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Tuition as a Fraudulent Transfer

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TUITION AS A FRAUDULENT TRANSFER

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Bankruptcy trustees are suing universities because the insolvent parent of an adult student has written a tuition check while insolvent. The theory is that the university is the initial transferee of a fraudulent transfer that has provided benefit to the student but not to the parent debtor. This Article claims that the university is never the initial transferee of tuition dollars. Rather, the student is. Where the university has no knowledge of parent insolvency, the university can count educating the student as a good faith transfer for value, thus immunizing the university from liability. The unpleasant side effect is that the student is liable as the initial transferee of a fraudulent transfer, and this liability is not dischargeable should the adult student seek refuge in bankruptcy.

Fraudulent acts are as varied as fish in the sea.[1]

Parents frequently cover the tuition expense of their adult children. Sometimes they do so when insolvent.

Bankruptcy trustees have started to claim that the colleges and graduate schools that receive tuition from insolvent parents are fraudulent transferees in the parents' bankruptcy proceeding.[2] Tuition payments can be sizable—six-figure numbers stretching over a few years, in some cases.[3]

Until recently, the issue has been whether the school gives value directly to the parents when their adult children are elevated to the determination of thinking reason.[4] Some courts have found that the insolvent parent receives a reasonably equivalent value. Accordingly, no fraudulent transfer occurs when the insolvent parent pays the tuition bill.[5] Other courts have found no benefit to

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1 *In re* Kaiser, 722 F.2d 1574, 1583 (2d Cir. 1983).

2 *See* Katy Stech, *Bankruptcy Trustees Claw Back College Tuition Paid for Filers' Kids*, WALL ST. J. (May 5, 2015), https://www.wsj.com/articles/bankruptcy-trustees-claw-back-college-tuition-paid-for-filers-kids-1430869820. *See generally* Derek A. Huish, Note, *Clawing Back Tuition Payments in Bankruptcy: Looking to Ancient and Recent History to Define the Future*, 104 IOWA L. REV. 2151, 2158 (2019) (reporting on 152 tuition cases, all but one instigated since 2006).

3 *See, e.g.*, Pergament v. Hofstra Univ. (*In re* Adamo), 582 B.R. 267, 269 (Bankr. E.D.N.Y. 2018), *rev'd*, 595 B.R. 6 (E.D.N.Y. 2019) (college sued for $121,388).

4 *See* GEORG WILHELM FRIEDRICH HEGEL, HEGEL'S SCIENCE OF LOGIC 123 (A.V. Miller trans., Prometheus Books 1969) (1812) ("The *determination* of man is thinking reason").

5 The leading case is Shearer v. Oberdick (*In re* Oberdick), 490 B.R. 687 (Bankr. W.D. Pa. 2013).

the parent.[6] Accordingly, the schools must return tuition dollars to the parent's bankruptcy trustee.

Recently, the district court in *Pergament v. Brooklyn Law School*[7] assumed that tuition payments by an insolvent parent are fraudulent transfers. But it outlined a legal fiction under which the school may or may not be liable to the bankruptcy trustee of the parent. According to this fiction, when a school takes tuition in advance of fall registration and promises a refund if the student does not register, the school is a "mere conduit" of the tuition and therefore not a transferee of the tuition dollars. Under this fiction, the adult child becomes the initial transferee of the tuition dollars, not the school. Later, when the school delivers an education, the school is a transferee of the student's dollars. If the school in good faith later delivers the education, the school is a transferee of fraudulently transferred tuition dollars, but it avoids liability by virtue of the bona fide transfer defense in Bankruptcy Code § 550(b)(1). Under § 550(b)(1), the bankruptcy trustee may not recover from "a transferee that takes for value, including satisfaction . . . of a present . . . debt, in good faith, and without knowledge of the voidability of the transfer avoided . . . . "[8]

Weirdly, under the *Brooklyn Law School* reasoning, if tuition payments are overdue when the education commences, the school is the initial transferee of the tuition dollars. The § 550(b)(1) defense is not available to "initial transferees."[9] The university's only defense is provided by § 548(c): a transferee of a transfer fraudulent under § 548(a) that "takes for value and in good faith . . . may retain any interest transferred . . . to the extent that such transferee . . . *gave value to the debtor* in exchange . . . ."[10] As a result, the school can defend itself only by proving that it gave value directly to the insolvent parent. If the school gives value to the student but not to the parent, the school has received a fraudulent transfer and so must regurgitate tuition to the parent's bankruptcy trustee.

Under the *Brooklyn Law School* test, *timing* determines whether a school is the initial transferee of the *student* and thus the transferee of a transferee of the bankrupt *parent* (no liability), or whether the school is the initial transferee of

6 The leading case is DeGiacomo v. Sacred Heart Univ., Inc. (*In re* Palladino), 942 F.3d 55 (1st Cir. 2019).

7 Pergament v. Brooklyn Law Sch., 595 B.R. 6, 18 (E.D.N.Y. 2019).

8 11 U.S.C. § 550(b)(1) (2019).

9 § 550. The defense applies only if the trustee proceeds under § 550(a)(2). Subsection (a)(2) covers "any immediate or mediate transferee of such initial transferee."

10 11 U.S.C. § 548(c) (2019) (emphasis added).

the *parent* (strict liability).[11] If payment precedes registration day, the school is safe. If payment occurs after registration day, the school must disgorge:

> Whether the schools exercise dominion and control over tuition payments immediately upon receipt thus depends on when each particular payment is made . . . . [I]n the case of any tuition paid early enough that the recipient school would have been obligated to refund it to the student if he or she then withdrew, the school must be classified as a mere conduit and the student an initial transferee, regardless of whether the student actually withdrew from school. But as for tuition paid so late that the student could never have had any right to obtain it, even had he or she withdrawn from school immediately, the school had dominion and control from the outset and thus is properly considered the initial transferee.[12]

How could the district court in *Brooklyn* end up articulating such an absurd rule? The answer is that the court relied on *Bonded Financial Services v. European American Bank*,[13] the leading case in tripartite fraudulent transfers cases. In such cases, a debtor (whom I shall call *D*) wishes to enrich a third party (*X*). *D* does so by sending funds to a creditor of *X* (C_X) or vendor (*V*) of *X*. In the context of tuition, *D* is the parent, *X* is an adult child, and *V* is an institution of higher learning. If *D* is delinquent on tuition payments, the school is C_X.

In my view, the *Bonded* court missed a major point about tripartite fraudulent transfer cases. According to this missed point, subrogation and agency doctrines identify the child as the initial transferee of the fraudulent transfer in all cases.[14] The educational institution therefore either gives clear value to the parent (subrogation) or the parent gives the tuition to the child and subsequently, as agent of the child, pays the child's tuition dollars to the child's school. In such case, the school bestows value on the child (not the parent). If the school is in good faith—if the school has no knowledge that the parent is insolvent—the school has a good faith transferee defense that prevents school liability to the parent's bankruptcy trustee.[15]

This Article proposes that good faith schools are never liable for fraudulent transfers when they accept checks from an insolvent parent of an adult student. In pursuit of this proposition, Part I of this Article briefly states what a fraudulent

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[11] *See* Mangan v. Univ. of Conn. (*In re* Hamadi), 597 B.R. 67, 73 (Bankr. D. Conn. 2019) ("timing is everything").

[12] Pergament v. Brooklyn Law Sch., 595 B.R. 6, 11 (E.D.N.Y. 2019).

[13] Bonded Fin. Servs. v. European Am. Bank, 838 F.2d 890 (7th Cir. 1988).

[14] David Gray Carlson, *Mere Conduit*, 93 AM. BANKR. L.J. 475 (2019).

[15] *See* 11 U.S.C. § 550(b)(1) (2019).

transfer is, and how a bankruptcy trustee of the parent is entitled to recover it from an initial transferee or transferee of a transferee.

Part II describes tripartite fraudulent transfer cases, where an insolvent debtor conveys funds to a creditor or vendor of a person the debtor wishes to enrich. It is a bizarre and indefensible aspect of the Bankruptcy Code that a good faith initial transferee that bestows value on a third party is absolutely liable for the fraudulent transfer. A transferee of a transferee, however, is defended by such bestowal. The statutory wreckage, irrational and indefensible, can be rendered harmless through the doctrines of subrogation and agency.

Part III reviews the "mere conduit" fiction employed in the *Brooklyn Law School* case and finds it analytically incorrect. Schools receive tuition from the student, even when the insolvent parent writes the tuition check. The school's *always* the transferee of a transferee.

Part IV warns that, if indeed tuition is a fraudulent transfer, and if schools are defended as good faith bestowers of value, then the adult student has received a fraudulent transfer by the very fact of being educated. Worse, if the adult student is driven into bankruptcy by the bankruptcy trustee of the parent, discharge of that obligation could be denied to the student under the recent case of *Husky International Electronics v. Ritz*.[16] Even if this is not the case, receipt of a fraudulent transfer means that the student has received a "student loan," as the Bankruptcy Code defines that term, and student loans are not dischargeable unless repayment constitutes an undue hardship on the student.[17] Letting the university off the hook implies that the student received the fraudulent transfer, and for this liability there can be no bankruptcy discharge.

I. FRAUDULENT TRANSFERS

It is my contention that, if the underlying property regime implied by fraudulent transfer law is carefully analyzed, schools would rarely be liable simply because a parent paid the tuition bill of an adult child. If the school has no knowledge of the parent's insolvency, the school is a bona fide transferee for value and therefore has the defense against liability spelled out in Bankruptcy Code § 550(b)(1).[18]

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[16] Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1589 (2016).

[17] 11 U.S.C. § 523(a)(8) (2019).

[18] *See infra* text accompanying notes 116–48.

Fraudulent transfer law emanates from state law, but the Bankruptcy Code also governs fraudulent transfers quite independently of state law. Furthermore, the Uniform Fraudulent Transfer Act (enacted in most states) imports purely federal ideas (some of which are regrettable) back into state law. Thanks to the UFTA, serious errors of legislative judgment in the Bankruptcy Code are now present in state law.

A. *State Law*

In the classic fraudulent transfer, a debtor (*D*) makes an absolute transfer of property to a transferee (*X*) with the intent of preventing *D*'s creditors from getting it. According to the time-honored phrase in the Uniform Fraudulent Transfer Act (UFTA), inherited from the Act of Elizabeth,[19] *D* conveys to *X* with the "actual" intent to "delay, hinder or defraud creditors."[20] When this intent is present, it doesn't matter whether *D* was solvent at the time of the conveyance or whether *D* received value in return. If *D*'s bad intent is present, *D*'s creditor (C_D) may obtain a remedy with regard to the very property that *D* conveyed to *X*. Passing over the considerable controversy that exists with regard to fraudulent transfer remedies,[21] it suffices to say that C_D may obtain a judicial lien on the precise property that *D* has conveyed to *X*. At least this was how the matter stood in Elizabethan England.

Fraudulent transfer law used to be a strictly *in rem* theory, with the proviso that if *X* breached her fiduciary duty to preserve the property for the creditors of *D*, *X* was guilty of the tort of conversion or breach of trust, which could generate a money judgment.[22] The UFTA adds that C_D is absolutely entitled to a money judgment "for the value of the asset transferred."[23] Thus, the UFTA, in stark contrast to its predecessor, the Uniform Fraudulent Conveyance Act (UFCA), moves fraudulent transfer from an in rem concept to an in personam tort idea.[24]

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[19] *See* Act Against Fraudulent Deeds, Gifts, etc. 1571, 13 Eliz. c. 5 (Eng.).

[20] UNIF. FRAUDULENT TRANSFER ACT § 4(a)(1) (UNIF. LAW COMM'N 1984).

[21] I cover these controversies in David Gray Carlson, *The Logical Structure of Fraudulent Transfers and Equitable Subordination*, 45 WM. & MARY L. REV. 157, 165–95 (2003).

[22] *See* Patrick J. Glackin, Note, *Lease Terminations as Fraudulent Transfers: Reconciling Bankruptcy Code Section 548 and 365(c)(3)*, 39 CARDOZO L. REV. 2368, 2372 (2018); RESTATEMENT (SECOND) OF TORTS § 222A(1) (AM. LAW INST. 1965) ("Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.").

[23] UNIF. FRAUDULENT TRANSFERS ACT § 8(b) (UNIF. LAW COMM'N 1984).

