subsection (b), it should not be overlooked that "property" that is subject to a "valid lien" by definition does not constitute an "asset" under Section 5101(b). Therefore, as a purely technical matter, subsection (b) should apply only to "property" that is sold at a sale to the extent that it is not already subject to a "valid lien."[102] Conversely, if the property is subject to a "valid lien," then it should not be considered an "asset" within the meaning of PUFTA and, by extension, should not be deemed to be fraudulently transferred if an interest is acquired in the exempt property at a disposition sale.[103]

D. Transfers Fraudulent as to Present and Future Creditors – Section 5104

Whereas Sections 5101 through 5103 define terms and concepts that are essential to understanding the law of "fraudulent transfer" under PUFTA, Section 5104 is the first section to

94. A "keepwell agreement" is "[a] contract between a parent company and its subsidiary to maintain solvency and financial backing throughout the term set in the agreement." http://www.investopedia.com/terms/k/keepwellagreement.asp (last viewed December 1, 2014).

95. 12 Pa.C.S. §5103, cmt. 4. Incidentally, the second paragraph of Comment 4 is a non-uniform addition. The significance of this Comment being a non-uniform addition is that it can be read as being potentially inconsistent with the cases cited in the uniform part of the Comment that do not limit 'support' to the personal services identified in the non-uniform addition. *Compare Harper* v. *Lloyd's Factors, Inc.*, 214 F.2d 662, 663 (2d Cir. 1954) ("The purpose of this [credit] arrangement, as found by the court below to have been disclosed by [debtor] and believed by the [creditor], was to enable [debtor] to obtain the benefit of the discount on the price of the furs for which the notes were given, this being a discount customarily given to defendant by fur dealers who sold notes to it as a factor."), *with* 12 Pa.C.S. §5103, cmt. 4 ("'Support' in this context refers to housing, feeding, clothing, medical care, recreation, education, travel, burial and similar services and expenses provided to an individual."). No court appears to have considered this potential ambiguity.

96. 12 Pa.C.S. §5103, cmt. 2.

97. *Id*.

98. *See* 12 Pa.C.S. §5103, cmt. 5 ("Subsection (b) does not apply to an action under 12 Pa.C.S. §5104(a)(1) to avoid a transfer or obligation because made or incurred with actual intent to hinder, delay or defraud any creditor."). Constructive fraud is discussed further, *infra*, at Sections II.D and II.E.

99. 12 Pa.C.S. §5101(b).

100. *See id*.

101. 12 Pa.C.S. §5103, cmt. 5.

102. Often times, property that is sold at a foreclosure sale will be subject to a "valid lien." In certain instances, however, it may not be, as would be the case if real property were sold pursuant to a power of sale clause in an unrecorded deed of trust or foreclosure of an unperfected security interest under Article 9. *See* Section III.H.5, n.275, *infra*.

103. *See SieMatic Mobelwerke GmbH & Co. KG* v. *SieMatic Corp.*, 643 F.Supp. 2d 675, 691 (E.D. Pa. 2009) ("[U]nder PUFTA there is no transfer subject to possible avoidance where the 'asset' 'transferred' is encumbered by a valid prior lien. In other words, a transfer is fraudulent only if the debtor disposes of property that the creditor would have a legal right to look for in satisfaction of his claim.") (citations and internal quotations omitted); *see also* 37 C.J.S. Fraudulent Conveyances §9 ("[O]nly equity in property in excess of the amount of encumbering liens thereon is an asset reachable by creditors under the Uniform Fraudulent Transfer Act. A transfer of property in which the debtor has no equity cannot be the subject of a fraudulent transfer action because creditors cannot show that they would have received anything by avoiding the transfer. . . .").

address when a transfer is "fraudulent." Section 5104 sets forth the "general rule" with respect to transfers affecting "present and future creditors"—i.e., creditors whose "claim arose either before or after the transfer was made or the obligation was incurred" by a debtor.[104] The "rule" consists of two "tests." The first "test" is concerned with actual fraud, while the second "test" is concerned with constructive fraud."[105] Courts have held that the pleading standard that applies to fraudulent transfer claims depends on whether the pleading alleges actual or constructive fraud.[106]

In addition to setting forth the circumstances under which a transfer or obligation is fraudulent, Section 5104 explains the relationship of PUFTA to other laws, such as the U.C.C. According to Comment 8,[107] PUFTA is not intended to preempt the field, so to speak, of "voidable transfers and obligations."[108] Said another way, to the extent that a law besides PUFTA creates different rights and obligations between debtors and creditors, that law remains valid, notwithstanding PUFTA.[109] That said, compliance with such a law does not completely insulate a debtor from liability under PUFTA, such as if an "insolvent debtor"[110] exercised its right to dispose of collateral under 13 Pa.C.S. §9205(a)(1)(i) for less than "reasonably equivalent value."[111]

1. Actual Fraud

Actual fraud exists where the debtor transfers an asset or undertakes an obligation "with actual intent to hinder, delay or defraud any creditor of the debtor."[112] "Actual intent" to defraud the specific creditor challenging the transfer or obligation is not required; rather, "[i]ntent to defraud any creditor is sufficient. . . ."[113] "[T]he determination whether the transfer was made with fraudulent intent is a question of fact that is rarely susceptible to resolution at the summary judgment stage."[114]

The definition of actual fraud set forth in Section 5104(a)(1) is identical to the definition set forth in Section 548(a)(1)(A) of the Bankruptcy Code.[115] Accordingly, courts strive to maintain uniformity in the interpretation of the two statutes.[116]

As courts have commented, "actual fraud is rarely proven by direct evidence."[117] As such, Subsection (b) sets forth numerous, non-exclusive "factors" that are relevant to a determination of whether a debtor has transferred an asset with the "actual intent" to defraud. These so-

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104. 12 Pa.C.S. §5104(a).

105. *Carr* v. *Loeser* (*In re Int'l Auction & Appraisal Servs., LLC*), No. 1-11-bk-00813-MDF, 493 B.R. 460, 468 (Bankr. M.D. Pa. 2013) ("Actual fraud is addressed in §5104(a)(1), and constructive fraud is addressed in §§5104(a)(2) and 5105.").

106. *See, e.g., Bratek* v. *Beyond Juice, LLC*, No. 04-4491, 2005 U.S. Dist. LEXIS 28137 at *18 (E.D. Pa. Nov. 14, 2005) ("[O]nly the portion of the fraudulent conveyance claim that alleges actual fraud is subject to the standards of Rule 9(b), *see* Pl's Resp., at 8, while all allegations of constructive fraud are subject to the liberal notice-pleading standards of Rule 8(a)."); *FL Receivables Trust 2002-A* v. *Bagga*, No. 03-CV-5108, 2005 U.S. Dist. LEXIS 3697 at *14–16 (E.D. Pa. Mar. 8, 2005) (applying heightened pleading standards of Rule 9(b) to fraudulent transfer claim alleging actual fraud).

107. Under the UVTA, this Comment has been renumbered as Comment 9 and revised. S*ee* Uniform Voidable Transactions Act, Section 4, Cmt. 9 (2014).

108. 12 Pa.C.S. §5104, cmt. 8. *Compare* 12 Pa.C.S. §5108 ("Defenses, liability and protection of transferee"), *with* 13 Pa.C.S. §9617 ("Rights of Transferee of Collateral"); §9332 (stating that transferees of money and funds from deposit account "take[ ] the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party").

109. *See id*. (citing various provisions of U.C.C. Article 2 and 9 setting forth rights and obligations among debtors and creditors under various circumstances). Incidentally, the reference to 13 Pa.C.S. §9301(a)(2) is outdated. It appears that the reference should be 13 Pa.C.S. §9317(a)(2), as Article 9 has been updated. *See* Part II.F, *infra*.

110. Presumably, the term "insolvent debtor" as used in Comment 8 refers to a debtor who satisfies one or both of the "tests" set forth in Subsection (a)(2)(i) or (ii). Clarification in this regard is not merely semantic, as Comment 8 otherwise is careful to distinguish between the "tests" under Section 5104(a) and the "test" of "insolvency" under Section 5102(b). *See id*. §5104, cmt. 4 ("The tests stated in subsection (a)(2) should be distinguished from the test stated in *12 Pa.C.S. §5102(b), which creates a rebuttable presumption that a debtor is insolvent* if such debtor 'is generally not paying his or her debts as they become due.'") (emphasis added).

111. 12 Pa.C.S. §5104, cmt. 8.

112. 12 Pa.C.S. §5104(a)(1).

113. *Tiab Communs. Corp.* v. *Keymarket of Nepa, Inc*., 263 F.Supp. 2d 925, 935 (M.D. Pa. 2003).

114. *Finkel* v. *Polichuk* (*In re Polichuk*), 506 B.R. 405, 418 (Bankr. E.D. Pa. 2014).

115. *See Carr* v. *Loeser* (*In re Int'l Auction & Appraisal Servs., LLC*), 493 B.R. 460, 468 (Bankr. M.D. Pa. 2013) ("The description of actual fraud in PUFTA is identical to the cause of action in §548(a)(1)(A) of the Bankruptcy Code.").

116. *See Leibersohn* v. *Campus Crusade for Christ, Inc*. (*In re C.F. Foods, L.P.*), 280 B.R. 103, 115 n. 27 (Bankr. E.D. Pa. 2002) (quoting *Moody* v. *Security Pacific Business Credit, Inc*., 971 F.2d 1056, 1067-68 (3d Cir. 1992)).

117. *Classman* v. *O'Brian* (*In re Valley Bldg. & Constr. Corp*.), 435 B.R. 276, 285 (Bankr. E.D. Pa. 2010) (quoting *Shubert* v. *Stranahan* (*In re Pa. Gear Corp*.), No. 02-36436DWS, Adversary No. 03-0942, 2008 Bankr. LEXIS 4129 at *9 (Bankr. E.D. Pa. Apr. 22, 2008).

called "badges of fraud,"[118] which derive from decisional law applying the Statute of 13 Elizabeth and the UFCA, must be viewed under the totality of the circumstances.[119]

The alleged existence of one or more of these "badges" "do[es] not create a presumption that the debtor has made a fraudulent transfer or incurred a fraudulent obligation."[120] Consequently, the burden of proving actual fraud rests with the creditor challenging a transfer or obligation.[121] Although the indicia of fraud that must be present to prove actual fraud will vary, a "goodly" number is ordinarily required.[122] However, the evidentiary standard by which these factors and others must be proven is debatable, with no clear consensus among the courts as to whether the standard is "clear and convincing" or a "preponderance of the evidence."[123] Significantly, the UVTA resolves this issue by adopting the latter standard, as well as specifying that the burden of proof belongs to the creditor.[124]

2. Constructive Fraud

There are two sets of circumstances, or "tests," under which a debtor's transfer of an asset is deemed constructively fraudulent. The first is where "the debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction."[125] The second is where "the debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due."[126] These "tests" stand in contrast to the "test" of "insolvency" set forth under Section 5102(b).[127] While the latter generally tends to focus on the debtor's ability to pay existing debts at the time of a transfer or obligation,[128] the former are concerned with the debtor's ability to pay existing and future debts.[129]

As a condition of liability under either "test" for constructive fraud, the debtor must not receive "reasonably equivalent value" for the transfer or obligation.[130] Consistent with Comment 1 to Section 5103, "reasonably equivalent value" does not hinge on the subjective, good faith of the transferee or obligee, as it did under the "fair consideration" inquiry that was in place under the UFCA.[131] Instead, the measure of "reasonably equivalent value" is "purely objective."[132] It is measured from the perspective of the creditor, not the debtor.[133] Accordingly, where a transferee pays consideration to the debtor that benefits only the tenants by the

118. *See* 12 Pa.C.S. §5104, cmt. 6(a)-(j) (setting forth cases in which courts have considered these various factors).

119. 12 Pa.C.S. §5104, cmt. 6.

120. *Id*.

121. *See id*.; *cf. In re DeVito*, 111 B.R. 529 (Bankr. W.D. Pa. 1990) ("The ultimate burden of establishing all of the required elements which render a transfer fraudulent under [Section 548(a)(1) of] the Bankruptcy Code lies in this case with the Trustee."). Incidentally, as discussed *infra*, a transferee against whom a fraudulent transfer claim is brought pursuant to Section 5104(a)(1) carries the burden of proving an affirmative defense under Section 5108(a)(1). *See* Section III.H, *infra*.

122. *Classman*, 435 B.R. at 286.

