Introduction

> "Probably the most severe trial to which an honest man can be subjected is the inability to pay his debts, even by the application of all his means. He is assailed by temptations of interest, of shame, of affection, to wander from the straight line of duty, while at the same time he is intrusted by the law with dominion over property which equitably and in justice belongs to his creditors. The quantity of litigation engendered by fraudulent conveyances is appalling, and the cunning devices and intricate schemes resorted to by debtors to elude the vigilance of creditors would, if no moral turpitude was involved, challenge admiration. The condition of the body of our law upon this subject is far from satisfactory and may be said to still be in a formative and unsettled state."[1]

As the United States continues to recover from the effects of a global pandemic, the Biden administration proposed legislation that aims to help strengthen American infrastructure as well as grow the economy "from the bottom up and middle out." The source of funding for these changes would come in part from increases in certain federal taxes. These changes have prompted many who have amassed great wealth to engage in sophisticated planning to reduce the contemplated increase in taxes they would otherwise pay. And while many facing the prospect of mounting creditors must liquidate assets to pay debts, the wealthy who face creditor claims can rest easier knowing that not only have they minimized amounts otherwise due to tax authorities, that same wealth may have been immunized from all other non-taxing creditors though intricate planning structures.

Consequently, at a time where the principle "those who owe must pay" holds especially true, the spotlight shines even brighter on those who have arranged their affairs to pay what they decide should be paid, if anything at all. The morality of dodging legitimate creditors becomes more pronounced during a pandemic, as do the economic consequences for a credit-based society.

Fortunately for creditors, an important legal tool exists that provides relief from the transfer of wealth structured in a fashion that hinders creditors. That tool is the centuries-old fraudulent conveyance law. Regardless of the degree of sophistication used to transfer wealth, the scope of fraudulent transfer law is broad

1. Frederick S. Wait, *A Treatise on Fraudulent Conveyances and Creditors' Bills, with a Discussion of Void and Voidable Acts* 4 (1884).

enough to permit a creditor relief where transactions range from the simplest to the most sophisticated. Fraudulent conveyance law provides a creditor with remedies to counteract a debtor's transfer of an asset, or the incurrence of an obligation, that impact the creditor's ability to collect a debt. The underpinnings for this ancient law are fairness and support for a system of credit. But some jurisdictions, including some U.S. states, altered or eliminated these policies to attract wealth and bolster the local economy. This discrepancy between jurisdictions has created complex conflict of law issues in fraudulent conveyance litigation.

Although the fraudulent conveyance law provides a creditor with remedies if a debtor makes a transfer of an asset under certain circumstances, there have been divergences among the states in providing such relief. These differences motivated a uniform act, which was first promulgated by the National Conference of Commissioners on Uniform State Laws in 1918 and referred to as the Uniform Fraudulent Conveyance Act (UFCA).[2] The Uniform Law Commission (ULC) then drafted an overhaul to the UFCA in 1984. The new uniform act was entitled the Uniform Fraudulent Transfer Act (UFTA). Finally, the ULC amended the UFTA in 2014, which included a name change—the Uniform Voidable Transactions Act (UVTA). The terms "voidable transaction," "fraudulent transfer" and "fraudulent conveyance" will be referred to collectively as a "fraudulent transfer" throughout this book, unless context requires otherwise. Aside from a choice of law provision and provisions related to series limited liability companies, the UVTA did not substantially change the UFTA and thus, references to the UFTA will be to the UVTA, unless context requires otherwise. References will also be made to the UFCA (still in force in Maryland) and non-uniform act state laws (e.g., South Carolina and Alaska) where context is required.

This book will examine the intersection between fraudulent transfer law and its application to modern day wealth transfer planning transactions. Although wealth transfer planning is a legitimate service and should be free from avoidance if done properly, some forms of wealth transfer are more prone to avoidance. Consequently, all parties impacted by the transfer of wealth can benefit from understanding the scope and application of fraudulent transfer law. Debtors can take steps to minimize a transaction's exposure to avoidance. Creditors can take proactive measures to reduce the chance of losing assets, or legal measures to restore the creditor.[3] Also, attention will be given to the scenarios where advisers face liability for their role in facilitating the transfer of wealth meant to frustrate a creditor's ability to collect a debt.

Ultimately, this book should provide a better understanding of how the broad reach of fraudulent transfer law can impact all parties to the modern transfer of wealth. But before applying fraudulent transfer law to modern transfers of wealth, one should consider historical applications of fraudulent transfer law.

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2. The National Conference of Commissioners on Uniform State Laws adopted the name "Uniform Law Commission" as an alternative name in 2007, but also retained the former name.

3. *See* N. Boeke and W. Fendrick, *Fraudulent Transfers, Creditors' and Debtors' Practice in Florida*, Eighth Edition (2022). ("Florida's fraudulent transfer law provides a creditor with a powerful (but often underused) right to set aside many transactions by its debtor that reduce the creditor's chances of getting paid.")