[24] This has led to the conclusion that the UFTA authorizes punitive damages against the transferor or the transferee. Klein v. Weidner, 729 F.3d 280 (3d Cir. 2013); SE Prop. Holdings, LLC v. Judkins, No. 1:17-CV-00413-TH-B 5666, 2019 U.S. Dist. LEXIS 5666 (S.D. Ala. Jan. 11, 2019). DFS Secured Healthcare Receivables Trust v. Caregivers Great Lakes, Inc., 384 F.3d 338 (7th Cir. 2004) (issue certified to Indiana Supreme Court).

If *D* has fraudulently transferred to *X*, *X* holds the property received for the creditors of *D*. In addition, *X* has power to sell good title (free of C_D) to a bona fide transferee for value. According to UFTA § 8(a), a transfer "is not voidable under Section 4(a)(1) against a person who took in good faith and for a reasonably equivalent value . . . ." The defense implies that, when *D* conveys to *X* with intent to hinder, delay, or defraud C_D, *X* holds a voidable title to the property conveyed.[25] One may say with accuracy that *X* holds the conveyance in trust for C_D and the other creditors of *D*.[26]

The preceding paragraphs describe the so-called *actual* fraudulent transfers. Long ago, the courts and legislators found the mental fact of intent to hinder, delay, or defraud difficult to administer. *D* could usually spin a tale in which the conveyance was motivated by some incentive other than the desire to hinder creditors.[27] Therefore, the UFCA of 1918 introduced the concept of the "constructive" fraudulent transfer. With regard to such transfers,[28] it was no longer necessary for creditors of *D* to prove what *D* actually intended. If *D* was insolvent[29] (or suffered some proxy for insolvency),[30] and if *D* transferred property to *X* without receiving reasonably equivalent value in return, the conveyance was deemed to be a fraud on creditors.[31] Basically, a constructive

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Classically this was unthinkable.

[25] *See* Kenneth C. Kettering, *The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act*, 70 BUS. LAW. 777, 819 (2015) ("the title received by the transferee in a transfer voidable under the UFTA is ordinarily voidable, and [UFTA §] 8(a) can be viewed as similarly wiping away that flaw in title if the property is taken by a good-faith purchaser for value.").

[26] *E.g.*, Bill Voorhees Co. v. R & S Camper Sales, Inc., 605 F.2d 888, 893 (5th Cir. 1979); First Natl. Bank v. Love, 167 So. 703, 705 (Ala. 1936); Buck v. Voreis, 89 Ind. 116, 117 (Ind. 1883).

[27] *See* Jones v. Orton (*In re* Orton), Case No. 3:17-bk-1242-JAF, 2018 Bankr. LEXIS 904, at *6 (Bankr. M.D. Fla. Mar. 27, 2018) (gift of car to daughter not an actual fraud on creditors because debtors had a moral obligation to help their daughter). To combat these proof difficulties, courts long ago began to identify "badges of fraud." *See* Twyne's Case (1601) 76 Eng. Rep. 809, 810–11. Eleven of these badges are codified in UNIF. FRAUDULENT TRANSFER ACT § 4(b) (UNIF. LAW COMM'N 1984).

[28] *See generally* CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 423–34 (4th ed. 1997) ("a watershed in the evolution of fraudulent transfer law"). For the law on constructive fraudulent transfer prior to the UFCA, *see generally* Kenneth C. Kettering, *Securitization and Its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553, 1608–20 (2008); John C. McCoid III, *Constructively Fraudulent Conveyances: Transfers for Inadequate Consideration*, 62 TEX. L. REV. 639, 652–56 (1983).

[29] *See* UNIF. FRAUDULENT TRANSFER ACT § 5(a) (UNIF. LAW COMM'N 1984).

[30] These proxies include: (i) was engaged or was about to engage in a business or transaction for which remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due. UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2) (UNIF. LAW COMM'N 1984).

[31] *See generally* Kenneth C. Kettering, *Codifying a Choice of Law Rule for Fraudulent Transfer: A Memorandum to the Uniform Law Commission*, 19 AM. BANKR. INST. L. REV. 319, 357 (2011); Marie T. Reilly, *A Search for Reason in "Reasonably Equivalent Value" After* BFP v. Resolution Trust Corp., 13 AM. BANKR. INST. L. REV. 261, 264–65 (2005).

fraudulent transfer is a "gift" by insolvent *D* to *X*. A constructive fraudulent transfer, however, may also be an *actual* fraudulent transfer, where *D* actually did intend to hinder, delay, or defraud creditors. The two concepts potentially overlap each other.[32]

Since our subject is tuition paid by *D* to *X*'s school, we shall largely confine our discussion to constructive fraudulent transfers. We shall assume *D* is insolvent at the time *D* pays tuition to *X*'s school. We shall assume that *D* does not ordinarily intend to spite creditors by sending *X* to school.

When the operative theory is constructive fraudulent transfer (or gift), *D*'s actual intent is supposedly[33] irrelevant. Instead, the focus turns to whether *D* received a reasonably equivalent value. This is at least what the UFTA requires. According to UFTA § 3(a):

> Value is given for a transfer or an obligation if, in exchange for the transfer . . . , property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.[34]

Notably, in the context of tuition, a school must show that it gave *property* (to somebody) or satisfied antecedent debt (of somebody). Is education *property*? The answer is decidedly yes. Education is a *service* delivered pursuant to a contract in exchange for a price. A student who complies with university rules has a property right to attend the university. Education is a "wasting asset."[35] Like good deeds, education is devoured as fast as it is made, forgot soon as done.[36]

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[32] *See* UNIF. FRAUDULENT CONVEYANCE ACT § 7 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1918) ("Every conveyance made . . . with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present of future creditors, is fraudulent as to both present and future creditors.").

[33] *See* Jack F. Williams, *The Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercorporate Guaranties: Fraudulent Transfer Law as a Fuzzy System*, 15 CARDOZO L. REV. 1403, 1413–14, 1424–25 (1994) (for the view that morality sneaks in through the doorway of reasonably equivalent value). *See also* Jack F. Williams, *Revisiting the Proper Limits of Fraudulent Transfer Law*, 8 EMORY BANKR. DEV. J. 55, 85 (1991) ("good faith in one variety or another is still very much alive in the reasonably equivalent value determination, not as proof of the prima facie case, but as a badge of fair value.").

[34] UNIF. FRAUDULENT TRANSFER ACT § 3(a) (UNIF. LAW COMM'N 1984).

[35] Drewes v. FM Da-Sota Elevator Co. (*In re* Da-Sota Elevator Co.), 939 F.2d 654, 655 n.2 (8th Cir. 1991) (contracts for maintenance a "sort of wasting asset"). *See* Frank R. Kennedy, *Reception of the Uniform Fraudulent Transfer Act*, 43 S.C. L. REV. 655, 661–62 (1992).

[36] *See* WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA act 3, sc. 3 ("Those scraps are good deeds past; which are devour'd As fast as they are made, forgot as soon As done . . . .").

The issue of whether services constitute value under the UFTA has bothered some scholars. In 1987, Professor Paul Shupack worried that the UFTA definition of value excluded the tendering of services:

> The question that the UFTA leaves unanswered is whether someone who supplies services to the debtor in exchange for an asset gives value. The drafters' policy statement would suggest that, in the event the services provided had utility for the creditors as well as the debtor, the services should be recognized as value. The statute, however, provides a strong counter to that argument. The statute states that for value to be given, "property" must be transferred. If the list of examples in the statutory language is to be read as limiting the meaning of the word value, then the limitation implied by "property" applies to physical or intangible items that can be transferred from one person to another. The difficulty that the drafters have created here comes directly from their having offered examples and a policy statement instead of a definition for what is, after all, one of the central concepts underlying the law of fraudulent transfer.[37]

If, however, we recognize that services are the proceeds of contract and that contracts proceeds are property, this concern disappears.[38] I proffer this opinion in spite of Bankruptcy Code § 523(a)(2), which renders nondischargeable debts for:

> money, *property*, *services*, or an extension . . . of credit to the extent obtained by—(A) . . . actual fraud . . . .[39]

Here, property is contrasted with services, as if they are two different things. But we should view services as the ghost of property past.[40]

One way to put this point is that value is considered from the debtor's standpoint, not the creditor's.[41] From the creditor's point of view, anything a

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[37] Pal M. Shupack, Confusion in Policy and Language in the Uniform Fraudulent Transfer Act, 9 CARDOZO L. REV. 811, 833 (1987).

[38] Janvey v. Golf Channel, Inc. 487 S.W.3d 560, 575 (Tex. 2016) ("economic benefit to the debtor does not demand consideration that replaces the transferred property with money or something else tangible or leviable that can be sold to satisfy the debtor's creditors' claims").

[39] 11 U.S.C. § 523(a)(2) (2019) (emphasis added).

[40] According to Derek Huish: "But courts have also held that forms of recreation and entertainment that are uncommon or wasteful, even gambling, can provide reasonably equivalent value to insolvent debtors. Most people would find it ridiculous that a court could find that an insolvent debtor received reasonably equivalent value through an investment in gambling but not through an investment in their own children's education under the same statutory provision." Derek A. Huish, Note, *Clawing Back Tuition Payments in Bankruptcy: Looking to Ancient and Recent History to Define the Future*, 104 IOWA L. REV. 2151, 2192 (2019).

[41] Daniel Keating, *Bankruptcy, Tithing, and the Pocket-Picking Paradigm of Free Exercise*, 1996 U. ILL. L. REV. 1041, 1051–52 (1996).

vendor *V* conveys to *D* which *D* immediately consumes (a vacation, say, or a restaurant meal) diminishes the debtor's estate to the prejudice of *D*'s creditors. But from the debtor's point of view, *D* receives value when *V* bestows a vacation or a meal on *D*.[42] It is routinely found that *V* is not liable for fraudulent transfer if *V* in good faith sells immediately consumed goods or services to *D*.[43]

Courts, however, sometimes insist upon the creditor's point of view. In the leading case of *Rubin v. Manufacturers Hanover Trust Co.*,[44] the Court allowed value conveyed to third parties to be counted as value to *D*, but "the decisions in fact turn on the statutory purpose of conserving the debtor's estate for the benefit of creditors."[45] A service rendered to *D* by *V* often becomes a fraudulent transfer under this standard.[46]

This controversy between the debtor's perspective and the creditor's perspective is a hugely important unresolved issue in fraudulent transfer doctrine. We shall assume, however, that the debtor's point of view is the appropriate standard, and that *D* does indeed receive value when *V* bestows an instantly consumed asset (such as a service) on *D*.

Since education bestowed is property of *X*, a school has clearly given value to *X*. But the Bankruptcy Code requires that value be given to *D* on the theory (to be challenged here) that *D* directly transfers tuition money to the school. According to § 548(c):

> a transferee . . . of such a [fraudulent] transfer . . . that takes for value and in good faith has a lien on or may retain any interest

[42] Balabar-Strauss v. Sixty-Five Brokers (*In re* Churchill Mortg. Inv. Corp.), 256 B.R. 664, 681 (Bankr. S.D.N.Y. 2000).

[43] Professor Zywicki also suggests that the debtor's standpoint is justified because the transferee bestows the service on the debtor and has relied on the consideration received to compensate for the service. Todd J. Zywicki, *Rewrite the Bankruptcy Laws, Not the Scriptures: Protecting a Bankruptcy Debtor's Right to Tithe*, 1998 WIS. L. REV. 1223, 1243 (1998). Reliance interest as an alternative mode of describing the bona fide transferee defense is just another way of expressing the idea that value should be perceived from the debtor's point of view.

[44] Rubin v. Mfrs. Hanover Tr. Co., 661 F.2d 979 (2d Cir. 1981).

[45] *Id.* at 992; *see also* Warfield v. Byron, 436 F.3d 551, 560 (5th Cir. 2006) ("The primary consideration in analyzing the exchange of value for any transfer is the degree to which the transferor's net worth is preserved.").

[46] DeGiacomo v. Sacred Heart Univ., Inc. (*In re* Palladino), 942 F.3d 55 (1st Cir. 2019). Professor Kettering remarks: "Fraudulent transfer law balances the interests of the debtor's creditors in avoiding a transfer against the interest of the debtor's transferee, against whom the action lies and who bears the burden of disgorging the transferred property or its value if the action is successful. The interest of the debtor's transferee surprisingly often has been forgotten in discourse on fraudulent transfer law, but to ignore that interest is an error that invalidates the discourse." Kettering, *Choice of Law*, *supra* note 31, at 350.