123. *See, e.g., Shearer* v. *Oberdick* (*In re Oberdick*), 490 B.R. 687, 699 (Bankr. W.D. Pa. 2013) ("[T]here is some uncertainty in the law as to whether the burden is by clear and convincing evidence, or only by a preponderance."); *Leibersohn*, 280 B.R. at 109 n. 14) (declining to decide whether preponderance or clear and convincing evidence standard applies to claims of actual fraud under PUFTA, while noting inconsistency of courts' approach under Section 548(a)(1)(A) of Bankruptcy Code); *Bohm* v. *Dolata* (*In re Dolata*), 306 B.R. 97, 117 (Bankr. W.D. Pa. 2004) ("[T]he standard of proof with respect to the same is (a) a mere preponderance of the evidence to the extent that the Trustee proceeds under a constructive fraudulent conveyance theory— ie., pursuant to either §548(a)(1)(B) or §5104(a)(2)—and (b) arguably clear and convincing evidence, but perhaps just a preponderance of the evidence, to the extent that the Trustee proceeds under an actual fraudulent intent theory—i.e., pursuant to either §548(a)(1)(A) or §5104(a)(1)."); *UPMC Senior Cmtys.* v. *Ranallo*, GD 09-21553, 2010 Pa. Dist. & Cnty. Dec. LEXIS 141(C.P. Allegheny Cty. April 29, 2010) (considering PUFTA claim and holding that "allegations of fraud must be pled 'with particularity' (Pa. R.C.P. 1019(b)) and must be proven by clear and convincing evidence"); *cf. Weissberger* v. *Myers*, 90 A.3d 730, 735 (Pa. Super. Ct. 2014) ("Although the elements to prove fraud in the Bankruptcy Court and Pennsylvania state courts are similar, the [creditors] burden to prove fraud by clear and convincing evidence as plaintiffs in a Pennsylvania state court is significantly heavier than their burden of preponderance of the evidence as creditors in the Bankruptcy Court.").

124. *See* Uniform Voidable Transactions Act, Section 4(c) (2014).

125. 12 Pa.C.S. §5104(a)(2)(i).

126. *Id*. §5104(a)(2)(ii).

127. *Id*. §5104, cmt. 4.

128. The "insolvency" test set forth in 5102(b) is derived from Section 303(h) of the Bankruptcy Code, which involves the ability of a debtor to pay debts "as [they] become due." 11 U.S.C. §303(h)(1); *see also In re Food Gallery*, 222 B.R. 480, 486–487 (Bankr. W.D. Pa. 1998) (discussing courts' interpretation and application of Section 303(h)(1)).

129. *Id*. §5104, cmt. 4.

130. *Id*. §5104(a)(2).

131. 12 Pa.C.S. §5104, cmt. 2. "Good faith," however, is a defense that can be raised by a transferee. This issue is explored further in Section III.H, *infra*.

132. 12 Pa.C.S. §5103, cmt. 1.

133. *See Klein* v. *Weidner*, 729 F.3d 280, 285 (3d Cir. Pa. 2013).

entireties estate and therefore is unreachable by creditors, it has not paid "reasonably equivalent value."[134]

In regard to the "tests" themselves, Comment 4 to Section 5104 explains that the "tests" for constructive fraud simply address two different aspects of the same inquiry—i.e., does the debtor have sufficient assets to pay its debts?[135] If he or she does, then the Comment explains that the debtor's "assets" should be "adequate" to permit the debtor to consummate the subject "business" or "transaction"[136] or to allow the debtor to "reasonably believe" that he or she will not incur debts that the debtor is unable to pay.[137]

Although the "tests" for constructive fraud set forth in subsection (a)(2)(i) and (ii) are separate, the inquiry necessarily overlaps in some respects since, again, each test focuses on the same basic inquiry.[138] The primary difference between the two "tests" appears to be that the latter may present an issue of "subjective intent," while the former does not.[139]

Neither test, however, permits "fraud by hindsight."[140] In order to prevent claims of "fraud by hindsight," a debtor might choose to prepare "financial projections [that] show that the debtor will be able to pay its debts as they become due on a continuing basis."[141] "Projections" should give appropriate weight to the ability to refinance maturing debts (as determined by the debtor's financial condition and the availability of credit generally), as well as the ability to pay debts through the sale of fixed assets or other transactions outside the ordinary course of business.[142] They should also take into account "reasonably foreseeable contingent obligations as they become absolute."[143]

Early on, which party bore the burden of proving constructive fraud was unclear, particularly to the extent that some cases employed a burden-shifting framework that placed the burden of proof on the debtor to prove that he or she received "reasonably equivalent value" or did not meet one of the two "tests" for constructive fraud once the creditor proved that the debtor was in "debt."[144] This issue was later squarely addressed by the U.S. District Court for the Eastern District of Pennsylvania in *Leibersohn* v. *Campus Crusade for Christ, Inc.*[145] There, the court rejected the burden-shifting framework and held that the creditor challenging the transaction or obligation bears the burden of proof.[146] This approach is now accepted as the rule[147] and, as stated, has been expressly incorporated into Section 4(c) of the UVTA.[148]

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134. *Id.*; *see also* 12 Pa.C.S. §5101(b) (defining "asset" in terms of property that would be available to satisfy the claims of an unsecured creditor).

135. *Id.* §5104, cmt. 4.

136. For a further discussion of the "unreasonably small assets" test, see *United States* v. *Rocky Mt. Holdings, Inc.*, 782 F.Supp. 2d 106, 119 (E.D. Pa. 2011).

137. *Id.*

138. *See Leibersohn* v. *Campus Crusade for Christ, Inc.* (*In re C.F. Foods, L.P.*), 280 B.R. 103, 116 (Bankr. E.D. Pa. 2002) (holding that debtor who ran Ponzi scheme satisfied both "tests" by very nature of how Ponzi scheme worked); *see also United States* v. *Rocky Mt. Holdings, Inc.*, 782 F.Supp. 2d 106, 119 (E.D. Pa. 2011) ("Similar to the 'reasonable foreseeability' test of subsection (a)(2)(ii), the unreasonably small assets test 'takes into account, among other things, the debtor's present and prospective debts, and whether the retained assets are sufficiently liquid to enable the debtor to pay such debts as they become due.'").

139. *Compare Leibersohn*, 280 B.R. at 116 (citing *In re Taubman*, 160 B.R. 964 (Bankr. S.D. Ohio 1993)), *with Rocky Mt. Holdings*, 782 F.Supp. 2d 106, 119 (E.D. Pa. 2011) ("The question of whether a debtor left itself with unreasonably small assets to carry on its business is ultimately one of *foreseeability*.") (emphasis added); *accord Asarco LLC* v. *Ams. Mining Corp.*, 396 B.R. 278, 399 (S.D. Tex. 2008) ("Unlike the 'unreasonably small assets' standard, th[e] [second] test has an objective and subjective prong, and the test is satisfied if either prong is met.").

140. 12 Pa.C.S. §5104, cmt. 4 ("The debtor should not be responsible as a matter of hindsight for developments that could not reasonably have been foreseen at the time of the transfer.").

141. *Id.*

142. *Id.*

143. *Id.*

144. *See* 12 Pa.C.S. §5102, cmt. 6. Incidentally, the use of the term "in debt" in Comment 6 appears to be a reference to language from the PUFCA. *See Stinner* v. *Stinner*, 446 A.2d 651, 652 (Pa. Super. Ct. 1982) ("A person is insolvent for the purposes of the Uniform Fraudulent Conveyance Act if 'the present, fair salable value of his assets is less than the amount that will be required to pay his probable liability on existing debts as they become absolute and matured.' *Id.* §352(1). Under section 4 of the Act, 39 P.S. §354, when the creditor establishes that the grantor was in debt at the time of a conveyance, the burden shifts to the grantees to establish, by clear and convincing evidence, either that the grantor was then solvent and not rendered insolvent by the conveyance, or that he received fair consideration for the conveyance."). Thus, the term should not necessarily be read as being synonymous with the term "insolvent" as used in PUFTA.

145. 280 B.R. 103, 114 (Bankr. E.D. Pa. 2002).

146. *Id.* at 115 ("[E]xcept when the statute expressly provides otherwise, there is no shifting burden of proof in a constructive fraud proceeding brought under §5104(a)(2) or §5105 of PUFTA and, therefore, the plaintiff carries the burden of proof on all elements by a preponderance of the evidence standard.").

147. *See Fid. Bond & Mortg.* v. *Brand,* 371 B.R. 708, 721 (E.D. Pa. 2007) ("[T]he PUFTA's legislative history and the stated goal of consistency with the Bankruptcy Code lead to the conclusion that the burden of proof in constructive fraud cases under the PUFTA remains with the party challenging the transfer.").

E. Transfers Fraudulent as to Present Creditors – Section 5105

Similar to Section 5104(a)(2),[149] Section 5105 is a "constructive fraud" provision.[150] Whereas "Section 5104(a)(2) applies to creditors whose claims arose either before or after the transfer," "section 5105 applies only to creditors whose claims arose before the transfer."[151] Also, in contrast to Section 5104(a)(2), Section 5105 requires a showing of "insolvency" on the part of the debtor under Section 5102.[152] Despite these differences, it is not uncommon for a creditor to bring constructive fraud claims pursuant to Sections 5104(a)(2) and 5105 simultaneously.[153]

When considering Section 5105, it is important to note that the section differs significantly from the UFTA in one material respect. Unlike the UFTA, Section 5105 does not prohibit payments to "insiders" because the Committee declined to adopt section 5(b) of the UFTA.[154] The Comment explains that payments to "insiders" are actually "preferential transfers," which are outside the scope of PUFTA.[155] Additionally, the Committee expressed concern that it would be "difficult or impossible" for debtors and creditors to contract around the prohibition on "insider" payments if they desired to do so.[156] Conversely, if debtors and creditors wanted to prohibit "insider" payments, they simply could use debt subordination agreements as they had already been doing.[157] The Committee determined, therefore, that the better approach was not to adopt the UFTA's prohibition on "insider" payments.

In addition, it was the Committee's view that the law of preferential transfers should be addressed "under state law, if at all, only as an adjunct to a comprehensive state insolvency law."[158] In setting forth this view, the Committee seemed to be of the opinion that subsection 5(b) of the UFTA did not go far enough in addressing the law of preferential transfers.[159] After commenting that "the effect of §5(b) is merely to shift the benefit of the preference from the insider creditor to the plaintiff creditor,"[160] the Committee took note of Sections 544(b) and 547 of the Bankruptcy Code. In particular, the Committee noted that Section 544(b) permits a trustee to invoke section 5(b) of the UFTA for the benefit of creditors generally,[161] before com-

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148. Uniform Voidable Transactions Act, Section 4(c) (2014).

149. Like Section 4, Section 5 of the UVTA now contains an express provision that states that the creditor bears the burden of proving constructive fraud under Section 5 by a preponderance of the evidence. *See* Uniform Voidable Transactions Act, Section 5(c) (2014).

150. *Shubert* v. *Stranahan* (*In re Pa. Gear Corp.*), No. 02-36436DWS, Adversary No. 03-0942, 2008 Bankr. LEXIS 4129 at *46 (Bankr. E.D. Pa. Apr. 22, 2008).

151. *Finkel* v. *Polichuk* (*In re Polichuk*), 506 B.R. 405, 418–19 (Bankr. E.D. Pa. 2014); *see also Mid Penn Bank* v. *Farhat*, 74 A.3d 149, 156 n.8 (Pa. Super. 2013) ("12 Pa.C.S.A. §5105 . . . applies specifically to creditors whose claims arise before a transfer has been made.").

152. *See Leibersohn* v. *Campus Crusade for Christ, Inc.* (*In re C.F. Foods, L.P.*), 280 B.R. 103, 115 (Bankr. E.D. Pa. 2002) ("[T]he test for constructive fraud under § 5104(a)(2) of PUFTA does not require a finding of insolvency. The Transfers can be deemed constructively fraudulent, even without an analysis of the Debtor's balance sheet solvency. Under PUFTA, insolvency is a factor only under §5105."). *But see Asarco LLC* v. *Ams. Mining Corp.*,396 B.R. 278, 399 (S.D. Tex. 2008) (describing one of "tests" under counterpart to Section 5104(a)(2) as "[t]he second test for insolvency"); *Official Comm. of Asbestos Pers. Injury Claimants* v. *Sealed Air Corp.* (*In re W.R. Grace & Co.*),281 B.R. 852, 855–856 (Bankr. D. Del. 2002) (discussing Sections 4(a)(2) and (5) of UFTA and noting that both "deal[ ] generally with the debtor's insolvency").

