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RECENT DEVELOPMENTS REGARDING THE "GOOD FAITH TRANSFEREE" DEFENSE IN FRAUDULENT TRANSFER LITIGATION

Fraudulent transfer claims, particularly in cases involving Ponzi schemes, frequently turn on the application of the "good faith transferee" defense. This article considers several recent decisions that highlight critical differences in application of this defense depending on whether the fraudulent transfer claims arise under section 548 of the Bankruptcy Code as opposed to state law fraudulent transfer statutes.

By Aaron G. McCollough *

While commercial bankruptcy filings have tapered off in the United States in recent years, liquidating trustees, receivers, and debtors in bankruptcy continue to push the limits of fraudulent transfer law in an effort to enhance recoveries for creditors. Much ink has been spilled in recent years evaluating the scope of the "safe harbor" provisions of the Bankruptcy Code, which provide certain defenses to fraudulent transfer claims in connection with "securities contracts," "forward contracts," "swap agreements," and certain other enumerated transactions. But less attention has been paid to the numerous (often inconsistent) court decisions regarding the application of the "good faith transferee" defense in fraudulent transfer cases. This article surveys recent cases that highlight the difference in application of the "good faith transferee," including several recent decisions that substantially narrowed the "good faith transferee" defense available in litigation involving state law fraudulent transfer claims.

STATUTORY FRAMEWORK

Two separate statutory schemes authorize the avoidance of fraudulent transfers. First, under section 548 of the Bankruptcy Code, the trustee in bankruptcy (or the debtor in possession) can avoid a transfer made within two years of the petition date if either: (i) the transfer was made with actual intent to hinder, delay, or defraud (referred to as an "actual fraudulent transfer") or (ii) the transfer was made while the debtor was insolvent, undercapitalized, or unable to pay its debts when due, and did not receive reasonably equivalent value in exchange for the transfer (referred to as a "constructive fraudulent transfer").

Separately, under state law in most states, individual creditors can avoid actual fraudulent transfers or constructive fraudulent transfers by a debtor under statutes that largely track the standards of section 548 of the Bankruptcy Code. Specifically, under the Uniform Fraudulent Transfer Act (the "UFTA"), which has been adopted by most states,[1] a creditor can avoid any transfer

[1] In 2014, the Uniform Law Commission proposed certain changes to the UFTA, including renaming the act as the Uniform Voidable Transfers Act. As of the date of publication of this article, several states, including California, have adopted these proposed changes. While the proposed changes to the

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