> transferred . . . to the extent that such transferee . . . gave value *to the debtor* in exchange for such transfer . . . .[47]

The parallel idea in the UFTA is difficult to locate, but it is definitely there. That value must be given *to the debtor* is located in UFTA § 5(a):

> A transfer made . . . by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made . . . if the debtor made the transfer . . . without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer . . . .[48]

In this formulation, it is the *debtor* that must receive value in exchange for the transfer. If the debtor has *not* received value (but some third party has), the transferee is liable.[49]

That the bona fide transferee defense depends on value being bestowed *on the debtor* (as opposed to a third party) is almost certainly the result of legislative error. The UFCA protected bona fide purchasers generally, regardless of who received the value. Thus, UFCA § 9 authorized avoidance "as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase . . . ."[50] Nothing here requires that fair consideration be received *by the debtor*. Since the Bankruptcy Act of 1898 enacted the UFCA as the trustee's own right to pursue fraudulent transfers, the Bankruptcy Act also did not require that value be received by the debtor.[51] This requirement stems from Bankruptcy Code § 548(c) and was probably introduced unintentionally.[52] Nevertheless, it is now accepted that the initial transferee of a fraudulent transfer has no defense even if the transferee in good faith bestowed value on a third party. This distinction makes vital the proper definition of "initial transferee."

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[47] 11 U.S.C. § 548(c) (2019) (emphasis added).

[48] UNIF. FRAUDULENT TRANSFER ACT § 3(a) (UNIF. LAW COMM'N 1984).

[49] UNIF. VOIDABLE TRANSFERS ACT § 8(b)(1) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014).

[50] UNIF. FRAUDULENT CONVEYANCE ACT § 9 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1918).

[51] Nelson Act of 1898, ch. 541, § 67(c)(3), 30 Stat. 544, 564 (1898) (generally dispersed throughout Title 11). *See* Nat'l Bankr. Conf. Analysis of H.R. 12889, 74th Cong., 2d Sess. 214 (Comm. Print 1936) ("We have condensed the provisions of the Uniform Fraudulent Conveyance Act, retaining its substance and, as far as possible, its language."). The state of Washington has wisely corrected this error in its nonuniform amendment to the UFTA. WASH. REV. CODE ANN. § 19.40.081(1) ("whether or not [the value was] given to the debtor"). *See* Ralph Brubaker, *On Constructively Fraudulent Transfers and Good Faith Transferees: The Case of a Debtor-Parent's Payment of an Adult Child's College Tuition*, 39 BANKR. L. LETTER 1, 8 (May 2019) (discussing Washington's amendment to the UFTA).

[52] David Gray Carlson, *Leveraged Buyouts in Bankruptcy*, 20 GA. L. REV. 73, 86 (1985).

An important question, then, is whether a benefit to *X* (the student) is also a benefit to *D* (the parent). If *D* receives a reasonably equivalent value, then there is no fraudulent transfer. Both school and student escape the wrath of the bankruptcy courts. I shall soon problematize whether *D* transfers to the school or whether *D* transfers to *X* who (through the agency of *D*) transfers *X*'s to the school. I shall also point out that, if the school is a bona fide transferee of services to *X*, then education is *X*'s property, and the creditors of *D* can recover the value of this "property" from *X*.[53] In short, it makes a difference whether the student *X* or the school is the initial transferee of the tuition money. If all value is received by *X* and none by *D*, then there *is* a fraudulent transfer and the controversy becomes who is the proper defendant—*X* or the school. For the moment, I observe that if *D* receives value from the school because *X* is educated, then there is no fraudulent transfer in the first place. Value to *D* serves to get *both X* and the school off the hook.[54] If value is received by *X* alone and not by *D*, then it follows that one of the defendants (*X* or the school) is liable to the creditors of *D*.

Before we consider whether education of *X* (*D*'s adult child) bestows value on *D* when *D* covers *X*'s tuition expenses, I review an analogous controversy from twenty years ago—whether church tithing is a fraudulent transfer. In the 1990s, the vogue suddenly sprang up amongst bankruptcy trustees to recover church tithings. Mostly trustees won these cases. Courts failed to find the "economic" value bestowed by the church on *D*. In short, churchly benefit is not the same as services rendered pursuant to a contract.[55]

Tithing cases differ structurally from tuition cases. Tithing cases are bipartite. In a tithing case, *D* gives a charitable contribution to *X Church* and the bankruptcy trustee brings suit against *X Church*. The issue was whether *D* received "property" from the church. This proved hard to find when the church was not contractually bound to do anything in exchange for the tithe. In contrast, tuition cases are tripartite. In a tuition case, *D* pays tuition to a school to make a gift to the adult child, *X*. Here, the inquiry is whether *D* received a reasonably equivalent value because a third party (*X*) was educated.

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53 *In re* Sterman, 594 B.R. 229, 236 (Bankr. S.D.N.Y. 2018). *See* Banner v. Lindsay (*In re* Lindsay), 2010 Bankr. LEXIS 1554, at *18–19 (Bankr. S.D.N.Y. May 4, 2010).

54 Gold v. Marquette Univ. (*In re* Leonard), 454 B.R. 444, 454–55 (Bankr. E.D. Mich. 2011). *But see* Lo v. Lee, 24 Cal. App. 5th 1065, 1074–75 (Cal. Ct. App. 2018) (where *D* received value because *X* was educated, *X* still might be liable if *X* received a benefit from the education).

55 Zywicki, *supra* note 43, at 1233–44.

The tithing cases inspired Professor Jack Williams to suggest that implicit in constructive fraudulent transfer doctrine is the concept of honest "ordinary course" conduct.[56] Thus, if a debtor customarily tithes, the creditors take this as the background reality of the debtor. Creditors cannot then obtain fraudulent transfer judgments against the churches, so long as tithing is in *D*'s ordinary course of business.[57] Such a view recognizes that constructive fraudulent transfer law is an ancient proxy for specific intent to hinder creditors. That is, the purpose of ordinary course tithing is not to hinder creditors; therefore, there is no actual fraud and neither should there be constructive fraud, since constructive fraud is just a proxy for actual fraud. Thus, it is silently agreed that trustees should not seek to recover modest Christmas gifts to children, or tips in restaurants or taxicabs, because such giving is in the ordinary course.[58] Such a notion, if tenable, would aid churches in tithing cases and schools in tuition cases. Admittedly, the notion cannot be squared with the definition of value or consideration, which is tied to receipt of property.[59]

As churches began to lose tithing cases, Congress responded with the Religious Liberty and Charitable Donation Protection Act of 1998 to shield churches from fraudulent transfer liability. Such legislation confesses that tithing violated the tenets of constructive fraudulent transfer law.[60]

As in the tithing cases, courts are quite divided over the "culturally and socially charged issue" of whether *D* obtains value when her adult child *X* gets educated.[61]

There is no division, however, when *X* is a minor. In such cases, courts find not just a legal but a moral duty in *D* to pay the tuition bill. In *Geltzer v. Xavarian*

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[56] Williams, *supra* note 33, at 1414–16.

[57] This is captured in Professor Glenn's estimate that "the real test of a fraudulent conveyance . . . is the unjust diminution of the debtor's estate." 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 195 at 348 (rev. ed. 1940). *See* Orr v. Kinderhill Corp., 991 F.2d 31, 36 (2d Cir. 1993). Professor Williams' vision can be found in the legislative cure to the tithing cases. According to Bankruptcy Code § 548(a)(2)(A), a tithe cannot be an actual fraudulent transfer "if the transfer was consistent with the practices of the debtor in making charitable contributions." 11 U.S.C. § 548(a)(2)(B) (2019). On this legislative reform, *see infra* text accompanying notes 77–93.

[58] *But see* Keating, *supra* note 41, at 1051–52 ("the drafters of fraudulent conveyance law have drawn the line at reasonably equivalent value received by (and from the perspective of) the debtor. This means that the insolvent debtor is still free to engage in most transactions, except those that amount to a gift by the debtor. Thus, though it may be small comfort to bankrupt tithers, a Mother's Day gift given while insolvent is just as recoverable by the trustee as a tither's donation to a church.").

[59] Zywicki, *supra* note 43, at 1244–56.

[60] Chorches v. Catholic Univ. of Am., No. 3:16-cv-1962 (MPS), 2018 U.S. Dist. LEXIS 116919, at *9–10 (D. Conn. July 13, 2018).

[61] *In re* Sterman, 594 B.R. 229, 236 (Bankr. S.D.N.Y. 2018).

High School (*In re Akanmu*),[62] the court ruled that the *D*s received a direct benefit from tuition paid for their minor children. One benefit was that the *D*s were obliged by New York law to educate their children, and actually doing so discharged this legal obligation.[63] The fact that cheaper modes of education (*i.e.*, public school) were available was "irrelevant."[64] The *Akanmu* court feared a slippery slope: if tuition could be recovered because it was too high and not strictly necessary, so could any vendor of goods used by the children.[65] In sum, the *Akanmu* court found a confluence of interest between *D* and their minor children such that *D* and their children "must be viewed as a single economic unit for these purposes."[66]

When *X* is an adult, courts are divided as to whether *D* has received a reasonably equivalent value.

Some courts have declared that *D* does receive a reasonably equivalent value when a school educates *X*. Most prominently, in *DeGiacomo v. Sacred Heart University, Inc. (In re Palladino)*,[67] the court acquitted a college of fraudulent transfer because the insolvent parent received value in return. It expressly found that if *X* was rendered financially self-sufficient by education, this was an economic benefit to *D*.

> Often a parent will not know at the time she pays a bill, whether for herself or for her child, if the medical procedure, the music lesson, or the college fee will turn out to have been "worth it." But future outcome cannot be the standard for determining whether one receives reasonably equivalent value at the time of a payment. A parent can reasonably assume that paying for a child to obtain an undergraduate degree will enhance the financial well-being of the child which in turn will confer an economic benefit on the parent. This, it seems to me,

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62 Geltzer v. Zavarian High Sch. (*In re* Akanmu), 502 B.R. 124 (Bankr. E.D.N.Y. 2013).

63 *Id.* at 132; *see* N.Y. EDUC. LAW § 3212(2)(d) (2005).

64 *Geltzer*, 502 B.R. at 132, 135. BAPCPA's means testing is hard and stingy when it comes to tuition for minors. David Gray Carlson, *Means Testing: Bankruptcy's Failed Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 298 (2007). But this attitude does not spill over to fraudulent transfer litigation.

65 *Geltzer*, 502 B.R. at 132 ("To hold otherwise would permit a trustee to scrutinize debtors' expenditures for the children's benefit, and seek to recover from the vendor if, in the trustee's judgment, the expenditure was not reasonably necessary, or if the good or service could have been obtained at a lower price, or at no cost, elsewhere.").

66 *Id.* at 136–37. The court goes overboard in accusing the trustee of wanting veto power over expenditures for the family. *Id.* at 132. For other cases finding no fraudulent transfer in case of tuition for minors; *see* McClarty v. University Liggett Sch. (*In re* Karolak), Case No. 12-61378, 2013 Bankr. LEXIS 3694, at *3–9 (Bankr. E.D. Mich. Sept. 6, 2013); *In re* Sterman, 594 B.R. 229, 239 (Bankr. S.D.N.Y. 2018).

67 DeGiacomo v. Sacred Heart Univ., Inc. (*In re* Palladino), 556 B.R. 10 (Bankr. D. Mass. 2016), *rev'd*, 942 F.3d 55 (1st Cir. 2019).