153. *See, e.g., David Cutler Indus.* v. *Bank of Am.* (*In re David Cutler Indus.*), 502 B.R. 58, 66 n.10 (Bankr. E.D. Pa. 2013) ("The constructive fraud provisions of PUFTA and the Bankruptcy Code are very similar. One difference is that PUFTA distinguishes between transfers that may be avoided only by creditors existing at the time of the transfer (PUFTA §5105) and transfers that may be avoided by existing and future creditors (PUFTA §5104(a)(2)). That difference is immaterial here because there was ample evidence that DCI had actual creditors at the time of the Transfers. Therefore, pursuant to §544(b), DCI may assert a claim under PUFTA §5105 as well as §5104(a)(2).").

154. 12 Pa.C.S. §5105, cmt. ("Significant nonuniform features of this section."). In material part, Section 5(b) of the Uniform Fraudulent Transfer Act states:

> "A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider has reasonable cause to believe that the debtor was insolvent." Section 5(b), Uniform Fraudulent Transfer Act (1984).

155. *Id.*; *see also* 12 Pa.C.S. §5103, cmt. 1 (discussing payments to "insiders").

156. *Id.* §5105, cmt. ("Significant nonuniform features of this section.").

157. *Id.*

158. *Id.*

159. *Id.* ("Furthermore, under this chapter (as under the Uniform UFTA), avoidance of a transfer is not for the benefit of the debtor's creditors generally, but only for the benefit of the plaintiff creditor. Hence the effect of §5(b) is merely to shift the benefit of the preference from the insider creditor to the plaintiff creditor.").

160. *Id.*; *see also Prairie Lakes Health Care Sys.* v. *Wookey*, 583 N.W.2d 405, 413 n.5 (S.D. 1998) ("Some states have declined to enact §5(b) of the UFTA because, among other reasons, it merely shifts the benefit of the preference from the insider creditor to the plaintiff creditor.").

161. *See Perkins* v. *Petro Supply Co.* (*In re Rexplore Drilling*), 971 F.2d 1219, 1222 (6th Cir. 1992) ("The bankruptcy trustee may seek to avoid a payment to a creditor as preferential under federal law, 11 U.S.C. §547(b), or under the provisions of state law using the avoidance powers authorized by 11 U.S.C. §544(b). Section 544(b) permits the trustee to avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law.").

menting that Section 547, which also may be invoked by the trustee, "deals comprehensively with preferences and places special burdens on preferences in favor of insiders."[162] As such, for this additional reason, it was the opinion of the Committee that section 5(b) of the UFTA should not be adopted as part of PUFTA.

F. When Transfer is Made or Obligation is Incurred – Section 5106

In order to determine "fraudulent transfer" liability under Sections 5104 and 5105, it is obviously necessary to determine when the subject transfer was made or the subject obligation was incurred. The timing of the transfer is critical. It is determinative not only of whether the creditor's claim existed at the time of the transfer or obligation, but it is also relevant to various "factors" evidencing an "actual intent" to defraud under Section 5104(a)(1).[163] Moreover, it is relevant to the solvency of the debtor[164] and whether the debtor received "reasonably equivalent value" for the asset or obligation.[165] For all of these reasons, the timing of the transfer or obligation is an important part of proving liability under PUFTA.

To this end, Section 5106 sets forth when an asset has been transferred or an obligation has been incurred. Subsections (1) through (4) address the transfer of assets, while subsection (5) addresses the undertaking of an obligation.

Subsection (1) sets forth the general rule for when an asset is transferred. If an asset is real property (including an interest under a contract for purchase or sale of the real property) other than a fixture, the transfer is deemed to have been made when it has been:

> so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee.[166]

Similarly, an asset that is not real property or is a fixture is transferred when:

> the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this chapter that is superior to the interest of the transferee.[167]

Both of these provisions essentially require perfection[168] in order for a transfer to occur within the meaning of PUFTA.[169] The purpose of requiring perfection is that it provides notice to the world that the asset has been transferred—i.e., before perfection, the creditor does not have knowledge of the transfer and therefore is not in a position to challenge it.[170] The concept of "postponing" the date of transfer until the time of perfection is derived from Section 548(d)(1)[171] of the Bankruptcy Code,[172] whose purpose similarly is:

> to prevent fraudulent transfers from becoming impregnable to attack by keeping them secret until the limitation period has lapsed. In effect, a transfer is not made for the purposes

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162. *Id*. §5105, cmt. ("Significant nonuniform features of this section."); *see also Sheehan* v. *Valley Nat'l Bank* (*In re Shreves*), 272 B.R. 614, 618 (Bankr. N.D. W.Va.2001) ("The trustee bears the burden of proving the five elements set forth under §547(b). Even if the trustee proves the elements of a preference, his avoidance power may be limited by enumerated exceptions as set forth in §547(c).") (citation omitted).

163. *See* 12 Pa.C.S. §5104(b)(2), (4), (9), (10).

164. *See id*. §5105; *see also id*. §5102.

165. *See Klein* v. *Weidner*, No. 08-3798, 2010 U.S. Dist. LEXIS 848 at *6 (E.D. Pa. Jan. 6, 2010) (stating that "reasonably equivalent value" is measured "at the time of transfer").

166. 12 Pa.C.S. §5106(1)(i).

167. *Id*. §5106(1)(ii).

168. To be precise, "perfection" does not refer to a "perfect" property interest, but, instead, the superior rights that are vested in a creditor upon perfection of a property interest under state law. *Smith* v. *SIPI, LLC* (*In re Smith*), 614 F.3d 654, 658 (7th Cir. 2010).

169. The Comments cite Section 548(d)(1) of the Bankruptcy Code as the source of these provisions, but, in actuality, the provisions are principally derived from Section 547(e)(1)(A) and (B) of the Bankruptcy Code. *See* 11 U.S.C. §547(e)(1)(A)–(B); *see also In re Momentum Computer Systems International*, 66 B.R. 512, 516 (N.D. Cal. 1986) ("Like subsections 547(e)(1)-(2), subsection 548(d)(1) provides that a transfer is made when a third party cannot acquire a superior interest.").

170. *See Mazer* v. *Jones* (*In re Jones*), 184 B.R. 377, 384–85 (Bankr. D.N.M. 1995) (construing substantively identical provision of New Mexico Fraudulent Transfer Act and concluding "[t]he manifest purpose of the perfection requirement in this instance is to prevent a fraudulent transfer from becoming impregnable to attack by keeping it secret until the limitation period has lapsed").

171. 11 U.S.C. §548(d)(1).

172. 12 Pa.C.S. §5106, cmt. 1 ("The provision for postponing the time a transfer is made until its perfection is an adaptation of §548(d)(1) of the Bankruptcy Code.").

> of section 548(d)(1) until it becomes known or discoverable by the exercise of reasonable diligence.[173]

Although the "perfection" requirement protects creditors by ensuring that a transfer is not immune from attack due to lack of notice to the creditor, it theoretically also could work to the detriment of creditors if the debtor and the transferee were to delay perfection intentionally in an attempt to prevent a "transfer" from taking place within the meaning of subsection (1).[174] To remedy this problem, subsection (2) provides that "the transfer is made immediately before the commencement of the action" if a transfer is capable of perfection but has not been perfected.[175] Consequently, "when a transfer actually takes place is not dispositive of when the same occurs for purposes of the PFTA."[176]

In the event that a transfer is not capable of perfection, then the transfer is deemed to be made when it becomes "effective between the debtor and the transferee."[177] The Comment to Section 5106 sheds light on this standard, explaining that "the transfer occurs for the purpose of this chapter when the transferor effectively parts with an interest in the asset as provided in the definition of the term 'transfer' in 12 Pa.C.S. §5101(b) *supra*."[178] So, in the case of a gift, which is considered to be outside the scope of Article 9, the transfer would be "effective" as of the time of acceptance of the gift.[179]

The final provision of Section 5106 to address the transfer of assets is subsection (d). Critically, that subsection effectively operates as a limitation on the debtor's ability to transfer an asset within the meaning of subsections (1) through (3). It does this by stating that "[a] transfer is not made until the debtor has acquired rights in the asset transferred."[180] Simply put, if a debtor does not have a present interest in an asset within the meaning of subsection (4), then there can be no "transfer" and, by extension, no cause of action for fraudulent transfer.[181] Although subsection (d) can operate to the detriment of creditors by making transfers immune from attack,[182] that is not always the case. In certain instances, for example, subsection (d) can operate to postpone the date of transfer in favor of the creditor in cases where a debtor or transferee seeks to avoid liability by arguing that the transfer of an "expectation interest" was sufficient to take the transfer outside the statute of limitations.[183] Whether a debtor has present rights to an asset for transfer purposes under PUFTA presents an issue of state law.[184]

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173. *Butler* v. *Lomas & Nettleton Co*., 862 F.2d 1015, 1019 (3d Cir. 1988) (citation and internal quotations omitted); *cf. Bergquist* v. *Fidelity Mortg. Decisions Corp*. (*In re Alexander*), 219 B.R. 255, 263 (Bankr. D. Minn. 1998) ("In §547(e)(2), however, Congress has since *specifically* articulated its intent to discourage secret liens against property of the debtor by postponing the effect of a transfer that was not perfected within ten days of its occurrence.").

174. *See* 12 Pa.C.S. §5106, cmt. 1 ("When no steps are taken to perfect a transfer that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to avoid it; without such a provision to cover that eventuality, an unperfected transfer would arguably be immune to attack.").

175. 12 Pa.C.S. §5106(2); *see also Sasha & Sasha, Inc.* v. *Stardust Marine*, S.A., 741 So. 2d 558, 559 (Fla. 4th DCA 1999) ("[T]he statute does not prevent the recognition of an unrecorded deed as constituting a transfer; it merely postpones the date of the transfer to immediately prior to the commencement of the action.").

176. *Smith* v. *Cowden* (*In re Cowden*), 337 B.R. 512, 524 (Bankr. W.D. Pa. 2006).

177. 12 Pa.C.S. §5106(3).

178. *Id*. §5106, cmt. 1.

179. *See Estate of Juhnke* v. *Marquardt*, 623 N.W.2d 731, 734 (S.D. 2001).

180. 12 Pa.C.S. §5106(4).

181. *See Smith* v. *Cowden* (*In re Cowden*), 337 B.R. 512, 527 (Bankr. W.D. Pa. 2006) ("[A]s a matter of law, a transfer of an expectancy in property to be acquired in the future, pursuant to §5106(4), is not respected for purposes of applying the PFTA and §5109.").

182. *See, e.g., Legal Asset Funding, LLC* v. *Veneski*, No. 3:04-CV-01156, 2006 U.S. Dist. LEXIS 64939 at *21–22 (M.D. Pa. Sept. 12, 2006) (finding that attorney's distribution of settlement funds to clients was not "transfer" under PUFTA because attorney had not yet acquired rights in settlement funds in an amount equal to full amount allegedly owed to plaintiff); *accord Essen* v. *Gilmore*, 607 N.W.2d 829, 835–36 (Neb. 2000) (holding that renunciation of an interest in a decedent's estate prior to distribution is not a transfer under UFTA).

183. *See, e.g. id*. at 527 ("[E]ven if *arguendo* what the Debtor allegedly assigned in 1993 was only an expectancy of realty interests that she would subsequently acquire, and even if—as the Defendants appear to wish to argue—she did not actually acquire such realty interests until the distribution of such realty out to her in August 1999 and later, the transfer of such realty interests in that event, for purposes of the PFTA and §5109, would nevertheless be deemed to have not occurred until August 1999 and later, that is when the Debtor actually acquired ownership of such realty interests. . . . Thus, and as a matter of law, a transfer of an expectancy in property to be acquired in the future, pursuant to §5106(4), is not respected for purposes of applying the PFTA and §5109.") (citation omitted).

184. *See id*. at 523–27 (rejecting defendants' argument that transfer was immune from attack because it purportedly took place outside statutory recovery period under PUFTA after looking to Pennsylvania law to determine when debtor acquired title to property as devisee under will for fraudulent transfer purposes); *see also Chiropractic Nutritional*

Turning to obligations, the timing of the obligation depends on whether the obligation is oral or written. If oral, the obligation is undertaken when it becomes effective; if written, the obligation is undertaken when signed by the obligor and delivered to or for the benefit of the obligee (i.e., the debtor).[185] The Comment explains that the purpose of subsection (5) is to make clear that an obligation such as a guaranty is deemed to be undertaken at the time of the agreement, not when the debtor advances payment under the guaranty.[186] This approach is generally consistent with the approach that Section 5102 takes with respect to evaluating guaranty obligations for solvency purposes.[187] Perhaps even more importantly, however, subsection (5) has been explained as a necessity given the realities of corporate borrowing and lending:

> The amendment drafters likely considered the significant costs that inure to loan creditors who, under the Rubin model, would be responsible for doing due diligence or seeking professional opinions every time a drawdown on a revolving credit facility occurred, which is precisely the sort of extra diligence that revolving facilities are meant to bypass. The UFTA makes "the relevant time for testing the transfer . . . the outset of the transaction when the writings are delivered," and thereby "assure[s] that with respect to guarantors, a separate fraudulent conveyance analysis will not be made each time an advance is made to the principal debtor—which could be over a period of months or years—but only at the time the guaranty is signed." 1-3 COLLIER LENDING INSTITUTIONS & THE BANKRUPTCY CODE ¶ 3.06 (2011). *See Schwarcz, supra*, at 740 (noting that Rubin would essentially force banks to "obtain, as a condition to making each future advance, the same representations and warranties as to the subsidiary's financial condition . . . as was obtained at the time the loan facility was originally extended. . . . A lender could gain additional comfort by performing the same level of due diligence regarding these financial tests as was made originally"). These opinions and investigations cost lenders money and therefore increase the cost of credit by an amount incommensurate with the benefit of protecting potential defrauded plaintiffs—that was the judgment of the drafters of the UFTA amendment. The four-year repose period is best understood as balancing the potential injuries to banks and defrauded creditors. Within four years of the establishment of the credit line, banks bear the burden of fraudulent conveyance; the guaranty to the bank could be set aside if made with fraudulent intent or for less than equivalent value. Afterwards, plaintiffs bear the risk. Of course, even in the latter case, there is no windfall for the debtor because the bank still has its security interest in the debtor's property.[188]

Finally, it should be noted that the references to Article 9 (as adopted in Pennsylvania) in the Comment are no longer accurate because parts of Article 9 were repealed and superseded in 2001.[189] Although the Uniform Commercial Code Modernization Act of 2001 updated references to Article 9 in the text of PUFTA,[190] the references in the Comment were not updated. Under revised Article 9, the reference to 13 Pa.C.S. §9302, *et seq*., in Comment 1 is now 13 Pa.C.S. §9310, *et seq*., while the reference to 13 Pa.C.S. §9203(a)(3) in Comment 2 is now 13 Pa.C.S. Sec. §9203(b)(2).

G. Remedies of Creditors – Section 5107

Section 5107 sets forth the remedies of a creditor against a debtor who has fraudulently transferred an asset or assumed an obligation within the meaning of Sections 5104 or 5105. The remedies recognized under Section 5107(a) generally include avoidance, attachment, and other forms of discretionary relief.[191] In addition, Section 5107(b) permits a creditor with a

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Assocs. v. *Empire Blue Cross & Blue Shield*, 669 A.2d 975, 983 n.11 (Pa. Super. 1995) ("A present transfer of rights that are not yet due or may never become due is effective *if it appears that there is an existing contract* out of which the claim may arise in the future.") (emphasis added); *Vandergrift Estate*, 177 A.2d 432, 444 (Pa. 1962) ("[A] contingent remainder or other contingent interest is transmissible, even though not, in the technical sense, vested.").

185. 12 Pa.C.S. §5106(5)(i)–(ii).

186. 12 Pa.C.S. §5106, cmt. 3.

187. *See* Part II.B, *supra* (noting that guaranty should be valued at the time of execution and not time of performance).

188. *See LaRosa* v. *LaRosa*, 482 Fed. Appx. 750, 755 (4th Cir. 2012).

189. *See Cont'l Ins. Co.* v. *Schneider,* 810 A.2d 127, 131 (Pa. Super. 2002) ("By Act of June 8, 2001, P.L. 123, No. 18 §16, effective July 1, 2001, certain sections of Article 9 of the UCC were revised.").

190. Act 2001-18 (S.B. 330), P.L. 123, §2, approved June 8, 2001, eff. July 1, 2001.

191. 12 Pa.C.S. §5107(a); *see also Schwartzman* v. *Rogue Int'l Talent Group, Inc*., No. 12-5255, 2013 U.S. Dist. LEXIS 159455 at *11–12 (E.D. Pa. Nov. 7, 2013) ("The Court will also impose a constructive trust on [transferee's] assets in the amount of $61,411.55 and enjoin [transferee] from transferring or disposing of any assets.").

judgment[192] against a debtor to obtain a court order allowing the creditor to execute directly against the fraudulently transferred asset or its proceeds if the asset has been sold.[193] These remedies are "cumulative" and do not, therefore, displace any remedies that a creditor enjoys under the procedural rules governing the enforcement of judgments.[194]

Courts are vested with substantial discretion in deciding which remedies are available to creditors.[195] Equitable considerations are determinative, especially where a creditor seeks to avoid an obligation (as opposed to a transfer) under Section 5107(a)(1).[196] In cases where an obligation is involved, "equitable subordination" of the obligation may be appropriate.[197] "Equitable subordination" is necessary because the transaction between the debtor and the obligor remains "enforceable" even if it is avoided under Section 5107(a)(1).[198] Accordingly, "equitable subordination" can be viewed as a way of protecting the rights of the creditor under PUFTA, while recognizing that "[the] obligation should still rank ahead of equity interests in the debtor."[199]

The concept that a creditor's claim takes precedence over an equity interest in the debtor is derived from the Bankruptcy Code.[200] As applied in the context of a fraudulent obligation under PUFTA, the concept can be explained as follows: if a party who is a "debtor" under PUFTA fraudulently assumes an "obligation" in the form of a guaranty, that party also stands in the shoes of a debtor for purposes of the obligation that he or she has assumed.[201] In turn, the party who benefits from the obligation (i.e., the party secured by the guaranty) stands in the position of a creditor.[202] Given this debtor-creditor relationship, it would unfairly prejudice the creditor if the guaranty were completely set aside upon avoidance under Section 5107(a)(1) because the creditor's security would be eliminated. At the same time, however, equity would be restored to the debtor because the obligation would be removed from the debtor's balance sheet. The purpose of "equitable subordination," therefore, is to avoid this anomalous result by recognizing the ongoing nature of the guaranty obligation, but subordinating it to the rights of the PUFTA creditor.

Beyond these types of equitable considerations, due process concerns are also implicated, particularly in the case of attachment under Section 5107(a)(2). Although Section 5107(a)(2) recognizes attachment as a remedy, its availability is constrained by the guaranty of due process under the state and federal constitutions.[203]

Despite Section 5107(a)(2) identifying attachment as a remedy, PUFTA does not provide an independent, substantive basis for awarding the remedy.[204] Instead, the remedy may only be

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192. This approach is generally in accord with the law of execution in Pennsylvania, which requires that the creditor hold a judgment before he or she may execute against the property belonging to the debtor. *See* Pa.R.C.P. No. 3102; *see also Patterson* v. *Hopkins*, 371 A.2d 1378, 1381 (Pa. Super. 1977) ("[I]n order to obtain property for execution sale on a money judgment, a plaintiff must file a writ of execution and the writ must be served by the sheriff. In the case of tangible personal property in the possession of the judgment debtor, the sheriff must levy upon the property.").

193. *Id*. §5107(b).

194. *See id*. §5107(b), cmt. 6; *see also* Pa.R.Civ.P. 3101, *et seq*.

195. *See id*. §5107(a)(3)(iii) (vesting court with discretion to award "any other relief the circumstances may require"); §5107(b) (permitting execution "if the court so orders").

196. *Id*. §5107, cmt 7.

197. *Id*. Generally, "equitable subordination" is a concept derived from bankruptcy law that prioritizes the interests of certain creditors among others where inequitable conduct is involved. *See generally General Electric Co.* v. *Hol-Gar Mfg. Corp*., 431 F.Supp. 881, 885 (E.D. Pa. 1977).

198. 12 Pa.C.S. §5107, cmt 7 ("[A] transaction fraudulent under [PUFTA] and its predecessors, even if avoidable by creditors [under subsection (a)(1)], remains *enforceable as between the parties to the transaction*.") (emphasis added); *see also Rodriguez* v. *Bey*, No. 004183, 2008 Phila. Ct. Com. Pl. LEXIS 65 at *4 (Pa. C.P. Philadelphia Cty. 2008) (ordering levy of execution against fraudulently transferred property, in addition to entering permanent injunction restraining debtor and transferee from making further transfers of property), *aff'd* without opinion, 959 A.2d 982 (Pa. Super. 2008, petition denied by, 972 A.2d 484 (Pa. 2009); *cf. Ex parte HealthSouth Corp*., 974 So. 2d 288 (Ala. 2007) ("[A] court's setting aside of a fraudulent transfer does not revest title in the debtor. Instead, the transferee continues to own the fraudulently transferred assets; the transfer is void only as to the creditor, and the creditor can execute on those assets directly [under Section 7(b) of UFTA].").

199. 12 Pa.C.S. §5107, cmt 7.

200. *See Shubert* v. *Lucent Techs. Inc*. (*In re Winstar Communs., Inc*.), 554 F.3d 382, 414 (3d Cir. 2009) ("§510(c)'s language plainly provides that a creditor's claim can be subordinated only to the claims of other creditors, not equity interests.").

201. *See Reuter* v. *Citizens & Northern Bank*, 599 A.2d 673, 678 (Pa. Super. 1991) ("Under Pennsylvania law, a guarantor is a 'debtor'. . . .").

202. *See generally Atalanta Corp.* v. *Ohio Valley Provision Co*., 398 A.2d 183, 185 (Pa. Super. 1979) ("A technical guaranty is that the debtor will be able to pay and this involves a diligent effort of the creditor to collect from his debtor before he proceeds against the guarantor.") (citation and internal quotations omitted).

203. 12 Pa.C.S. §5107, cmt 2.

204. *Id*. §5107, cmt 7 ("Subsection (a)(2), as so completed, does not create a right to any provisional remedy under Pennsylvania law. Rather, it preserves any right to such a remedy which may otherwise exist from time to time under Pennsylvania law.").

awarded to the extent that it is otherwise available under Pennsylvania law. At least one decision has noted generally that the remedy is theoretically available.[205] As a practical matter, however, the availability of the remedy is limited under Pennsylvania law, as "[f]ormer Pa. R.C.P. Nos. 1285-1292 [fraudulent debtor's attachment], which permitted the prejudgment attachment, were rescinded by the 1989 amendment."[206]

Separate and apart from these issues and considerations, certain remedies may also be restricted if the creditor holds an "unmatured" claim. Whereas the UFCA expressly differentiated between the remedies available to creditors holding "matured" and "unmatured" claims, PUFTA does not.[207] Nonetheless, the same remedies are not available to both types of creditors. For instance, although creditors holding "matured" and "unmatured" claims should both have the right to injunctive relief or the appointment of a receiver,[208] they do not enjoy the same right to be paid immediately from the proceeds of a sale on execution.[209]

Regarding the remedy set forth in Section 5107(b), no state or federal court in Pennsylvania appears to have explained exactly what it means for a court to order a creditor to "levy execution on the asset transferred or its proceeds." In *Universal Computer Consulting, Inc.* v. *Pitcairn Enters.*, however, the U.S. District Court for the Eastern District of Pennsylvania interpreted Section 5107(b) as permitting it to order execution against fraudulently transferred assets after the creditor had commenced an action challenging the transfers as fraudulent.[210] This approach is generally consistent with the approach that was taken under the PUFCA.[211] Although ordering execution against the asset under Section 5107(b) might seem unnecessary at first blush because the creditor theoretically could resort to ordinary means of judgment enforcement to reach the asset after avoidance, such an order might streamline the collections process for the creditor.[212]

That said, some courts outside of Pennsylvania have explained the remedy available under Section 5107(b) differently. Rather than only allowing the court to order execution against the asset as part of the fraudulent transfer suit in which a judgment is obtained, some courts have held that the remedy actually contemplates permitting "a judgment creditor [to] seek execution against an allegedly fraudulent transfer under subsection (b) without filing a separate suit or first having the question of fraud determined."[213] In other words, under this interpretation, Section 5107(b) permits a creditor to seek the remedy of execution as part of "the original suit in which the money judgment was granted."[214] No court appears to have considered the validity of this interpretation under Pennsylvania law, though it could implicate due process concerns[215] and possibly raise other procedural issues (e.g., the right to a jury trial),[216] even if the language of Section 5107(b) were amenable to such an interpretation.

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205. *See, e.g., Finkel* v. *Polichuk* (*In re Polichuk*), 506 B.R. 405, 435 (Bankr. E.D. Pa. 2014) ("Similarly, the lead remedy in PUFTA is avoidance of the transfer accompanied by other remedies that are designed to recover the asset by attachment or appointment of a receiver to 'take charge' of the asset.").

206. *Borough of Ambler* v. *Regenbogen*, 713 A.2d 145, 149 n. 3 (Pa. Cmwlth. 1998).

207. *Id*. §5107, cmt. 3.

208. *Id*.