> constitutes a *quid pro quo* that is reasonable and reasonable equivalence is all that is required.[68]

Channeling Professor Williams's point, the court in *Shearer v. Oberdick* (*In re Oberdick*)[69] found no fraudulent transfer: "there is something of a societal expectation that parents will assist with such expense if they are able to do so."[70]

A slight majority of courts, however, finds that the parent receives no value when an adult child is educated.[71] Just before press time, the First Circuit Court of Appeals, reversing in *DeGiacomo v. Sacred Heart University, Inc., (In re Palladino)*,[72] ruled that "the answer is straightforward. The tuition payments here depleted the estate and furnished nothing of direct value to the creditors who are the central concern of [§ 548(a)]."[73]

In *Gold v. Marquette University* (*In re Leonard*),[74] the school claimed *D* received peace of mind because *X* would have the opportunities in life that a

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68 *Id.* at 15. In *Palladino*, *D* used Ponzi funds to pay tuition. Ponzi funds can be viewed as being held in constructive trust for the dupes and victims of the scheme. Thus, it is tempting to think that there were no fraudulent transfers in the case. Rather, the university simply received trust funds of some identifiable victim. But, as a bona fide purchaser of trust funds, the university took them free and clear of the rights of the victims and, in any case, the bankruptcy trustee has no right to enforce the beneficial interest of constructive trust on behalf of the victims. *Id.* at 14–15. On this issue, *see* David Gray Carlson, *Fraudulent Transfers and Constructive Trusts: When Worlds Collide*, 103 MARQ. L. REV. 365 (2020). The *Palladino* court also refused to use the Ponzi presumption that any payment made to further the scheme is an intentional (not constructive) fraudulent transfer. *In re Palladino*, 556 B.R. at 13–14.

69 Shearer v. Oberdick (*In re* Oberdick), 490 B.R. 687 (Bankr. W.D. Pa. 2013).

70 *Id.* at 712. *See* Lo v. Lee, 24 Cal. App. 5th 1065 (Cal. Ct. App. 2018). The *Oberdick* case is bizarre. It involves a deposit account with a bank that was held in tenancy by the entirety under Pennsylvania law. In Pennsylvania, the marital entity is considered a separate legal entity from either husband or wife. The theory of the case was that *D* (husband) deposited wages in the deposit account. Under Pennsylvania law, ninety percent of wages are exempt from garnishment. Nevertheless, 100% of the deposits were held to be fraudulent transfers from *D* to the marital entity. *D* and his spouse (*W*) made many prepetition withdrawals. This made *D* and *W* transferees of a transferee. *D* had a bankruptcy discharge, which should have terminated *D*'s liability for receiving and dissipating marital entity funds. The discharge was held not to apply on inscrutable reasoning. Then, out of nowhere, *D* and *W* were accorded a defense if the funds they received from the marital entity were used on necessities, as opposed to luxuries. Such a defense has no relation to any fraudulent transfer I am familiar with. It was in the context of the "necessities defense" the court made its observation about college education. Thus, rather than ruling that the parents received reasonably equivalent value in exchange for tuition, the court was really ruling that college education is not a luxury. Finally, the court identifies some luxury spending, but it allowed these amounts to be offset by "necessities" spending. Thus, *D* and *W* escaped liability altogether, even though they spent some prepetition dollars on luxuries. *Oberdick*, 490 B.R. at 698–714. "Necessities" may refer to the fact that wages are ninety percent exempt, except to the extent the wages are not necessary for upkeep. *See generally* Shearer v. Titus (*In re* Titus), 916 F.3d 293 (3d Cir. 2019).

71 Huish, *supra* note 2, at 2184; Gold v. Marquette Univ. (*In re* Leonard), 454 B.R. 444 (Bankr. E.D. Mich. 2011).

72 *In re Palladino*, 942 F.3d 55.

73 *Id.* at *6–*7.

74 *In re Leonard*, 454 B.R. 444.

college education supposedly represents. Noting that the definition of value requires *D* to receive property or satisfaction of antecedent debt, the court allowed that receipt of value might be indirect—channeled from the school to *X* to *D*, like a bank shot in a game of pool.[75] But the value *D* received must be "(1) an 'economic' benefit; (2) concrete; and (3) quantifiable."[76] Since *D* had no legal obligation to support *X*, *D* received no "value." Peace of mind and moral obligation cut no ice.[77] On the other hand, the court chastised the school for not even trying to quantify these values, leaving open the possibility that if quantification could be achieved, these indirect benefits might be value after all.[78]

B. Legislative Reform

The vogue of suing universities for tuition has been compared with the fad of suing churches for tithings in the 1990s.[79] Mostly the churches lost. As a result, Congress enacted legislation to prevent suits in bankruptcy for constructive fraudulent transfers for charitable contributions for amounts not exceeding "15 percent of the gross annual income for the year in which the transfer of the contribution is made . . . ."[80] For actual fraud cases, no law suits for amounts less than the same fifteen percent can be sustained "if the transfer was consistent with the practices of the debtor in making charitable contributions."[81] Meanwhile, § 544(b)(2) prevents the trustee from subrogating to the state law rights of a creditor against a charity tied to the same fifteen

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75 *See* Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 991–92 (2d Cir. 1981) ("the transaction's benefit to the debtor 'need not be direct; it may come indirectly through benefit to a third person . . . . If the consideration given to the third person has ultimately landed in the debtor's hands, or if the giving of the consideration to the third person otherwise confers an economic benefit upon the debtor, then the debtor's net worth has been preserved . . . .").

76 *In re Leonard*, 454 B.R. at 457 (citing Lisle v. John Wiley & Sons., Inc. (*In re* Wilkinson, 196 F. App'x 337, 342 (6th Cir. 2006)).

77 *See* Chorches v. Catholic Univ. of Am., No. 3:16-cv-1962 (MPS), 2018 U.S. Dist. LEXIS 116919, at *8–10 (D. Conn. July 13, 2018). *See also In re* Sterman, 594 B.R. 229, 236 (Bankr. S.D.N.Y. 2018); Boscarino v. Bd. of Trs. of Conn. State Univer. Sys. (*In re* Knight), Case No. 15-21646 (JJT) 2017 Bankr. LEXIS 3324, at *11 (Bankr. D. Conn. Sept. 29, 2017); Roach v. Skidmore Coll. (*In re* Dunston), 566 B.R. 624, 636–37 (Bankr. S.D. Ga. 2017).

78 *In re Leonard*, 454 B.R. at 459. *But see* Slobodian v. Pa. State Univ. (*In re* Fisher), 575 B.R. 640, 647 (Bankr. M.D. Pa. 2017) (trustee's complaint survived Rule 12(b)(6) dismissal because *D* had the burden to prove that *D* actually realized intangible value in exchange for tuition payments). The court deemed it necessary to find out if *X* has graduated and is gainfully employed. Thus, a bad choice of major might render the tuition payment a fraudulent transfer.

79 *See supra* text accompanying notes 55–60.

80 11 U.S.C. § 548(a)(2)(A) (2019).

81 § 548(a)(2)(B).

percent limit.[82] This section concludes with a remarkable sentence: "Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case."[83] Thus, a creditor might sue a church under state law, but if the debtor files for bankruptcy, the creditor's suit is "preempted"—presumably it disappears.[84]

Some have called for parallel legislation to protect universities from fraudulent transfer liability.[85] Such calls confess that universities are indeed at risk, which the current article denies.

At least one state (Connecticut) has enacted a non-uniform amendment to the UFTA. According to Conn. Gen. Stat. § 52-552i:

> A transfer or obligation is not voidable under subdivision (2) of subsection (a) of section 52-552e or section 52-552f against an institution of higher education, as defined in 20 U.S.C. 1001, if the transfer was made or obligation incurred by a parent or guardian on behalf of a minor or adult child in furtherance of the child's undergraduate education.[86]

Conn. Gen. Stat §§ 52-552e(a)(2) and 52-552f refer to constructive fraudulent transfers. Thus, it is still possible to sue a school for receipt of an actual fraudulent transfer. The statute neglects to protect graduate institutions for tuition received.

The Connecticut reform so far stands alone, and it raises choice of law predicaments in tuition cases.

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[82] *See* Kettering, *UVTA*, *supra* note 25, at 784. On state reforms, *see id.* at 785–90.

[83] 11 U.S.C. § 544(b)(2) (2019).

[84] For criticism of these amendments on technical grounds, *see* Steven Walt, *Generosity in Bankruptcy: The New Place of Charitable Contributions in Fraudulent Conveyance Law*, 32 LOY. L.A. L. REV. 1029 (1999).

[85] Alexis Gebhardt, Comment, *Closing the Loophole: Bankruptcy Trustees Attempt to Claw Back Tuition Payments from Colleges and Universities*, 3 BUS. & BANKR. L.J. 319, 339–46 (2016); Jenna C. MacDonald, Comment, *Out of Reach: Protecting Parental Contributions to Higher Education from Clawback in Bankruptcy*, 34 EMORY BANKR. DEV. J. 243, 245–46 (2017); Andrew Mackenzie, Note, *The Tuition Claw Back Phenomenon: Reasonably Equivalent Value and Parental Tuition Payments*, 2016 COLUM. BUS. L. REV. 924, 949–52 (2016). Derek Huish presents a nuanced reform that would protect undergraduate institutions from liability when it receives a payment more than one year before the parents' bankruptcy or (if "such transfer was consistent with the practices of the debtor") more than six months before bankruptcy. Derek A. Huish, Note, *Clawing Back Tuition Payments in Bankruptcy: Looking to Ancient and Recent History to Define the Future*, 104 IOWA L. REV. 2151, 2198 (2019).

[86] Conn. Gen. Stat. § 52-552i(f) (2017).

Choice of law as applied to fraudulent transfers is an obscure topic that has, happily, been thoroughly reviewed by Professor Kenneth C. Kettering.[87] Professor Kettering reminds us that the *First Restatement of Conflicts of Laws* favored the now-discredited "situs" test.[88] Under this test, where the parent pays for tuition by check, the situs would be where the parent's bank is located. A school will receive the check in the mail, will deposit the check at its local bank, which will send the check through a clearing system. Eventually, the parent's bank honors the check, usually by crediting the account of the presenting bank, which eventually results in the school's bank giving the school a right of withdrawal from the school's deposit account.

Since the *First Restatement*, a "revolution in American choice of law thinking" has swept away the situs test.[89] The *Second Restatement*, considering real property cases, is mealy-mouthed about the situs test which "usually applies" but "on occasion" may not.[90] It says nothing at all about personal property cases. As to real property cases, the *Second Restatement* points to the methodology appropriate to torts, which basically bids a court to find somehow which state has the most significant relationship with the occurrence of the tort.

Finding such standards unsatisfactory, Professor Kettering suggests that the parent's domicile should be the rule in constructive fraudulent transfer cases and also in actual fraud cases involving transfers for less than reasonably equivalent value.[91] This rule, borrowed from Article 9 for hypothecations,[92] has found its way into the Uniform Voidable Transactions Act (UVTA),[93] the latest version of a uniform fraudulent transfer law. The UVTA has been enacted in several states, but not yet in Connecticut.

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87 Kettering, *Choice of Law*, *supra* note 31, at 357.

88 *Id.* at 339 ("The *First Restatement*, issued in 1934, sets forth a simple sharp-edged rule: fraudulent transfer law is determined by the situs at the time of the challenged transfer.").

89 *Id.*

90 *Id.* at 341 (discussion of RESTATEMENT (SECOND) OF CHOICE OF LAW § 145).

91 *Id.* at 357–58. His suggested rule thus lines up with the basic choice-of-law rule in Article 9 of the Uniform Commercial Code. UNIF. COMMERCIAL CODE § 9-301(1) ("while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and priority of a [possessory] security interest in that collateral"). Recall that Article 9 is basically fraudulent transfer legislation, legalizing hypothecations that otherwise would have been struck down by Twyne's Case (1601) 76 Eng. Rep. 809, 810–11. *See* G. Ray Warner, *The Anti-Bankruptcy Act: Revised Article 9 and Bankruptcy*, 9 AM. BANKR. INST. L. REV. 3, 6–9 (2001).

92 U.C.C. § 9-301(1) ("Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral"). In the case of pledges, the law where collateral is located is the choice of law. *Id.* § 9-301(3).

93 UNIF. VOIDABLE TRANSFERS ACT § 10 (UNIF. LAW COMM'N 2014). *See* Kettering, *supra* note 25, at 796–98.

If such a rule were to be applied,[94] Connecticut's statute would protect universities worldwide where the parent lives in Connecticut. On the other hand, Connecticut universities gain no succor where they accept tuition from non-Connecticut parents.