209. *See id*., cmt. 1. Incidentally, the Comment does not explain under what circumstances a creditor holding an "unmatured" claim would be entitled to "payment for the proceeds of a sale on execution . . . .," particularly given the requirement in Section 5107(b) that the creditor must hold a judgment against the debtor before the court may order execution against the asset or its proceeds. 12 Pa.C.S. §5107(b); *see also id*. §5109, cmt. 2 (discussing a "sale on execution levied pursuant to 12 Pa. C.S. §5107(b)"). It would seem, however, that the "unmatured" claim must be capable of being reduced to judgment in order for the creditor to be entitled to such payment. *See, e.g., Cortez* v. *Vogt*, 52 Cal. App. 4th 917, 931 (Cal. App. 1997) (noting that "creditor may pursue the unmatured claim to judgment").

210. No. 03-2398, *Universal Computer Consulting, Inc.* v. *Pitcairn Enters*., 2005 U.S. Dist. LEXIS 18401 at *46–47 (E.D. Pa. Aug. 26, 2005); *see also In re Antonious*, 373 B.R. 400, 409 (Bankr. E.D. Pa.2007) ("It would appear, though, that section 5107 of PUFTA affords both *in rem* and *in personam* relief against a transferee.").

211. *See Corbett* v. *Hunter*, 436 A.2d 1036, 1038 (Pa. Super. 1981) (addressing availability of execution sale as remedy in action commenced by debtor alleging fraudulent conveyance of property).

212. *Cf. Tibble* v. *Farmers Grain Express, Inc*. (*In re Mich. Biodiesel, LLC*), 510 B.R. 792, 797 (Bankr. W.D. Mich. 2014) ("Consistent with the analytical separateness of avoidance and recovery mentioned above, courts have generally read §550 as requiring a trustee to avoid the underlying transfer before (or at least while) seeking to recover the property or its value from a subsequent transferee.").

213. *Kennedy* v. *Hudnall*, 249 S.W.3d 520, 525 n.12 (Tex. App. 2008); *see also DBM Consulting Eng'rs, Inc.* v. *Sanders*, No. 59738-8-I, 2010 Wash. App. LEXIS 2012 at *5 (Wash. Ct. App. Sept. 7, 2010) ("The statute plainly contemplates that a creditor will invoke the UFTA after obtaining *a judgment on some other basis*, and provides a remedy in that event. Requiring a separate lawsuit in such circumstances would do nothing more than unnecessarily tax judicial resources.") (emphasis added).

214. *Hudnall*, 249 S.W.3d at 525.

215. *Compare* Pa.R.C.P. 3118(a) (establishing various remedies in aid of execution, including remedies against "the defendant or any other party or person"), *Rodriguez* v. *Bey*, No. 004183, 2008 Phila. Ct. Com. Pl. LEXIS 65 (Pa.C.P. Philadelphia Cty. 2008) ("[T]his Court ordered that the deed transferring the property from Defendant to [non-party

H. Defenses, Liability and Protection of Transferee – Section 5108

Because the remedies that are available to creditors under Section 5107 implicate the rights of third parties, Section 5108 addresses the issue of third-party liability under PUFTA. The section generally sets forth affirmative defenses that a third party (primarily, transferees) may invoke to avoid liability under PUFTA and imposes certain limitations on third-party liability.

1. Affirmative Defenses

With respect to affirmative defenses, Section 5108(a) states that:

> [a] transfer or obligation is not fraudulent under section 5104(a)(1) (relating to transfers fraudulent as to present and future creditors) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.[217]

The burden of proving this affirmative defense belongs to the transferee.[218]

At least one court construing a provision identical to Section 5108(a) has found that this language is susceptible to more than one interpretation.[219] As that court noted, it is arguably ambiguous whether the requirements of "good faith" and "reasonably equivalent value" pertain to a "subsequent transferee," or, instead, if a subsequent transferee is absolved from liability without regard to whether he or she took "in good faith and for a reasonably equivalent value."[220] In resolving this issue, the court looked to a provision that is identical to Section 5108(b)(2),[221] which provides that judgment may be entered against "any subsequent transferee other than a good faith transferee who took for value. . . ."[222] In light of this language, the court determined that a "subsequent transferee" is subject to the requirements of "good faith" and "reasonably equivalent value." At least one other court, however, has reached the opposite conclusion, concluding that subsection (a)(1) contains two separate defenses—i.e., one defense for a person who takes "in good faith and for a reasonably equivalent value," and another for a person who is a "subsequent transferee or obligee."[223] No court appears to have addressed this specific issue under Pennsylvania law, but it has been assumed that "subsequent transferees" are subject to the requirements of "good faith" and "reasonably equivalent value" under PUFTA.[224]

Notably, subsection (a) by its express terms does not address transferee liability under a theory of constructive fraud under Section 5104(a)(2). As such, it is not immediately clear whether the "good faith" affirmative defense set forth in subsection (a) can be raised by a

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transferee] be stricken and set aside. Plaintiff was granted a levy upon the property and was entitled to conduct a Sheriff's sale to satisfy the judgment. Further, a permanent injunction was issued to preclude Defendant and [non-party transferee] from further transferring or encumbering the property."), *aff'd without opinion* 959 A.2d 982 (Pa. Super. 2008, *petition denied* by 972 A.2d 484 (Pa. 2009), *Patterson* v. *Hopkins*, 371 A.2d 1378, 1382 (Pa. Super. 1977) (holding that trial court's determination of ownership of fraudulently transferred asset as tenants by the entireties as part of execution proceedings was procedurally proper where evidence was heard on issue), *with Garden State Standardbred Sales Co.* v. *Seese*, 611 A.2d 1239, 1242 (Pa. Super. Ct. 1992) ("[S]upplementary proceedings may not be used to adjudicate conflicting rights or claims made in good faith to property in the possession of third persons, because it deprives defendants in such actions of the protection afforded by the safeguards of a full hearing."); *accord In re Paolini*, 11 B.R. 317, 319 (Bankr. W.D.N.Y. 1981) ("[Creditors] appear to believe that the statute [permitting execution upon property conveyed] is self-operating. This interpretation seems to the Court to fly in the face of the most fundamental concept of 'due process.' Such a result would deny an alleged fraudulent transferee the opportunity to defend his title.").

216. *Gulf Mortg. & Realty Inv.* v. *Alten*, 428 A.2d 978, 980–81 (Pa. Super. 1981) ("[I]n a suit to set aside an alleged fraudulent conveyance, the burden of proof is upon the moving party and the ultimate issue, to-wit, whether the transfer in question is fraudulent, is an issue of fact *for the jury*.") (emphasis added).

217. 12 Pa.C.S. §5108(a). Incidentally, Section 8(a) of the UVTA now states that "reasonably equivalent value" must be "given the debtor." Uniform Voidable Transactions Act, Section 8(a) (2014).

218. 12 Pa.C.S. §5108, cmt. 1 ("The person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged."). The UVTA now contains a separate subsection that addresses the burden and standard of proof with respect to proving affirmative defenses under Section 8. *See* Uniform Voidable Transactions Act, Section 8(g)(1)–(4) and (h) (2014).

219. *See McConkie* v. *Rice Props*., No. 2:09cv275, 2012 U.S. Dist. LEXIS 80902 at *11 (D. Utah June 8, 2012).

220. *Id*.

221. *Id*. at *12.

222. 12 Pa.C.S. §5108(b)(2).

223. *See Estate of Hurst* v. *Jones*, 750 S.E.2d 14, 24 (N.C. Ct. App. 2013) ("A subsequent transferee is not required to demonstrate that they took in good faith or for value.").

224. *See United States* v. *Rocky Mt. Holdings, Inc*., No. 08-3381, 2009 U.S. Dist. LEXIS 52203 at *28–29 (E.D. Pa. 2009) (considering but ultimately rejecting argument by subsequent transferees that complaint should be dismissed because creditor failed to plead that they were not good faith transferees within meaning of Section 5108(a)).

transferee or obligee where the transfer or obligation is alleged to be constructively fraudulent. Again, no court appears to have considered this precise issue under Pennsylvania law, but arguments exist both for and against the proposition.

For the proposition, it can be argued that other parts of Section 5108 recognize "good faith" as an affirmative defense to constructive fraud claims. Specifically, Section 5108(d), which is derived from Section 548(c) of the Bankruptcy Code,[225] states that a good-faith transferee or obligee who takes for value enjoys certain rights, even though a transfer or obligation is voidable under Section 5107(a)(1). Various federal court decisions have relied upon the relationship between Section 5108(d) and Section 548(c) of the Bankruptcy Code to suggest broadly that "good faith" (along with "reasonably equivalent value") is a complete defense to constructive fraud claims in the same way that it is a complete defense to actual fraud claims under subsection (a).[226]

Against the proposition, it can be argued that basic principles of statutory construction require Section 5108 to be interpreted as written. Under this approach, the omission of any reference to Section 5104(a)(2) in Section 5108(a) suggests an intent to exclude constructive fraud claims.[227] In addition, to the extent that it is permissible to consider Section 5108(d) in interpreting subsection (a), Section 5108(d) should not necessarily be read as being co-extensive with Section 548(c) of the Bankruptcy Code because subsection (d) by its express terms does not purport to create a complete defense for a transferee who takes for value and in "good faith."[228]

It also should not be ignored that interpreting subsection (a) to apply to claims of constructive fraud arguably would seem to require transferees to make an additional showing that is not contemplated by Section 5104(a)(2). Specifically, Section 5104(a)(2) makes clear that a transfer or obligation is only constructively fraudulent if it is not made for "reasonably equivalent value" and satisfies one of the "tests" set forth in sub-subsections (i) or (ii).[229] In other words, it does not mention "good faith." The omission of a "good faith" requirement from Section 5104(a)(2) is actually consistent with Comment 1 to Section 5103, which, as already stated, explains that the concept of "value" is "purely objective."[230] From this premise, it would not seem to make sense to require a transferee to offer evidence of "good faith" as a defense under Section 5108(a), as a showing of constructive fraud under Section 5104(a)(2) does not in any way turn on subjective intent. Finally, such an interpretation also would appear

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225. 12 Pa.C.S. §5108, cmt. 4.

226. *See, e.g., Satriale* v. *Key Bank USA, N.A.* (*In re Burry*), 309 B.R. 130, 135 (Bankr. E.D. Pa. 2004) (suggesting broadly that "the[ ] defenses [of innocence on the part of the transferee and an exchange of value] defeat both actual and constructive fraud claims") (citing 5 *Collier on Bankruptcy*, P 548.07[2][a] (Matthew Bender 15th ed. revised 2003) (interpreting Section 548(c) of Bankruptcy Code); *Lichtenstein* v. *First Nat'l Bank* (*In re Moll Group, LLC*), Bankruptcy No. 02-38198, Adv. No. 04-1113, Adv. No. 04-1115, 2005 Bankr. LEXIS 3320 at *7 (Bankr. E.D. Pa. June 15, 2005) ("The two defenses [under Section 5108(d)] thus require proof of two elements: first, innocence on the part of the transferee, and second, an exchange of value. Raised successfully, these defenses *defeat both actual and constructive fraud claims*.") (emphasis added) (citing 5 *Collier on Bankruptcy*, ¶ 548.07[2][a] (Matthew Bender 15th ed. revised 2003) (interpreting Section 548(c) of Bankruptcy Code); *United States* v. *Rocky Mt. Holdings, Inc*., No. 08-3381, 2009 U.S. Dist. LEXIS 52203 at *28 (E.D. Pa. 2009) ("[Section 5108(a)] offers an affirmative defense to a defendant faced with *a claim of either intentional or constructive fraudulent* transfer under section 5104.") (emphasis added) (citing *In re Burry*, 309 B.R. 130, 134–35 (Bankr. E.D. Pa. 2004); *Hecht* v. *Malvern Preparatory Sch*., 716 F.Supp. 2d 395, 401 (E.D. Pa. 2010) ("Under PUFTA §5108(d), an innocent 'winning' investor in a Ponzi scheme may retain his principal investment through the demonstration of 'good faith.'") (citing *In re Burry*, 309 B.R. at 135); *SEC* v. *Forte*, Nos. 09-63 and 09-64, 2010 U.S. Dist. LEXIS 24705 at *14 (E.D. Pa. Mar. 17, 2010) (same) (citing *In re Burry*, 309 B.R. at 135); *Schwartzman* v. *Stinson*, No. 11-3934, 2011 U.S. Dist. LEXIS 88813 (E.D. Pa. Aug. 9, 2011) (same) (citing *Forte*, 2010 U.S. Dist. LEXIS 24705 at *5); *cf. Castle Cheese, Inc.* v. *MS Produce, Inc*., No. 04-878, 2008 U.S. Dist. LEXIS 71053 at *75 n.21 (W.D. Pa. Sept. 19, 2008) (observing that court was considering constructive fraud claim only, but nonetheless noting "[t]here is an affirmative defense available to transferees who accept a transfer in good faith and for a reasonably equivalent value.").

227. *See Orange Stones Co.* v. *Borough of Hamburg*, 28 A.3d 228 (Pa. Cmwlth. Ct. 2011) ("Under the maxim *expressio unius est exlusio alterius*, the express mention of a specific matter in a statute implies the exclusion of others not mentioned.") (citation and internal quotations omitted).

228. 12 Pa.C.S. §5108, cmt. 4 ("Subsection (d) is an *adaptation* of §548(c) of the Bankruptcy Code.") (emphasis added); *see also Ohio Cas. Group of Ins. Cos*. v. *Professional Ins. Mgmt*. (*In re Professional Ins. Mgmt*.),130 F.3d 1122, 1127 (3d Cir. 1997) ("[The Court] must interpret the statutory scheme as written.").

229. 12 Pa.C.S. §5104(a)(2); *see also id*. §5103, cmt. 1 (stating that concept of "reasonably equivalent value," which pertains to constructive fraud claims under Section 5104(a)(2), is "purely objective" and does not include subjective element of "good faith").

230. *See* 12 Pa.C.S. §5103, cmt. 1 ("The definition in this section of 'value' and hence of 'reasonably equivalent value,' is purely objective, as is also the case with the definition of 'value' in §548(d)(2) of the Bankruptcy Code. By contrast, the analogous definition of the term 'fair consideration' in §3 of the Uniform Fraudulent Conveyance Act required subjective 'good faith' on the part of the transferee, as well as objective 'fair equivalen[ce]' in the exchange.").

to run afoul of Section 5108(b)(1), which broadly contemplates the entry of judgment against a first transferee without regard to mental state.[231]

There does not appear to be a clear consensus on this issue under Pennsylvania law,[232] but other jurisdictions have concluded that "good faith" is irrelevant to the issue of constructive fraud.[233] One way of possibly reconciling the seemingly conflicting decisions on this issue is to view "good faith" as not operating as a "complete" affirmative defense within the meaning of Section 5108(a). Rather, it only operates as a "defense" in the sense that it vests the transferee with certain rights[234] when a transfer is otherwise constructively fraudulent within the meaning of Section 5104(a)(2) or 5105. But again, there is no clear authority on this point in Pennsylvania.

2. Judgments Against Transferees[235]

Subsection (b) addresses a creditor's ability to obtain a judgment when the creditor invokes the remedy of voiding a transfer under Section 5107(a). The remedy of a judgment is distinguished from other remedies, such as return of the property. These remedies are generally derived from Section 550(a) of the Bankruptcy Code, from which Section 5108(b) is principally derived.[236]

The judgment that may be entered under subsection (b) is subject to two restrictions. First, the amount of the judgment is limited to the lesser of the amount of the creditor's claim or the value of the property at the time of the transfer,[237] plus interest as equity may require.[238] Second, the judgment may be entered against either "the first transferee of the asset or the person for whose benefit the transfer was made" or a "subsequent transferee"; however, no judgment may be entered against a "subsequent transferee" who takes in "good faith" and "for value."[239]

Notably, the phrase "[t]he person for whose benefit the transfer was made," as used in subsection (b)(2), may include any persons who benefited from the transfer, such as the transferee's shareholders or successor entities.[240] When invoked, this provision of PUFTA obviates the need for the creditor to pierce the corporate veil or establish successor liability at common law.[241] It should be noted, however, that there appears to be disagreement among some

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231. 12 Pa.C.S. §5108(b)(1).

232. *See Universal Computer Consulting, Inc.* v. *Pitcairn Enters*., No. 03-2398, 2005 U.S. Dist. LEXIS 18401 at *30 (E.D. Pa. Aug. 26, 2005) ("Tellingly, the drafters state that the PUFTA does not contain an analogous 'good faith' defense to constructive fraud, *for the precise reason* that preferential transfers 'as such' are not fraudulent.") (emphasis in original).

233. S*ee Pajaro Dunes Rental Agency* v. *Spitters* (*In re Pajaro Dunes Rental Agency*),174 B.R. 557, 573 (Bankr. N.D. Cal. 1994) ("Good faith on the part of the creditor/transferee is nominally irrelevant for finding constructive fraud under 3439.04(b) [California's counterpart to Section 5104(a)(2)]."); *see also Thompson* v. *Hanson*, 239 P.3d 537, 541 (Wash. 2009) ("A plain reading of the remedial provision [subsection 8(b) of the UFTA] indicates that creditors may seek relief from first transferees without regard to the transferees' intent.").

234. *Cf. Argus Mgmt. Group* v. *Rodman* (*In re CVEO Corp*.), No. 01-0223 (MFW), Adversary No. 03-50376, 2004 Bankr. LEXIS 2123 at *12–13 (Bankr. D. Del. Dec. 15, 2004) ("We agree with the Plaintiff that the Defendants have misinterpreted the statute. Section 548(c) does not provide the Defendants with a *complete* defense against the Plaintiff's section 548(a)(1) claim. Rather, the Defendants would be protected only 'to the extent of the consideration' they gave to the Debtor.") (emphasis in original) (citing 5 Collier on Bankruptcy §548.07 (15th ed. 2004)).

235. Section 8(b) of the UVTA has been revised slightly. In addition to changes to the language of subsection (b), a new sub-subsection has been added to "make clear that the defense [under subsection (b) applies to recovery of or from the transferred property or its proceeds, by levy or otherwise [under Section 7(a)(1) and (b)], as well as to an action for a money judgment." Uniform Voidable Transactions Act, Prefatory Note (2014 Amendments) (2014).

236. *See* 12 Pa.C.S. §5108, cmt. 2; *see also In re Computer Universe, Inc*., 58 B.R. 28, 32 (Bankr. M.D. Fla.1986) ("Section 550(a) of the Bankruptcy Code permits the court to order either return of the property transferred or enter judgment for the value of the property.").

237. 12 Pa.C.S. §5108(b)(1). At the risk of stating the obvious, this limitation ensures that the creditor does not receive a windfall by collecting more than the amount of his claim against the debtor.

238. *See United States* v. *Rocky Mt. Holdings, Inc*., 782 F.Supp. 2d 106, 125 (E.D. Pa. 2011) ("The amount of the transferee's liability is limited to the lesser amount of the transferor's liabilities or the amount transferred to the transferee, plus any allowable interest.") (citation and internal quotations omitted); *see also Castle Cheese, Inc.* v. *MS Produce, Inc*., No. 04-878, 2008 U.S. Dist. LEXIS 71053 at *99–1000 n.28 (W.D. Pa. Sept. 19, 2008) (stating that further briefing was required on issue of calculation of interest); *accord Stanko* v. *Commissioner*, 209 F.3d 1082, 1088 (8th Cir. 2000) (holding that interest under UFTA is not available as a matter of right, but is determined by equities).

239. *Id*. §5108(b)(2). The language of Section 8(b)(2) of the UFTA has been modified slightly under the UVTA. The UVTA now frames the "subsequent transferee" defense in terms of "a good-faith transferee that took for value [from the first transferee]" and "an immediate or mediate good-faith transferee of a person [who is a good-faith transferee that took for value from the first transferee]." Uniform Voidable Transactions Act, Section 8(b)(1)(ii)(A)-(B) (2014).

240. *See Schwartzman* v. *Rogue Int'l Talent Group, Inc*., No. 12-5255, 2013 U.S. Dist. LEXIS 159455 at *7–8 (E.D. Pa. Nov. 7, 2013) (holding successor entity controlled by transferee liable for judgment under Section 5108(b)).

241. *See id*. (citing *Carroll* v. *Stettler*, Civ. A. No. 10-2262, 2010 U.S. Dist. LEXIS 120672 at *3 (E.D. Pa. Nov. 12, 2010)).

courts as to whether a debtor may qualify as a "person for whose benefit the transfer was made" for purposes of entering judgment.[242] No court appears to have considered this issue under PUFTA.

The term "good faith," as used in both subsections (a) and (b) of Section 5108, has a specific meaning. It refers to "[a] transferee or obligee [who] act[s] without actual fraudulent intent and . . . [does] not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor. '"[243] Without more, a transferee or obligee's awareness of the debtor's insolvency is an insufficient basis on which to conclude that he or she has not acted in good faith.[244] In addition, because the voidability of a particular transfer necessarily involves a legal conclusion, whether a transferee has knowledge of the voidability of the transfer is irrelevant for purposes of determining "good faith."[245] Also, in the case of subsequent transferees, knowledge that the original transfer was a gift or for nominal consideration by itself does not evidence a lack of good faith on the part of the subsequent transferee.[246]

Because subsection (b) is framed primarily in terms of transferee liability, the United States Bankruptcy Court for the Eastern District of Pennsylvania has predicted that the Pennsylvania Supreme Court would decline to extend liability to "non-transferees" on a theory of accomplice liability. This issue was addressed in *Miller* v. *Marcel Dutil the Canam Manac Group, Inc.* (*In re Total Containment, Inc.*).[247] In that case, however, it does not appear to have been argued that such persons could be held liable as "[p]ersons for whose benefit the transfer was made."[248]

3. Measure of Recovery

Even where judgment is appropriate under subsection (b), the judgment is subject to equitable adjustment by the court under subsection (c).[249] The purpose of equitable adjustment is basically to account for any change in the value of the asset after the transfer.[250] Often, adjustment in the form of a reduction is necessary where a transferee makes improvements to the transferred asset.[251] Adjustment, however, may also be appropriate where the transferee confers a benefit upon the debtor after the transfer.[252] Along these same lines, the U.S. Bankruptcy Court for the Eastern District of Pennsylvania predicted in a very recent decision that the Pennsylvania Supreme Court would conclude that "there is no right to set aside a fraudulent transfer under PUFTA if the transferee returns the property to the transferor."[253]

One potential issue that may arise is the propriety of equitable adjustment where the transferee was complicit in the commission of actual fraud. No court appears to have ad-

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242. *Compare Renda* v. *Nevarez*, 223 Cal. App. 4th 1231, 1236 (Cal. App. 4th Dist. 2014) (noting, but not deciding, that "cases suggest the UFTA does not authorize entry of a money judgment against a debtor under any circumstances") (emphasis in original), *with Citizens National Bank of Texas* v. *NXS Construction, Inc.*, 387 S.W.3d 74, 84 (Tex. App. 2012) ("The person for whose benefit the transfer was made may include the actual debtor or someone attempting to avoid a debt.").

243. 12 Pa.C.S. §5108, cmt. 6; *see also Tiab Communs. Corp.* v. *Keymarket of Nepa, Inc.*, 263 F.Supp. 2d 925, 941 (M.D. Pa. 2003).

244. *Id*. §5108, cmt. 6.

245. *Id*.

246. *Id*.; *see also Tiab*, 263 F.Supp. 2d at 946 n. 26 (noting existence of additional considerations relevant to actual fraud under Section 5104(b) that weighed against finding of good faith under 5108(d) where asset was transferred for nominal consideration).

247. 335 B.R. 589, 616 (Bankr. E.D. Pa. 2005).

248. *See* 12 Pa.C.S. §5108(b)(1).

249. *Id*. §5108(c).

250. *Id*. §5108, cmt. 3 ("The premise of subsection (c) is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor's recovery.").

251. *Id*. ("[I]f the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by improvements of the asset transferred or discharge of liens on the property, a good faith transferee should be reimbursed for the outlay for such a purpose to the extent the sale proceeds were increased thereby."); *accord Dahar* v. *Jackson* (*In re Jackson*), 318 B.R. 5, 27 (Bankr. D.N.H. 2004) ("[E]quitable adjustments are generally made to prevent the Plaintiff from receiving a windfall of the post-transfer costs incurred by the transferee to improve the property.") *aff'd*, 459 F.3d 117 (1st Cir. 2006); *United States* v. *Verduchi*, 434 F.3d 17, 23 (1st Cir. 2006) ("Often the exercise of the equitable adjustment power is meant to protect the transferee, not the creditor. The law sought to avoid giving creditors the windfall of the costs incurred by an innocent transferee to improve the property.").

252. *See Shearer* v. *Oberdick* (*In re Oberdick*), 490 B.R. 687, 708 (Bankr. W.D. Pa. 2013) ("[E]xpenditures of a particular type made from the Entireties Account, or deposits into the Entireties Account from other sources, may in essence act as setoffs to lower the amount of the transfer that can be characterized as a fraudulent transfer."); *accord Dahar*, 318 B.R. at 27 (allowing for equitable adjustment under comparable provision of New Hampshire UFTA in absence of actual fraud where transferee used proceeds from sale to pay certain expenses of debtor).