Such a choice-of-law rule indicates that Connecticut's reform will have only spotty application, guaranteeing Connecticut schools protection only when the parent resides in Connecticut.[95] This bleak assessment of the impact of state legislation, coupled with the well-known paralysis in the United States Congress, should motivate finding ways to protect schools from fraudulent transfer liability from within the resources of existing doctrine. I maintain that these resources are available.

C. Federal Bankruptcy Law

So far, we have treated the tuition question as a matter of state law. In fact, tuition litigation most often occurs within the context of bankruptcy litigation. Since the invention of bankruptcy, creditor representatives have been endowed with the power to collect fraudulent transfers made to third parties.[96]

In modern times, a bankruptcy trustee has two different theories to recover a fraudulent transfer. First, the trustee has direct standing to recover fraudulent transfers under Bankruptcy Code § 548(a). Second, under § 544(b), the trustee can assert the rights of an actual creditor who has avoidance rights under state law.[97] The principal difference between the two provisions is the statute of limitations. Under § 548(a), a bankruptcy trustee has a two-year look-back period. Under § 544(b), where the trustee invokes the avoidance rights of some real-life creditor, the trustee is subject to a longer statute of limitations. Under the UFTA, the statute of limitations is four years.[98] In New York, the statute of limitations is six years.[99]

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94 Although Professor Kettering offers his proposal for legislative reform, he remarks: "There is little or nothing to prevent a court from following the approach to choice of law for fraudulent transfer set forth in this paper, if the court finds it sensible. Indeed, there are few subjects on which judges have been more receptive to suggestions from the academic community than choice of law." Kettering, *Choice of Law*, *supra* note 31 at 359.

95 Chorches v. Catholic Univ. of Am., No. 3:16-cv-1964 (MPS), 2018 U.S. Dist. LEXIS 116919, at *20–27 (D. Conn. July 13, 2018) (declining to give Conn. Gen. Stat. § 52-552i retroactive effect).

96 BFP v. Resolution Trust Corp., 511 U.S. 531, 541 (1994); Frank R. Kennedy, *Involuntary Fraudulent Transfers*, 9 CARDOZO L. REV. 531, 541–44 (1987).

97 *In re* Tribune Co. Fraudulent Conveyance Litig., 818 F.3d 98, 113 (2d Cir. 2016) (section 544(b) permits a trustee to "step into the shoes of a creditor under state law and avoid any transfers such a creditor could have avoided.") (quoting Univ. Church v. Geltzer, 463 F.3d 218, 222 n.1 (2d Cir. 2006)).

98 UNIF. FRAUDULENT TRANSFER ACT § 9 (UNIF. LAW COMM'N 1984).

99 N.Y. C.P.L.R. § 213 (MCKINNEY 2019); *In re* Bernard L. Madoff Inv. Sec. LLC, 773 F.3d 411, 416

State law presents a trap for bankruptcy trustees. The UFCA and the UFTA distinguish between future and present creditors. If the trustee relies on insolvency of *D* (and not one of the insolvency proxies), the trustee must locate someone who was a "present" creditor at the time the tuition payment was made.[100] Suppose *D* is bankrupt in 2019 and six years is the relevant statute of limitations. The bankruptcy trustee can recover two years of tuition under § 548(a)(1)(B) without any reference to state law. But under state law, the trustee will have to locate someone who was a creditor in 2013 to capture tuition in the years 2013-16. If such a creditor cannot be located, the trustee can still recover if the trustee locates a creditor who was still a *future* creditor as of 2013. But this requires more than *D*'s insolvency. The trustee must also prove that, in the years 2013-16, *D*:

> (i) [W]as engaged or was about to engage in a business or transaction for which remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> (ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due.[101]

Thus, a creditor whose claim arose in 2018 might be invoked, but the burden of proof on the trustee extends beyond a showing of balance-sheet insolvency in 2013.[102]

The Bankruptcy Code supplements avoidance, as that concept is invoked in § 548(a) and § 544(b). According to § 550(a):

> [T]o the extent that a transfer is avoided under section 544 . . . [or] 548 . . . the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> (2) any immediate or mediate transferee of such initial transferee.[103]

(2d Cir. 2014).

[100] *See* Alan N. Resnick, *Finding the Shoes that Fit: How Derivative is the Trustee's Power to Avoid Fraudulent Conveyances under Section 544(b) of the Bankruptcy Code?*, 31 CARDOZO L. REV. 205, 210 (2009). This distinction between present and future creditors in fraudulent transfer cases relates back to Reade v. Livingston, 3 Johns. Ch. 481 (N.Y. Ch. 1818) (Kent, C.).

[101] UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2) (UNIF. LAW COMM'N 1984).

[102] Resnick, *supra* note 100, at 212.

[103] 11 U.S.C. § 550(a) (2019).

This section uses the word "recover," which is undefined. I take this to be repeating the word "avoid,"[104] as used in §§ 544(b) and 548(a). "Recover" adds nothing, if I am right.[105]

Section 550(a) does add the idea of money judgments against *X*, "if the court so orders." Such an idea is implicit in the idea of avoidance. If *X* (our fraudulent donee) sells the personal property received instead of holding in trust for *D*'s creditors, *X* is guilty of the tort of conversion. *X* has converted the property to her own use and must pay the value of the thing converted at the time of conversion.[106] The reference in § 550(a) to money judgments reiterates this idea.

Most of our difficulties stem from a distinction introduced by § 550(a)—a distinction between the initial transferee and a transferee of a transferee. In the context of fraudulent transfers, the only chance for an initial transferee to defend (putting aside the statute of limitations) is giving value *to the debtor* under § 548(c). Where, however, the theory of avoidance is that an insolvent *D* made a *gratuitous* transfer, this defense will not avail the initial transferee. According to § 548(c):

> [A] transferee . . . of such a [fraudulent] transfer . . . that takes for value and in good faith has a lien on or may retain any interest transferred . . . to the extent that such transferee . . . gave value *to the debtor* in exchange for such transfer . . . .[107]

In our paradigm case, *D* pays tuition to a school for *X*'s education. Since *X* gets the value (education) and (*ex hypothesi*) *D* does not get value, the school has no defense under § 548(c). If a good faith university is deemed an initial transferee, the university is bereft of a defense.[108]

A transferee of a transferee, however, has a different defense, as we have seen.[109] According to § 550(b):

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[104] *See* Begier v. United States, 496 U.S. 53, 55 (1990) ("This case presents the question whether a trustee in bankruptcy may 'avoid' (*i.e.*, recover) . . . payments . . . .").

[105] *But see* Suhar v. Burns (*In re* Burns), 322 F.3d 421, 425–29 (6th Cir. 2003). According to the Sixth Circuit, "recovery" is necessary when, at the time of *D*'s bankruptcy petition, D was out of possession. Thus, recovery is redundant of the turnover provision. 11 U.S.C. § 542(a) (2019). In my view, recovery is redundant of avoidance itself.

[106] "Conversion" is a personal property concept. RESTATEMENT (SECOND) OF TORTS § 222A(1) (AM. LAW INST. 1965) ("Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel."). Courts are quite willing to issue money judgments for the fraudulent transfer of real property as well. James v. Powell, 279 N.Y.S.2d 10, 24–25 (N.Y. 1967).

[107] 11 U.S.C. § 548(c) (2019) (emphasis added).

[108] Mangan v. Univ. of Conn. (*In re* Hamadi), 597 B.R. 67, 72 (Bankr. D. Conn. 2019).

[109] *See supra* text accompanying notes 6–7.

> The trustee may not recover under section (a)(2) of this section from—(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided . . . .[110]

By the reference to § 550(a)(2), § 550(b) indicates that initial transferees may not assert this defense.[111] This defense differs from that to be found in § 548(c). Whereas § 548(c) requires good faith value to the *debtor*, § 550(b) permits good faith value to *nondebtors*.

As a result, in the case of gratuitous transfers, it matters a great deal whether we proclaim the defendant to be the initial transferee or the transferee of a transferee. If the school is an *initial transferee* who has in good faith given value to *X*, such value cannot defend the school. But if the school is the *transferee of a transferee*, good faith value extended to *X* (education) has defensive bite on behalf of the school.

Section 550(a)(1) gives the trustee the additional option of recovering from the "entity for whose benefit" the initial transfer was made.[112] This concept, however, is not relevant in tuition cases. *X* is clearly *benefited* when *D* pays the tuition bill, but *X* also receives the *proceeds* of the tuition. *X* is therefore a transferee of a transferee (if the school is conceived as the initial transferee of tuition dollars). The seminal case on tripartite fraudulent transfers, *Bonded Financial Services v. European American Bank*,[113] holds that a transferee of a transferee under § 550(a)(2) can never be a "person benefited" under § 550(a)(1).[114] A transferee of a transferee is entitled to the bona fide transfer defense under § 550(b)(1) and a "person benefited" under § 550(a)(1) is not. Judge Easterbrook, in *Bonded*, reasoned a transferee of a transferee ought not to be deprived of the bona fide transfer defense by recharacterizing the remote transferee as a person benefited by the initial transfer.[115] Accordingly, either *X* is the initial transferee or *X* is the transferee of a transferee, but *X* is never a person benefitted when *D* pays *X*'s tuition bill. Bizarrely, the law implies that

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110 11 U.S.C. § 550(b) (2019).

111 Abele v. Modern Fin. Plans Servs. (*In re* Cohen), 300 F.3d 1097, 1101–02 (9th Cir. 2002); Shafer v. Las Vegas Hilton Corp. (*In re* Video Depot), 127 F.3d 1195, 1197 (9th Cir. 1997); Rupp v. Markgraf, 95 F.3d 936, 938, 944 (10th Cir. 1996); Bowers v. Atlanta Motor Speedway (*In re* Se. Hotel Props. Ltd. P'ship), 99 F.3d 151, 154 (4th Cir. 1996).

112 Carlson, *Mere Conduit*, *supra* note 14, at 525–26 (analyzing the meaning of "benefit").

113 Bonded Fin. Servs. v. European Am. Bank, 838 F.2d 890 (7th Cir. 1988).

114 *Id.* at 896.

115 *Id.*

education never "benefits" *X*. It is only *transferred* to *X* in a billiards-style bank shot.

II. TRIPARTITE FRAUDULENT CONVEYANCES

A great many fraudulent transfer cases are tripartite. In these cases, insolvent *D* pays C_X, a creditor of *X*, where *X* is a friend, relative or insider of *D*. Because *D*'s check is made payable to C_X, courts wrongly perceive C_X as the initial transferee of a fraudulent transfer made for the benefit of *X*.[116] As the initial transferee, C_X's only chance to defend is that C_X in good faith conveyed value to *D* (rather than to *X*). Courts usually think this cannot be shown.

C_X, however, can easily show that *D*'s check to C_X bestowed value upon *X*. If *X* were the initial transferee and if C_X were *X*'s transferee, C_X would be a transferee of a transferee under § 550(a)(2). Such a transfer once removed from *D* is entitled to the defense of § 550(b)(1). That defense requires C_X to be a good faith transferee, and it expressly includes "tak[ing] for value, including satisfaction or securing of a present of antecedent debt . . . ."[117] It does not require that the value be given *to D*, as § 548(c) does.

A. *Subrogation*

Courts assume that when *D* writes a check to C_X, C_X is the initial transferee of a fraudulent transfer. What courts forget is that when *D* sends funds to C_X, *D* is subrogated to C_X's rights against *X*. Where *X* is solvent, this subrogation right is a dollar-for-dollar equivalent exchange.[118] Accordingly, *D* receives value within the meaning of § 548(c).[119]

The mechanics of subrogation is most easily seen if we translate the matter to the environment of negotiable instruments. Suppose *X* has borrowed $100 from C_X and has signed a promissory note for this debt. At the time of the loan assume *X* is solvent. *D* then pays C_X $100 for the note and C_X surrenders the note

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116 Carlson, *Mere Conduit*, *supra* note 14.

117 11 U.S.C. § 550(b)(1) (2019).

118 *In re* Ollag Construction Equip. Corp., 578 F.2d 904, 908–09 (2d Cir. 1978); Schwartz v. Comm'r, 560 F.2d 311, 317 (8th Cir. 1977); Peter A. Alces, *The Efficacy of Guaranty Contracts in Sophisticated Commercial Transactions*, 61 N.C. L. REV. 655, 679 (1983); Phillip I. Blumberg, *Intragroup (Upstream, Cross-Stream, and Downstream) Guaranties under the Uniform Fraudulent Transfer Act*, 9 CARDOZO L. REV. 685, 699–700 (1987); Kenneth J. Carl, *Fraudulent Transfer Attacks on Guaranties in Bankruptcy*, 60 AM. BANKR. L.J.109, 113 (1986); William H. Coquillette, *Guaranty of and Security for the Debt of a Parent Corporation by a Subsidiary Corporation*, 30 CASE W. RES. L. R 433, 456–57 (1980).