253. *Finkel* v. *Polichuk* (*In re Polichuk*), 506 B.R. 405, 435 (Bankr. E.D. Pa. 2014).

dressed this issue under PUFTA, but at least one other court construing a provision identical to Section 5108(c) has refused to condition equitable adjustment on the transferee acting in "good faith" within the meaning of subsections (a) and (b).[254] Moreover, allowing adjustment in cases of actual fraud appears to be consistent with the text of subsection (c). Specifically, subsection (c) refers back to subsection (b),[255] which, in turn, refers back to Section 5107(a)(1).[256] That subsection broadly addresses "relief against a transfer or obligation under this chapter."[257] As such, there is no apparent reason why subsection (c) may not be invoked in cases of actual fraud under Section 4(a)(1), unless the "equities" analysis employed by the court mandates otherwise.

Although somewhat less common,[258] equitable adjustment may also be invoked to *increase* the amount of the judgment against the transferee. This may occur where the transferee causes diminution to the value of the transferred asset.[259] Similarly, where a transferee benefits from the use of an asset in the form of rents or other income generated from the asset's use, he or she may have to account for the "net income."[260] As such, if the cost of generating the income exceeds the income derived therefrom, there should be no liability on the part of the transferee.[261]

No matter what the nature of the adjustment, courts generally agree that the calculation is typically more art than science. Case law interpreting PUFTA has not delved deeply into this issue, but other courts have commented that the calculation is "imprecise," and that the court's discretion is plenary.[262]

4. Rights of Transferees

As stated, *supra*,[263] subsection (d), which again is derived from Section 548(c) of the Bankruptcy Code, gives transferees and obligees who take in good faith and for value certain rights. These rights include: (1) a lien on or a right to retain any interest in the asset transferred; (2) enforcement of any obligation incurred; or (3) a reduction in the amount of the liability on the judgment.[264] There are a handful of decisions citing subsection (d) for the basic proposition that "good faith" and "for value" are defenses that may be invoked by a transferee,[265] but no decisions appear to have had occasion to explore subsection (d) carefully.

In a relatively recent case, the Washington Supreme Court considered the interplay between Washington's statutory counterpart to Section 5108(d) and the other subsections of Washington's counterpart to Section 5108. Specifically, the court was called on to decide how "a re-

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254. *Kingsley* v. *Wetzel* (*In re Kingsley*), 518 F.3d 874, 878 (11th Cir. 2008) (per curiam) (holding bankruptcy court did not abuse discretion inequitably adjusting recovery from initial transferee who committed actual fraud but later repaid funds to the estate).

255. 12 Pa.C.S. §5108(c).

256. *Id*. §5108(b).

257. *Id*. §5107(a).

258. *See United States* v. *Verduchi*, 434 F.3d 17, 24 (1st Cir. 2006) ("[J]ust as the commentary suggests that a 'good faith transferee should be reimbursed' for his contribution 'if the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by . . . [the] discharge of liens on the property,' we see no reason why equity would not allow for a money judgment against a transferee who has decreased the value of the property by encumbering it with a mortgage.").

259. 12 Pa.C.S. §5108, cmt. 3 ("If the value of the asset has been diminished by severance and disposition of timber or minerals or fixtures, the transferee should be liable for the amount of the resulting reduction.").

260. *Id*.; *accord Galaz* v. *Galaz* (*In re Galaz*), Case No. 07-53287-RBK, Chapter 13, Adversary No. 08-5043-RBK, 2012 Bankr. LEXIS 5750 at *12 (Bankr. W.D. Tex. Dec. 13, 2012) ("The Royalties did not begin to generate *revenue* until after the transfer occurred, but this does not mean they did not have value. Rather, a determination of the value of the Royalties must take into account their potential to generate revenue in the future. Because the Royalties generated a significant amount of income after the transfer, equity requires an adjustment of value to reflect the revenue they generated between the time they were fraudulently transferred to [transferee] and the date the Court nullified the transfer.").

261. *See Guttierrez* v. *Kennedy*, No. 1:09-mc-91-WTL-TAB, 2010 U.S. Dist. LEXIS 73053 at *6 (S.D. Ind. July 2, 2010) ("[R]egardless of whether [debtor] fraudulently transferred the Dana contract to [transferee], Defendants cannot recover under the Fraudulent Transfer Act because the Dana contract—after deducting the expenses incurred in earning the income—had negative value as set out in [transferee's] affidavit."), *approved and adopted by*, No. 1:09-mc-91-WTL-TAB, 2010 U.S. Dist. LEXIS 73015 (S.D. Ind. July 20, 2010).

262. *Dahar* v. *Jackson* (*In re Jackson*), 459 F.3d 117, 127 (1st Cir. 2006) ("In many cases, determining the precise amount of . . . an adjustment may be difficult if not impossible."); *see also Galaz* v. *Galaz* (*In re Galaz*), 2012 Bankr. LEXIS 5750 at *11 ("A court has wide discretion to approximate the value that a claimant has lost as a result of a defendant's fraudulent transfer of assets.").

263. *See* Section III.H.1.

264. 12 Pa.C.S. §5108(d)(i)–(iii).

265. *See* Section III.H.1, n.222, *supra*.

duction in the amount of the liability on the judgment" should be calculated."[266] According to the court:

> [a] transferee's liability [on the judgment] could theoretically be reduced in two ways, and we must determine which, if either, the statute [Washington's statutory counterpart to Section 5108(d)(3)] allows. First, it could be reduced by lowering the value of the asset transferred. Because a transferee's liability to a creditor is capped by the value of the asset transferred, RCW 19.40.081(b) [Washington's statutory counterpart to Section 5108(b)], a reduction in the value of the asset lowers the total amount a transferee may be required to pay. The second way liability could be reduced is by subtracting the value given the debtor from the lesser of the creditor's claim or the value of the asset transferred.[267]

Against this backdrop, the court considered the transferees' argument that the judgment against them should be reduced both ways. In particular, the transferees, who had assumed $365,000 in debt on the transferred properties, claimed the trial court not only should have factored in the debt assumption in calculating (i.e., reducing) the value of the asset for purposes of the entry of judgment under subsection (b), but then should have further reduced the amount of the already-reduced judgment by the amount of debt assumption under subsection (d).[268]

The court agreed with the trial court that such a "double offset," which would have completely eliminated liability on the part of the transferees, was not permissible under the UFTA.[269] Ultimately, the court explained the relationship between the various parts of Section 8 of the UFTA as follows:

> RCW 19.40.081(b) [Washington's statutory counterpart to Section 5108(b)] limits liability to the value of the property received by the transferee and, for good faith transferees, subsection (d) further limits liability to the *net* value received (i.e., the value of the asset transferred less the value given the debtor). The value given the debtor, including any debt assumed, is deducted from the value of the asset transferred prior to determining the measure of judgment. Subsection (c) is the means by which this occurs, as it allows for the adjustment to the value of the asset transferred.

Essentially, the court determined that subsection (c) is not an independent basis on which a judgment against a transferee may be adjusted, but, instead, exists for the purpose of giving effect to the "value" adjustment contemplated by subsection (d).

Although this interpretation is plausible, it is not the only way that Section 8 of the UFTA can be interpreted. Technically speaking, although both subsections (c) and (d) both address the adjustment of judgments against transferees, it alternatively can be argued that the latter creates a statutory legal right in favor of the transferee where the requirements of "good faith" and "for value" are met, while the former merely establishes an equitable right that is subject to the court's discretion independently of the "good faith" and "for value" requirements. Case law interpreting subsection (c) is not inconsistent with this observation, particularly to the extent that certain cases have permitted equitable adjustment under subsection (c) where there has been actual fraud (i.e., no "good faith").[270] In interpreting subsection (c) as being co-extensive with subsection (d), the Washington Supreme Court seemed to assume without deciding that subsection (c) applies only to good-faith transferees who take for value, even though no such language appears in subsection (c).[271] This assumption is interesting, especially since the court elsewhere in its decision noted the absence of a mental state in subsection (b)(1) and relied upon the absence of the same in concluding that judgment can be entered against a first transferee under a theory of constructive fraud.[272] Regardless, as the

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266. *Thompson* v. *Hanson*, 239 P.3d 537, 541–42 (Wash. 2009) (en banc).

267. *Id*. at 542.

268. *Id*.

269. *Id*. at 542–43. The court also noted that the transferees' proffered interpretation of the statute would lead to absurd results because a transferee who assumed debt would be entitled to an additional offset that a transferee who had paid cash would not receive. *Id*.

270. *See* Section III.H.3, n.247, *supra*.

271. *See Thompson*, 239 P.3d at 542 ("Subsection (c) allows for adjustment of the value of the asset transferred 'as the equities may require.' The official comments to the UFTA contemplate such an adjustment for a good faith transferee [under subsection (c)] that has enhanced the value of the asset through discharge of liens. The statutory provision protecting good faith transferees from outsized judgments operates '[n]otwithstanding voidability of a transfer' and entitles a good faith transferee to '[a] reduction in the amount of the liability on the judgment" up to 'the value given the debtor for the transfer or obligation [under subsection (d).'") (emphasis added) (citations omitted).

272. *See id*. at 540 ("Notably, no mental state language appears in that subsection . . . The structure of the statute indicates that while fraudulent transfers may or may not include a culpable mental state, once a transfer has been found to be fraudulent, remedy is available against transferees.").

Washington Supreme Court's decision illustrates, the boundaries between subsections (c) and (d) can be tenuous where good-faith transferees who take for value are concerned.

5. Exempted Transactions

The final subsection of Section 5108, subsection (e), exempts certain transactions from transferee liability under a theory of either actual or constructive fraud. The transactions that are exempted are: (1) lease terminations where the debtor has defaulted in his or her payment obligations,[273] and (2) the enforcement of secured interests under U.C.C. Article 9, except as to a creditor's acceptance of collateral in full or partial satisfaction of the secured obligation under 13 Pa.C.S. §9620 or comparable provision under the laws of another state.

Regarding subsection (e)(1), prior to the enactment of the UFTA, there was at least one significant decision that held that a lessor was a transferee within the meaning of fraudulent transfer law if the lessor terminated the debtor's lease upon default because it effectively removed an asset (i.e., the leasehold interest) from the debtor without the payment of "fair consideration" by the lessor.[274] Subsection (e)(1) resolves this issue by specifically exempting terminated leases from the scope of fraudulent transfer law.

With respect to subsection (e)(2), it is important to appreciate that the term "security interest" is not synonymous with "perfected security interest." In other words, a secured party under U.C.C. Article 9 theoretically can enforce a security interest against property (i.e., collateral) without having a perfected security interest.[275] It is this type of "transfer" (i.e., where the security interest is enforced, but has not been perfected) to which subsection (e)(2) would seem to apply,[276] particularly since property that is subject to an existing, perfected security interest technically cannot be a "transfer" within the meaning of subsection (e)(2) because the property is subject to a "valid lien" and therefore does not meet the definition of "asset" under Section 5101(b).[277]

As noted above, however, there is a limitation on this exemption for "strict foreclosures"—i.e., where a secured creditor accepts the collateral securing the debt in lieu of his or her right to collect the amount remaining on the debt.[278] This exception is actually a non-uniform change to the UFTA adopted in Pennsylvania.[279]

Last, regarding the Comment to Section 5108, it should be noted that the references to Pennsylvania U.C.C. Article 9 are no longer current.[280] The references to former Section

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273. 12 Pa.C.S. §5108(e)(1).

274. *Id*. §5108, cmt. 5 (citing *In re Ferris*, 415 F.Supp. 33, 40–41 (W.D. Okla.1976)).

275. *See, e.g., Harkness* v. *EZ Pawn Ala., Inc*., 724 So. 2d 32, 33 (Ala. Civ. App. 1998) ("A secured party's rights over the collateral as against the debtor are unaffected by failure to perfect the security interest.") (citation and internal quotations omitted); *Roberge* v. *Bankers Trust Co*., N.A.,84 A.D.2d 8, 9 (N.Y. App. Div. 1981) ("[W]e find no requirement [in U.C.C. Article 9] which necessitates the perfection of a security interest prior to foreclosure."); *Benson County Coop. Credit Union* v. *Central Livestock Ass'n*, 300 N.W.2d 236, 240 (N.D. 1980) ("Attachment has two consequences. First, the security interest becomes enforceable against the debtor. If the debtor defaults, the secured creditor can foreclose or otherwise realize on the collateral to satisfy his claim. Second, the security interest becomes enforceable against third parties and the secured party, in general, takes his collateral from or to the exclusion of third parties. However, third parties can defeat an attached but unperfected security interest.").