119 *See* UNIF. FRAUDULENT TRANSFER ACT § 1 cmt. 2 (UNIF. LAW COMM'N 1984), 7A U.L.A. 644, 645 (1985) (stating that the debtor assets include the "contingent claim of a surety for . . . subrogation").

to *D*. Assume at the time of this exchange, *D* is insolvent. It is erroneous to think that C_X has been paid and that *X* is now debt-free. Rather, *D* has bought the promissory note and may now enforce the note against *X*. This is precisely how subrogation works.

Because of subrogation, C_X has made a contemporaneous exchange with *D*. *D* paid $100 to C_X and in exchange has received rights against *X*. Since *X* is solvent and can pay, *D* has received full value from C_X. The exchange is not a fraudulent transfer.

Suppose further that, later, *D* realizes that if *D* recovers from *X*, the proceeds will only enrich *D*'s creditors. Therefore, in an effort to enrich *X*, *D* rips up the note, waives her rights and renders *X* debt-free. Forgiveness of debt is a transfer[120] and, if *X* gave nothing in return for debt forgiveness, forgiveness is a *fraudulent* transfer. Accordingly, *D*'s bankruptcy trustee can recover $100 from *X*, who is the initial transferee of the debt cancellation. The trustee can recover nothing from C_X.

Typically, a school, like any rational vendor, wants tuition payments up front, before the education of *X* actually commences.[121] The school is typically not a creditor of *X*. But subrogation can (uneasily) be made to fit the tuition puzzle. In the subrogation model, *D* (the parent) buys the education. Then the parent doles out the education to the child. Every time *X* obtains a unit of education from the school, *D* is surrendering an asset to *X* without receiving a reasonably equivalent value in return. In this vision, *D* owns the education and doles it out to *X*.

There are several things wrong with the subrogation picture as applied to tuition cases. First, *D* does not deliver lectures to *X*, nor does *D* grade *X*'s papers or bestow a diploma on *X*. The school does all these things—though it arguably does so as agent of *D*.

A second possible objection is that the school admitted the child, not the parent. If the parent shows up at school and demands to be educated, the school is within its rights to call security to have the parent escorted off campus, because the admission was granted to the adult child alone.

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120 Grochocinsky v. Reliant Interactive Media Corp. (*In re* General Search.com), 322 B.R. 836, 842–43 (Bankr. N.D. Ill. 2005); Potter v. Alliance United Ins. Co., 37 Cal. App. 5th 894, 904–05 (Cal. App. 2019); *cf.* Patrick J. Glackin, Note, *Lease Terminations as Fraudulent Transfers: Reconciling Bankruptcy Code Section 548 and 365(c)(3)*, 39 CARDOZO L. REV. 2368, 2386–89 (2018) (lease cancellations are transfers).

121 Pergament v. Hofstra Univ. (*In re* Adamo), 582 B.R. 267, 269–72 (Bankr. E.D.N.Y. 2018), *rev'd*, Pergament v. Brooklyn Law Sch., 595 B.R. 6 (E.D.N.Y. 2019) (college sued for $121,388).

A third observation suggests subrogation is the wrong concept. Suppose the parent *D* and the child *X* have a falling out. *D* then forbids *X* from attending school out of spite. The school will undoubtedly conclude that *X* has bought the education because the tuition bill was paid. Most schools, I think, educate *X* over the opposition of *D* (where *X* is an adult).[122]

A fourth objection is that subrogation creates reasonably equivalent value for *D* when *X* is solvent. But where *X* is insolvent, the value of *D*'s asset must be discounted. College students are usually insolvent. Therefore, the school does not give full value when it sells *X*'s education to the parent *D*. Subrogation will usually yield only a partial defense to a university.

These observations militate against applying the subrogation model. Although subrogation describes transfers to C_X (creditor of *X*), the concept ill fits the tuition cases.

B. Agency

There is an alternative way to analyze simple tripartite cases where C_X is the creditor of *X* and *D* wishes to enrich *X* by retiring C_X's claim against *X*. The extinguishment of C_X's claim requires that *X* tender payment to C_X. Under our scenario, *D* tenders *D*'s own dollars to *X*. According to the law of payment, *D*'s tender means precisely what *D* intends it to mean.[123] *D*'s intent is that the dollars are to extinguish *X*'s claim. C_X cannot accept *D*'s dollars for any other purpose. C_X cannot say, "I treat this as a gift from *D* to me personally," while maintaining, on the side, "I shall bring an action against *X* to compel *X* to pay *X*'s debt, since that debt is outstanding." The meaning of *D*'s tender is that *X*'s debt is extinguished. C_X is stuck with that meaning.[124]

Being a creditor means that C_X is required to accept tender of money from *X* to extinguish the debt. A corollary is that C_X is not required to accept money from a stranger to pay (or buy) *X*'s debt. C_X can refuse *D*'s tender and insist that *X* pay C_X. *D*, however, can claim to be the agent of *X* and can claim that *D*'s dollars are actually *X*'s dollars. In that case, if *D* really is the agent of *X*, C_X is obligated to accept *D*'s tender, because *D* is tendering *X*'s dollars. And if *X* agrees that C_X's claim against *X* is extinguished, *X* must have ratified *D*'s acts as being authorized. This necessarily entails that *D* first gave dollars to *X* as initial transferee. Only thereafter did *X* (through the agency of *D*) tender dollars

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122 *In re Adamo*, 582 B.R. at 275.

123 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 388–89 (Walter H.E. Yaeger ed., 3rd. ed. 1972).

124 Shultis v. Woodstock Land Dev. Assocs., 594 N.Y.S.2d 890, 892 (N.Y. App. Div. 1993).

to C_X. This makes C_X a transferee of a transferee. As such C_X's claim against *X* is value given to *X* and C_X is defended under § 550(b)(1).

As applied to tuition, once *D* pays it, the school is obliged to educate *X*, even over the subsequent opposition of *D*. This implies that *D* made a final and irrevocable gift of tuition dollars to *X* and (as *X*'s agent) *D* conveyed *X*'s dollars to the school in payment of tuition. *X* is thus the initial transferee and the school is the transferee of a transferee.

On this model, suppose the student changes her mind and decides not to go to school. Under the policy of reputable schools, a refund of tuition dollars will be offered.[125] If the refund belongs to *X*, then it must be the case that *D* first gifted *X* with the dollars and then (as *X*'s agent) bought *X* the education with *X*'s funds. For this reason, *X* owns the refund. If the refund belongs to *D*, then it also follows that *D* may prevent *X* from attending school, thereby generating the refund. The school may take the position that, where *X* wants to continue the education, *X* may attend school over the opposition of *D* and *D* is not entitled to the refund. This is good evidence that *X* was the initial transferee of the tuition dollars and that the school is a transferee from *X*—a transferee of a transferee entitled to the § 550(b)(1) defense.

A proof exists to show that *X* is the initial transferee and the school is the remote transferee. The proof comes from voidable preference law and, more specifically, from the "earmarking doctrine" that has been developed to defend refinancing of debt.

Very briefly, Bankruptcy Code § 547(b) makes voidable transfers to unsecured creditors shortly before bankruptcy. Suppose *D* owes C_1 on an unsecured debt. The day before bankruptcy, *D* wires funds to C_1. The trustee may avoid this payment, forcing C_1 to disgorge.[126] C_1 may then enter the bankruptcy as an unsecured creditor.[127]

Suppose, however, *D* refinances the debt to C_1 by borrowing on an unsecured basis from C_2. *D* promises to repay C_2 and, on the day before bankruptcy, C_2 wires the loan proceeds directly to C_1. Courts long ago observed that this transaction has no deleterious effect on the size of *D*'s bankruptcy estate or on the equal distribution of the estate to *D*'s unsecured creditors. In effect, all that we observe is that the identity of one of the unsecured creditors has changed.

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125 *Pergament*, 595 B.R. at 11; Mangan v. Univ. of Conn. (*In re* Hamadi), 597 B.R. 67, 70–71 (Bankr. D. Conn. 2019).

126 11 U.S.C. §§ 547(b), 550(a)(1) (2019).

127 11 U.S.C. § 502(h) (2019).

Two days before bankruptcy, C_1 was a creditor. On the day of bankruptcy, C_1 is *not* a creditor. C_2 has taken the place of C_1, and the amount available to distribute to the unsecured creditors remains unchanged.[128]

The way courts describe this result is to say that C_1 never received debtor property.[129] Rather C_1 received C_2's property. The reason why the loan proceeds are not *D*'s property is that *D* never *controlled* the loan proceeds. The wire went directly from C_2 to C_1.

The claim is patently absurd. *D* requested the loan and instructed C_2 where to send the proceeds. *Obviously*, *D* controlled the entire transaction. Nobody forced *D* to refinance.

So far, earmarking is to the detriment of the universities. Just as C_2's wire to C_1 was (supposedly) a transfer of C_2's property to C_1, so *D*'s tuition check to the university is *D*'s funds, not *X*'s funds.

The proof emanates from the cases in which *D* uses a *secured* refinancing to retire *unsecured* debt. Suppose *D* grants a recorded mortgage to C_2 and instructs *D* to wire the loan proceeds to C_1. *D* and C_2 have exchanged real estate for money. This exchange is not preferential.[130] Then *D* directs C_2 to wire loan proceeds to C_1. C_2 does so as agent of *D*, transferring *D*'s dollars to C_1. This tripartite transaction depletes the bankruptcy estate and so C_1 is guilty of voidable preference. In analyzing these cases, courts simply forget the premises of earmarking. In the earmarking cases, C_2's wire to C_1 conveyed C_2's property, not *D*'s property.[131] In secured refinancing, however, C_2 is deemed to convey *D*'s property to C_1.[132]

The secured refinancing cases prove that universities are not the initial transferees of tuition payments. In this latter line of cases, the proceeds of C_2's loan are *D*'s property. We see a wire from C_2 to C_1, but C_1 is not the initial transferee of C_2's property. Conceptually, the transaction is triangular. C_2 endows *D* and it is *D* (via the agency of C_2) that conveys to C_1.

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128 Glinka v. Bank of Vt. (*In re* Kelton Motors, Inc.), 97 F.3d 22, 25 (2d Cir. 1996).

129 11 U.S.C. § 547(b)(1) (preamble) ("the trustee may avoid any transfer of an interest of the debtor in property . . . ."); *In re* Smith, 966 F.2d 1527, 1538 (7th Cir. 1992), *cert. dismissed*, 506 U.S. 1030 (1992); Mandross v. Peoples Banking Co. (*In re* Hartley), 825 F.2d 1067, 1070 (6th Cir. 1987).

130 Dean v. Davis, 242 U.S. 438, 443 (1917). In *Dean*, the Court struck down the mortgage as a fraudulent conveyance, since C_2 knew *D* would soon be bankrupt. In effect, *D* intended to hinder his other unsecured creditors when he granted the mortgage to C_2.

131 *In re Kelton Motors, Inc.*, 97 F.3d at 28.

132 David Gray Carlson & William H. Widen, *The Earmarking Defense to Voidable Preference Liability: A Reconceptualization*, 73 AM. BANKR. L.J. 591, 595–99 (1999).

The tuition cases are similarly triangular. In the tuition cases, we witness a check from *D* go to the university, but the school is not the initial transferee of *D*'s property. Rather, *D* enriches *X*, then *X* pays the school through the agency of *D*.[133]

The secured refinancing cases turn on making the C_2-to-C_1 payment into a triangle. These cases prove that the *D*-to-school cases are also triangular.