276. *See, e.g., Phillips* v. *Phillips*, A13-0699, 2014 Minn. App. Unpub. LEXIS 190 at *10 (Minn. Ct. App. Mar. 10, 2014) ("If [debtor] had granted [transferee] a security interest to secure its debt to her before becoming insolvent, then the statutory defense in Minn. Stat. §513.48(e)(2) would have permitted her to enforce the security interest notwithstanding [debtor's] insolvency.").

277. *See* 12 Pa.C.S. §5101(b); *accord Dietter* v. *Dietter*, 737 A.2d 926, 935 (Conn. App. Ct. 1999) ("There is no dispute that [transferee's] security interest in these assets was effective against a subsequent judicial lien obtained by the defendant. In light of the definitions in §52-552b and the reasoning employed in *Kellstrom Bros. Painting*, we conclude, as a matter of law, that the assets the trustee in bankruptcy transferred to [transferee], which were encumbered by a valid lien, were not 'assets' within the meaning of the Fraudulent Transfer Act and, therefore, this transfer is not subject to the Fraudulent Transfer Act."), *appeal denied* by 743 A.2d 617 (Conn. 1999); *Epperson* v. *Entm't Express, Inc*., 338 F.Supp. 2d 328, 342–43 (D. Conn. 2004) ("These security interests are 'valid liens' that exceeded the value of the collateral, thereby precluding either Hill A&E's property or the convertible note from meeting UFTA's definition of 'asset.' As such, the May 31, 1996 sale cannot, as a matter of law, be considered a 'transfer' subject to UFTA.").

278. *Goldberg* v. *Sotheby's Int'l Realty, LLC* (*In re Sol, LLC*), Case No 09-12684-BKC-AJC, Chapter 7, Adv. Case No. 11-01719-AJC, 2012 Bankr. LEXIS 3047 at *36 (Bankr. S.D. Fla. June 3, 2012) ("Strict foreclosure in accordance with state law is not a *per se* transfer for reasonably equivalent value. This Court is guided by the case law that clearly holds that even where there is a transfer that occurs through strict foreclosure, the Court must still determine whether the debtor received reasonably equivalent value.") (citation omitted).

279. *See id*. §5108, cmt. ("Significant nonuniform features of this section."). California has adopted a similar provision, *see* Cal Civ Code §3439.08(e)(2), and this is the position that is now taken under the UVTA. *See* Uniform Voidable Transactions Act, Section 8(e)(2) (2014).

280. For an explanation why the references are not current, see Part II.F, *supra*.

9505(b), relating to acceptance of collateral as discharge of an obligation, and former Section 9502, relating to enforcement of rights in collateral without a sale, now appear to be codified at Sections 9620 and 9610, respectively. The reference to "good faith" under former Section 9103, on the other hand, now appears in the Comment to Section 9601.[281]

I. Extinguishment of Cause of Action – Section 5109

Section 5109 governs "extinguishment of [a] cause of action" under PUFTA. Technically, the section operates primarily as a statute of repose, rather than a statute of limitations.[282] Said another way, Section 5109 generally establishes an outer limit on the time within which a "claimant"[283] must bring a cause of action under PUFTA, subject to a limited discovery period that will allow a claimant to commence such a cause of action after the repose period under certain circumstances. Despite being a statute of repose, Section 5109 is commonly referred to as a statute of limitations.[284]

The applicable "limitations" period depends on whether the cause of action sounds in actual or constructive fraud.[285] For causes of action for actual fraud arising under Section 5104(a)(1), the prescribed period is the later of four years after the transfer was made or the obligation was incurred *or* one year after the cause of action is or reasonably could have been discovered.[286] Similarly, causes of action for constructive fraud arising under Sections 5104(a)(2) and 5105 also must be brought within four years within the transfer.[287] In contrast to causes of action for actual fraud, however, causes of action for constructive fraud are not subject to any discovery period.[288]

An interesting issue that was addressed recently by the U.S. District Court for the Western District of Pennsylvania is whether the applicable recovery period may include transfers made *after* the fraudulent transfer action has been filed. In *Titus* v. *Shearer*, the trustee not only sought to recover for transfers that had been made up to four years prior to the commencement of the fraudulent transfer action (i.e., the statutory recovery period under Section 5109), but also transfers that allegedly were made after the action was filed.[289] Although the bankruptcy court had refused to allow the trustee to pursue these transfers, the district court reversed on appeal. Citing Section 5107(a)(3)(i), the district court noted that "[t]he PUFTA contemplates ongoing transfers . . ." and held that the transfers were, in fact, recoverable because "[n]othing in the statute or case law suggests that recovery is only permitted for transfers prior to the filing of a fraudulent transfer complaint."[290]

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281. *See* U.C.C. §9-601, cmt. 5 ("Subsection (c) permits the simultaneous exercise of remedies if the secured party acts in good faith.").

282. *See K-B Bldg., Co.* v. *Sheesley Constr., Inc.*, 833 A.2d 1132, 1133 n.1 (Pa. Super. 2003) ("Our review of decisions of other jurisdictions reveals that section 5109 is referred to as both a statute of limitations and a statute of repose."); *Kaliner* v. *MDC Sys. Corp., LLC*, No. 2:09-MC-00005-JD, 2011 U.S. Dist. LEXIS 5377 at *31 (E.D. Pa. Jan. 19, 2011) ("[Transferee] properly characterizes 12 Pa.C.S.A. §5109 as a 'statute of repose.'").

283. Although PUFTA is framed in terms of "creditors" seeking relief, *see* 12 Pa.C.S. §5104, *id*. §5105, Section 5109 uses the term "claimant" rather than "creditor." *Id*. §5109(1). The Comment to Section 5109 possibly provides insight into why the term "claimant" is used. According to Comment 2, the limitations periods in Section 5109 "apply [] whether the action under this chapter is brought by the creditor defrauded *or by a purchaser at a sale on execution levied pursuant to 12 Pa.C.S. §5107(b)." Id*. §5109, cmt. 2 (emphasis added). The Comment, however, offers no further explanation as to when a purchaser might bring a claim under PUFTA. *Cf. Kaliner* v. *Load Rite Trailers* (*In re Sverica Acquisition Corp.*), 179 B.R. 457, 467 (Bankr. E.D. Pa. 1995) ("Prior to enactment of the UFCA in Pennsylvania, the exclusive means of remedying transfers of property made in fraud of creditors was by a cumbersome and expensive process at common law requiring the creditor to obtain a judgment on the debt, levy execution on the conveyed property, purchase it and then bring an action in ejectment against the alleged fraudulent transferee wherein the fraudulent nature of the transfer would finally be adjudicated."); *accord Brasie* v. *Minneapolis Brewing Co.*, 92 N.W. 340, 341 (Minn. 1902) ("[Creditor] may place his demand in judgment, levy upon the property alleged to have been fraudulently transferred, cause the same to be sold under execution, and leave the purchaser at the sale to contest the validity of the fraudulent grantee's title."); *Sanders* v. *Muegge*, 91 Ind. 214, 219 (Ind. 1883) ("The judgment creditor, where the debtor's lands have been conveyed to defraud creditors, may disregard the fraudulent conveyance while the lands remain in the hands of the fraudulent grantee; may levy upon the same, and the purchaser at sheriff's sale may bring ejectment, and, at law, avoid the fraudulent conveyance.").

284. *See Kaliner*, 2011 U.S. Dist. LEXIS 5377 at *31 (*citing K-B Bldg.*, 833 A.2d at 1133 n.1).

285. *See generally Finkel* v. *Polichuk* (*In re Polichuk*), 506 B.R. 405, 419 (Bankr. E.D. Pa. 2014).

286. *See* 12 Pa.C.S. §5109(1); *see also State Farm Mut. Auto. Ins. Co.* v. *Cordua*, 834 F.Supp. 2d 301, 307 (E.D. Pa. 2011) ("Common sense would therefore necessitate a finding that a cause of action for fraud will not accrue until the claimant discovered or should have discovered the facts constituting the fraud.").

287. 12 Pa.C.S. §5109(2).

288. *See id*.; *Cordua*, 834 F.Supp. 2d at 305 (E.D. Pa. 2011) ("[T]his argument [regarding tolling] is inapplicable to constructive fraud claims as there is no discovery exception cited in section 5109(2).").

289. 498 B.R. 508, 514 (W.D. Pa. 2013).

290. *Id*. at 515.

As a final comment on Section 5109, because the time for bringing a cause of action commences with the subject transfer or obligation, the principles set forth in Section 5106 are essential to analyzing whether a cause of action has been timely brought pursuant to Section 5109. Consequently, the two sections are often analyzed in connection with one another.[291]

J. Supplementary Provisions – Section 5110

The final section of PUFTA, Section 5110, states that the "principles of law and equity" governing various areas of law are intended to supplement PUFTA, unless PUFTA provides to the contrary. Generally, there is a dearth of case law either applying or construing Section 5110. Nonetheless, the U.S. Court of Appeals for the Third Circuit has recently relied upon Section 5110 as support for the proposition that punitive damages are available under PUFTA.[292] Those damages, however, appear to be recoverable only from the debtor, not the transferee.[293]

Interestingly, Section 5110 also has recently been invoked in a Ponzi scheme case in which the investor plaintiffs were seeking to recover investment profits that were paid to other investors whom the plaintiffs had named as defendants to the fraudulent transfer action.[294] In that case, the U.S. District Court for the Eastern District of Pennsylvania relied upon Section 5110 when rejecting the defendants' argument that investments that the defendants had made in the names of other investors[295] should be counted against the investment profits they had allegedly received from the debtor, thereby reducing the amount of profits that the plaintiffs were allowed to recover from the defendants who had been paid more than the plaintiffs as part of the Ponzi scheme.[296] Citing principles of contract law, the court concluded that an offset would be inappropriate because the right to recover investments made in the names of other investors did not belong to the defendants, but to the investors in whose names the investments were actually made.[297] Additionally, the court also deemed it inequitable to allow the defendants to offset the "investments" made in the names of other investors because many of these investors had joined as plaintiffs to the fraudulent transfer action and already recovered the "investments" that the defendants were seeking to offset.[298] Simply put, the "named" investors and the defendants both could not lay claim to the same "investments." As this case demonstrates, Section 5110 vests the court with broad discretion to invoke legal and equitable principles in resolving issues of liability under PUFTA.

IV. CONCLUSION

Although PUFTA contains only ten sections, it is a nuanced statute. This article has introduced practitioners to the basic concepts of fraudulent transfer law under PUFTA, while highlighting a number of the issues that have yet to be addressed under Pennsylvania law. It is hoped that practitioners not only will understand the statutory framework within which these issues are to be resolved, but now will have a reference point for understanding the forthcoming changes under the UVTA.

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291. *See, e.g., Smith* v. *Cowden* (*In re Cowden*), 337 B.R. 512, 523–24 (Bankr. W.D. Pa. 2006) (discussing statute of limitations under Section 5109 in relation to time of transfer under Section 5106(1)(i)); *Kaliner* v. *MDC Sys. Corp.*, LLC, No. 2:09-MC-00005-JD, 2011 U.S. Dist. LEXIS 5377 at *31–32 (E.D. Pa. Jan. 19, 2011) (citing Section 5106(c) in resolving statute of limitations defense under Section 5109); *accord Pnc Equip. Fin., LLC* v. *Zilberbrand*, No. 12-cv-03074, 2013 U.S. Dist. LEXIS 44307 at *8-9 (N.D. Ill. Mar. 28, 2013) (looking to subsection 6 of UFTA to determine limitations period under Section 9); *Universal Trading & Inv. Co.* v. *Dugsbery, Inc.*, No. C 08-03632 CRB, 2011 U.S. Dist. LEXIS 1711 (N.D. Cal. Jan. 7, 2011) ("The relevant benchmark for [California's] UFTA's statute of limitations . . . . is when [debtor] conveyed the assets [under California counterpart to Section 5106].").

292. *See Klein* v. *Weidner*, 729 F.3d 280, 288 (3d Cir. Pa. 2013).

293. *See id*. at 292 n. 4 ("[W]hile Sections 5107 and 5108 clearly limit the monetary damages that a creditor may recover from a transferee, they less clearly limit the damages recoverable from the debtor.").

294. *See Carroll* v. *Stettler*, No. 10-2262, 2013 U.S. Dist. LEXIS 76519 (E.D. Pa. May 30, 2013).

295. There was a limit imposed on the amount that each investor could invest in a given "project." *Id*. at *11.

296. *Id*. at *10–11.

297. *Id*.

298. *Id*. at *12.