C. Tuition Funded by Loans to the Parent

Under the Higher Education Act of 1965,[134] the Department of Education (DOE) will lend funds for tuition to the parents of a student to fund the student's education, but the DOE insists on transferring the loan proceeds directly to the university.[135]

A few cases have ruled that the university receiving these funds has never received debtor property. Consequently, the university is not the recipient of a fraudulent transfer from the insolvent parent.[136] In *Eisenberg v. Pennsylvania State University (In re Lewis)*,[137] the court remarked:

> [T]he proceeds from the Parent PLUS loans were never [*D*'s] property, were never in his possession or control, and were never remotely available to pay [*D*'s] creditors. As a result, the [DOE's] payment of the Parent PLUS loan proceeds to Penn State did not diminish [*D*'s] bankruptcy estate and avoidance of these transfers would be improper and unwarranted.[138]

That the university prevails is consistent with the normative thrust of this Article. But the rationale of *Lewis* is in fact catastrophic. The idea is that *D* can borrow and divert the loan proceeds to *X*. *X* has received a gift from insolvent *D* but is immune from fraudulent transfer liability because *X* took lender money, not *D*'s

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133 Distressingly few tripartite fraudulent transfer cases are willing to find a triangle from *D* to *X* to C_X, but they do exist. *See* First Independence Capital Corp. v. Merrill Lynch Bus. Fin. Servs. Inc. (*In re* First Independence Capital Corp.), 181 Fed. Appx. 525, 527–28 (6th Cir. 2006); *In re* Auto-Pak, Inc., 73 B.R. 52, 55 (D.D.C. 1987); Meoli v. Huntington Natl. Bank (*In re* Teleservices Croup, Inc.), 444 B.R. 767, 793–95 (Bankr. W.D. Mich. 2011); *In re* Concord Sr. Housing Foundation, 94 B.R. 180, 183 (Bankr. C.D. Cal. 1988). For anti-triangle cases *see* Bowers v. Atlanta Motor Speedway (*In re* Southeast Hotel Props. Ltd. Partnership), 99 F.3d 151, 156 (4th Cir. 1996); *see* Richardson v. FDIC (*In re* M. Blackburn Mitchell Inc.), 164 B.R. 117, 124–28 (Bankr. N.D. Cal. 1994). *See also* Carlson, *Mere Conduit*, *supra* note 14.

134 20 U.S.C. § 1001 (2019).

135 § 1087(b).

136 *See* Roumeliotis v. Johnson & Wales Univ. (*In re* Demauro), 586 B.R. 379, 380–81, 387–88 (Bankr. D. Conn. 2018); Novak v. Univ. of Miami (*In re* Demitrus), 586 B.R. 88, 92–93 (Bankr. D. Conn. 2018).

137 *See* Eisenberg v. Pa. State Univ. (*In re* Lewis), 574 B.R. 536, 540 (Bankr. E.D. Pa. 2017).

138 *Id.* at 539.

money. Such a premise not only privileges *X*, who is enriched because *D* obtained the loan, but it makes the lender absolutely liable for having made the loan. *D*'s incurrence of an obligation, it seems, can be a fraudulent transfer. Suitably redacted, Bankruptcy Code § 548(a) provides:

> (1) The trustee may avoid any . . . obligation . . . incurred by the debtor, that was . . . incurred on or within 2 years before the date of the filing of the petition, if the debtor . . . (B)(i) received less than a reasonably equivalent value in exchange for such . . . obligation; and (ii)(I) was insolvent on the date that such . . . obligation was incurred, or became insolvent as a result of such . . . obligation . . . .[139]

Suppose the lender is unaware that *D* was insolvent. One would expect that the lender is a good faith purchaser of its claim because it tendered consideration *to D*. According to § 548(c), an "obligee of such [an] . . . obligation . . . may enforce any obligation incurred . . . to the extent such . . . obligee gave value *to the debtor* in exchange for such . . . obligation."[140] But if the lender has tendered the loan proceeds *to X*, not to *D*, then the lender never qualifies for the § 548(c) defense.

In *Roumeliotis v. Johnson & Wales Univ.* (*In re Demauro*),[141] the court ruled that the university had not received a fraudulent transfer because it received DOE funds, not debtor funds.[142] In so ruling, the court imagined that it was protecting the integrity of the Higher Education Act:

> A conclusion that the Direct PLUS Loan proceeds are property of the debtor for purposes of §§ 544 and 548 and therefore available for distribution to a debtor's creditors would undermine the purposes of the HEA and disregard the parent-debtor's lack of possession and control over the Direct PLUS Loan proceeds.[143]

In fact, the effect of the ruling was to shift liability from the university back to the DOE for sending loan proceeds to a third party instead of to the debtor. Worse, the rationale deprives the DOE of a bona fide transferee defense under § 548(c).[144]

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139 11 U.S.C. § 548(a) (2019).

140 § 548(c) (emphasis added).

141 Roumeliotis v. Johnson & Wales Univ. (*In re* Demauro), 586 B.R. 379, 380–81, 387–88 (Bankr. D. Conn. 2018).

142 *Id.* at 386.

143 *Id.*

144 The DOE can be compared to the financing lender of a leveraged buyout, where the lender knows that the loan proceeds are not to be retained by the borrower but are to be "upstreamed" to the departing shareholders.

The concept of "control" as the hallmark of debtor property is borrowed from the earmarking doctrine in voidable preference law, described above.[145] *D*'s lack of control explains why C_1 is not preferred when an unsecured refinancing C_2 advances funds to C_1. The concept stems from pre-Code days, when the voidable preference statute was poorly written, and courts had to cobble together legal fictions to make the statute work.[146] The Bankruptcy Code adds a "contemporaneous exchange" defense in § 547(c)(1).[147] According to this defense, if C_1 has received debtor funds on antecedent debt and it was intended to be contemporaneous with C_2 (advancing funds on an unsecured basis), then the transfer cannot recover the payment to C_1.[148] The criterion of control is therefore outmoded in the environment of voidable preference law and should be retired. It definitely should not be exported to fraudulent transfer law.

In any case, this rationale that the university never received the debtor's property contradicts the classic holding of *Dean v. Davis*.[149] In *Dean*, a lender (X) lent money to *D* but sent the cash directly to *D*'s unsecured creditor, *C*. The Court refers to *C* as being preferred, and *X*'s mortgage on *D*'s property was held a fraudulent transfer because the lender knew that *D*'s use of the loan proceeds to pay *C* was a voidable preference. Thus, the Supreme Court viewed the loan proceeds (forwarded to *C*) as *D*'s property, since it recognized that *C* had been preferred.[150] A preference to *C* implies *C* received debtor property, not lender property.

Similarly, when a parent *D* borrows from the DOE and the DOE sends funds directly to the university, the university is receiving *D*'s property. The DOE is lending to *D* and, as agent of *D*, forwards the proceeds to the university. When *D* borrows cash from the DOE, *D* is exchanging a promise to repay. *D* "controls" the transaction because *D* voluntarily promises to repay. The promise enriches the university when the DOE wires the funds directly to the university. Effectively, the DOE puts *D* into funds and *D* then puts the university into the

Ralph Brubaker, *On Constructively Fraudulent Transfers and Good Faith Transferees: The Case of a Debtor-Parent's Payment of an Adult Child's College Tuition*, 39 Bankr. L. Letter 1, 11–12 (May 2019).

145 *See id.* at 11.

146 Carlson & Widen, *supra* note 132, at 607–12.

147 11 U.S.C. § 547(c) (2019).

148 Carlson & Widen, *supra* note 132, at 592.

149 *See* Dean v. Davis, 242 U.S. 438, 443–45 (1917).

150 According to Justice Brandeis: "The mortgage was not voidable as a preference under § 60b. Preference implies paying or securing a preexisting debt of the person preferred. The mortgage was given to secure Dean for a substantially contemporary advance. The bank, not Dean, was preferred. The use of Dean's money to accomplish this purpose could not convert the transaction into a preferring of Dean . . . . Mere circuity of arrangement will not save a transfer which effects a preference from being invalid as such." *Id.* at 443.

same funds. That the DOE requires that the loan proceeds be remitted directly to the university does not change the fact that *D* opted to borrow without receiving the loan proceeds. The loan, obviously, dilutes the debtor's estate thereby harming each unsecured creditor of *D* on a *pro rata* basis.

The university should not be liable for receiving the DOE loan, but for the reason that it is not the initial transferee of the fraudulent transfer. Rather, *D* borrowed from the DOE to benefit *X*, the adult child. As agent of *D* and of *X*, the DOE conveys *X*'s property to the university. *D* first makes the gift of loan proceeds to *X* and then (as *X*'s agent) arranges for the DOE to pay the tuition bill. On this preferred analysis, the university obtains the good faith transferee defense in Bankruptcy Code § 551(b)(1).

III. MERE CONDUIT

In the *Brooklyn Law School* case, the court, Solomon-style, ruled that sometimes the school is liable and sometimes it is not. But the criterion for distinguishing liability from non-liability is arbitrary. This arbitrariness stems from the invocation of the legal fiction of mere conduit.

"Conduit" was a phrase Justice Cardozo once used. In *Carson v. Federal Reserve Bank of New York*,[151] a bank wrote checks to the Federal Reserve Bank (FRB), which was a collecting agent for other banks with whom checks had been deposited.[152] The checks bounced and the FRB demanded that the drawer bank pay the amounts of the dishonored checks. The drawer bank did so and soon filed for bankruptcy. Since the FRB was acting for other entities, the FRB was acquitted of voidable preference. Judge Cardozo said, "The person to be charged with liability, if he has parted before the bankruptcy with title and possession, must have been more than a mere custodian, an intermediary or *conduit* between the bankrupt and the creditor."[153]

In modern times, *Bonded Financial Services v. European American Bank*[154] is considered the seminal case of "mere conduit."[155] *Bonded* is a case rife with unacknowledged contradiction.[156] Much simplified, the case involves *D* instructing its bank to debit *D*'s account and to credit *X*'s account with the same

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151 Carson v. Federal Reserve Bank, 172 N.E. 475 (N.Y. 1930).
152 *Id.* at 476.
153 *Id.* at 482 (emphasis added).
154 *Bonded Fin. Servs.*, 838 F.2d 890 (7th Cir. 1988).
155 Pergament v. Brooklyn Law Sch., 595 B.R. 6, 10 (E.D.N.Y. 2019).
156 This is documented in Carlson, *Mere Conduit*, *supra* note 14.

bank.[157] Properly, the bank was neither a transferee nor a transferor.[158] At one moment the bank owed *D*. Following *D*'s order, the bank owed *X*. The bank's duty to pay was the thing transferred.[159] There were no bank deposits of new funds in the case.[160]

Nevertheless, Judge Frank Easterbrook confused matters by proclaiming that the bank was a transferee that was not a transferee.[161] Rather, the bank was a conduit. Judge Easterbrook read § 550(a)(1) as excluding mere conduits from being transferees.[162]

In the course of unnecessarily visiting the definition of "transferee," Judge Easterbrook offered a hypothetical under which bank *would* be a transferee—and an initial transferee to boot. According to Judge Easterbrook:

> If the note accompanying [*D*'s] check had said: "use this check to reduce [*X*'s] loan" instead of "deposit this check into [*X*'s] account, § 550(a)(1) would provide a ready answer. The Bank would be the "initial transferee" and [*X*] would be the "entity for whose benefit [the] transfer was made."[163]

This is tantamount to the following claim: *X* owes C_X. *D*, wishing to enrich *X*, tenders the money to C_X, who accepts it in discharge of C_X's claim against *X*. Supposedly, C_X is the initial transferee of a fraudulent transfer. *X* is the person benefited.[164] That is, *X* is no transferee at all and is a "person benefited" under § 550(a)(1). The trustee has the option to pursue C_X or *X* under § 550(a)(1). Neither is entitled to the good faith transferee defense of § 550(b)(1). Judge Easterbrook's unfortunate hypothetical completely overlooks the phenomenon of subrogation, whereby the bank sells to *D* the bank's valuable rights against *X*. That is, when *D* pays the bank, *X*'s obligation to the bank does not disappear. The bank sells its rights to *D*; *D* receives reasonably equivalent value whenever *X* is solvent at the time *D* conveys funds to the bank.[165] Separately, debt forgiveness is independently a fraudulent transfer. This transfer travels from *D* directly to *X*.[166]

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157 *See Bonded Fin. Servs.*, 838 F.2d at 890.
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.*
163 *Id*. at 892.
164 *See* Rupp v. Markgraf, 95 F.3d 936, 937–41 (10th Cir. 1996).
165 *See* Grochocinsky v. Reliant Interactive Media Corp. (*In re* General Search.com), 322 B.R. 836, 842–43 (Bankr. N.D. Ill. 2005).
166 *See supra* text accompanying notes 116–20.

Judge Easterbrook's hypothetical has been read as establishing the following proposition: If a transferee (C_X) is a creditor of *X*, C_X is an initial transferee. But if C_X receives an advance payment, expecting to be a creditor later, C_X is not a transferee, even if C_X used the advance payment for its own purposes. Rather, in receiving the advance payment and owing a refund to *X*, C_X was a mere conduit, not a transferee. Later, when C_X's contingent claim becomes vested, C_X (not a transferee) becomes a transferee of a transferee. As such, C_X is entitled to assert that C_X in good faith accepted the payment in satisfaction of *X*'s debt, entitling C_X to the bona fide transferee defense of § 550(b)(1).

The purest example of this theory at work is *Menotte v. United States (In re Custom Contractors, LLC)*[167], where C_X (the IRS) was held to be a mere conduit. *X*, an insider, had caused *D Corp.* to pay *X*'s estimated taxes by sending a check directly to the IRS.[168] *X* ended up having no income, so the IRS refunded the entire payment to *X*. *X* did not remit the refund to *D Corp.*, as he should have done. *D Corp.* was soon bankrupt.

D's bankruptcy trustee sued the IRS as the initial transferee of a fraudulent transfer.[169] The court ruled, however, that the IRS was a mere conduit. The IRS was the "initial *recipient*"[170] of a transfer but it was not the initial *transferee*.

According to the *Custom* court, when *D* conveys to C_X in discharge of *X*'s obligation to C_X, C_X is an initial transferee, contrary to what has been argued here. "Implicit in these cases is the principle that funds received as payment of a debt leave the recipient with no obligations; that is, the transferee receives them with no strings attached."[171]

But where, as a result of *D*'s transfer, C_X owes repayment to *X*, C_X has no control over the transferred property, even though C_X is free to use *D*'s dollars for its own purposes. When C_X is a bank receiving funds from *D* for the benefit of *X*, C_X is a mere conduit:

> Our case law, then, stands for the proposition that, when a bank receives funds in the form of a deposit, the attendant obligations owed to the transferor [sic]—namely to return the funds upon request—are

[167] Menotte v. United States (*In re* Custom Contractors, LLC), 745 F.3d 1342, 1352 (11th Cir. 2014).

[168] *D Corp*. listed these payments to the IRS as distributions to *X*. *Id*. at 1345.

[169] Actually, *X* was probably an embezzler. If so, this was no fraudulent transfer case, and the court had no need to ascertain the meaning of Bankruptcy Code § 550(a)(1). A fraudulent transfer is a conveyance of legal and equitable title. An embezzlement at best leaves equitable title in the victim. *See* Carlson, *Mere Conduit, supra* note 14, at 485–491.

[170] *In re* Custom Contractors, LLC, 745 F.3d 1342, 1351 (11th Cir. 2014).

[171] *Id.* at 1350.

> sufficiently important that we will not hold the bank liable as an initial transferee in spite of the significant control it exercises over the funds.[172]

Significantly, this account contains a Freudian slip. When *D* makes an advance payment to C_X (a bank), C_X owes a refund to the *transferor*. That would be *X*. So, *D* conveyed to *X* as initial transferee (not to C_X). *X* made an advance payment to C_X, and when C_X's contingent claim against *X* becomes vested, *C* expropriates *X*'s property. *X* was the transferor and hence must have been the initial transferee of *D*.

Let us visit Judge Easterbrook's hypothetical more slowly. *D* (wishing to enrich *X*) deposits money with C_X in expectation C_X will perform a service for *X*'s benefit. So far, C_X is not a transferee. Yet *D* has alienated the money. Somebody must be the transferee. That person must be *X*.

On the other hand, suppose the payment is not in advance of the vesting of C_X's claim. That is to say, *X* owes C_X at the time of the debt. *D* gives funds to C_X. On Judge Easterbrook's hypothetical, C_X is the initial transferee.[173]

This makes no sense. In the case of the advance payment, where C_X is not obliged to segregate the funds, C_X has dominion and control over what C_X received from *D*. In Judge Easterbrook's colorful phrase, C_X is free to buy "lottery tickets or uranium stocks."[174] Yet these are the same facts when C_X has a vested claim against *X*. In both cases, C_X is a transferee with dominion and control over the advance payment. Whether C_X is obligated to *X* does not change this fact.[175]

As applied to fraudulent tuition, the schools in the *Brooklyn* case required advance payment and offered refunds in case of cancellation. According to the *Brooklyn* court, schools in this posture are not initial transferees.[176] Since *D* has made a transfer and since the school is not the transferee, *X* was the one and only

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172 *Id.*

173 *See* Bonded Fin. Servs. v. European Am. Bank., 838 F.2d 890, 891–92 (7th Cir. 1987).

174 *Id.* at 894.

175 To make matters worse, the bank in *Bonded* did not even have a duty to honor *X*'s withdrawals. The bank had lent money to *X* and had a right of setoff against *X*. In short, the bank had control over *X*'s deposit account and, on Judge Easterbrook's control criteria, the bank should have been the initial transferee of *D*'s deposit on behalf of *X*. Carlson, *Mere Conduit*, *supra* note 14. *See* Meoli v. Huntington Nat'l Bank, 848 F.3d 716, 725 (6th Cir. 2017) ("As our sister circuits have explained, the account-holder's right to withdraw the deposits keeps the bank from obtaining dominion and control."). Yet there were no bank deposits in *Bonded*. So, the bank was not a transferee at all!

176 Pergament v. Brooklyn Law Sch., 595 B.R. 6, 10–11 (E.D.N.Y. 2019).

transferee.[177] Later, when the school earns the advance payment, the school is transferee of a transferee. If the school does not know that the parent *D* is insolvent, the education bestowed on *X* is value defending the school under § 550(b)(1).[178]

But when tuition is not paid in advance, the school *is* the initial transferee.[179] And *X*, by implication, would seem to be a person benefited within the meaning of Bankruptcy Code § 550(a)(1). The trustee thus has the option of pursuing the school or *X* for recovery of the fraudulent transfer.

Where the student *X* is the initial transferee, is not the school also "the entity for whose benefit [the] transfer was made[,]" within the meaning of § 550(a)(1)?[180] If so, the school is deprived all the same of the bona fide transferee defense, which is available to transferees of transferees.[181]

This conclusion violates a major holding in *Bonded*. It will be recalled that, in *Bonded*, *D* ordered a bank to debit *D*'s deposit account and credit *X*'s deposit account, thereby enriching *X*. It so happened that *X* also owed the bank on a secured loan. Six weeks after, *X* used the deposit account to pay down the bank loan.[182] The *Bonded* court viewed the bank as a transferee of a transferee in good faith. As such, the court held the bank was entitled to the good faith transferee defense of § 550(b)(1).[183] This much is not controverted.

The bankruptcy trustee in *Bonded* countered that, although the bank may have been the transferee of a transferee, the bank also benefited by the deposit, because the "deposit" was eventually used to pay the bank.[184] As a person benefited under § 550(a)(1), the bank was not eligible for the good faith transferee defense of § 550(b)(1). Sensibly, Judge Easterbrook responded that, once labeled a transferee of a transferee, *D Bank* was constitutively incapable of being an entity for whose benefit the initial transfer was made. Any other conclusion would deny to a transferee of a transferee the § 550(b) good faith defense: "The structure of the statute separates initial transferees and beneficiaries, on the one hand, from 'immediate or mediate transferee[s],' on the

177 *Id.* at 9.

178 20 U.S.C. § 151 (2019).

179 *Pergament*, 595 B.R. at 18.

180 *Id.* at 7; *see* 11 U.S.C. § 550(a)(1) (2019).

181 *See* 11 U.S.C. § 550(b)(1) (making the defense available to entities described in subsection (a)(2).

182 *See* Bonded Fin. Servs. v. European Am. Bank, 838 F.2d 890, 892–93 (7th Cir. 1988).

183 *Id.* at 897–98.

184 *Id.* at 891. The trustee's position is compromised by the fact that there *was* no deposit in *Bonded*. The transfer was accomplished by an "on us" check issued by *D* for the benefit of *X*. *See supra* text accompanying notes 152–58.

other. The implication is that the 'entity for whose benefit' is different from a transferee, 'immediate' or otherwise."[185] This is sound statutory interpretation, though one must admit that every transferee of a transferee is benefited by the initial transfer.

To be noted is that Judge Easterbrook read § 550(a)(1) in a way to assure that a transferee of a transferee receives access to the good faith transfer defense. Why then can we not read § 550(a)(1) in such a way as to provide Brooklyn Law School with a good faith transfer defense? We have seen that such a triangle is drawn to solve an important subset of voidable preference cases. Such a triangle should be conjured in fraudulent tuition cases, in order to assure that universities obtain the bona fide transfer defense.[186]

I end this section with a suggestion that demonstrates the perversity of the *Brooklyn* case. The court relied heavily on the fact that the student owned the refund if the student decided to cancel prior to registration day. Because of this supposed fact, Brooklyn Law School was potentially a transferee of a transferee entitled to the bona fide transfer defense in Bankruptcy Code § 550(b)(1). The decision includes this footnote: "The trustee's subsequent assertion that 'the Debtor limited his children's right to use the Tuition Payments for any purpose other than paying tuition' . . . is conclusory and unsupported by the record."[187] What if a trustee can prove that the adult child *X* agreed that if *X* canceled school *X* held the refund in trust for *D*? It is rather hard to say, prior to registration day, that *X* has received a fraudulent transfer. At best, *X* has received legal title to a contingent refund held in trust for *D*. In that case, the school has received tuition dollars with the obligation to return them in case of school cancellation. This is no fraudulent transfer either, since *D* receives a reasonably equivalent value from the school when it transfers refundable dollars to the school. Now suppose the semester begins. The tuition is no longer refundable. It seems to me that the school is the initial transferee of a fraudulent transfer, in spite of the advance payment of tuition. Before the semester begins, *D* has an equitable right to a refund. After the semester begins, *D* gives up this right and the university is enriched. If this is correct, then school liability turns entirely on the agreement

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185 *Id.* at 895.

186 Courts in tripartite fraudulent transfer cases like to "collapse" triangles in order to make the case bipartite and easy to solve, as the bona fide purchaser defense of value-paying defendants is eliminated. *See* United States v. Tabor Court Realty Corp., 803 F.2d 1288, 1302 (3d Cir. 1986); CNB Int'l, Inc. Litig. Tr. v. Lloyds TSB Bank plc (*In re* CNB Int'l, Inc.), 440 B.R. 31, 42–45 (W.D.N.Y. 2010). What I propose here is the opposite. A straight line is to be made triangular. In mathematics, this is known as a "lifting" homomorphism in a short exact sequence of ring modules—a straight line between two objects is made into a triangle between three objects. DAVID S. DUMMIT & RICHARD M. FOOTE, ABSTRACT ALGEBRA 385–88 (3d ed. 2003).

187 Pergament v. Brooklyn Law Sch., 595 B.R. 6, 14, n. 8 (E.D.N.Y. 2019).

between parent and child with regard to the refund. It is very difficult for school administrators to guard against this possibility. Insisting on advance payment would not suffice to ward off liability. All this nonsense is eliminated if it is agreed that the student is *always* the initial transferee of fraudulent tuition. In such a case the school is transferee of a transferee and entitled to the defense accorded to bona fide transfers in Bankruptcy Code § 550(b)(1).

IV. THE LIABILITY OF STUDENTS

Among the courts that have considered the matter, a majority holds that the tuition-paying insolvent parent receives no reasonably equivalent value when an adult child is educated. On this assumption, there *is* a fraudulent transfer, but who is liable? I have suggested that a good faith school is never liable because it is always a transferee of a transferee with the § 550(b)(1) defense. It therefore follows that the adult child is liable as the initial transferee.[188]

Since *X* dissipates the contractual right to an education by actually being educated, there are no longer any tangible proceeds of tuition that can be turned over to the bankruptcy trustee. Education is a "wasting asset."[189] Therefore, the trustee can expect a money judgment to be issued against *X*. According to Bankruptcy Code § 550(a), in the case of a fraudulent transfer, "the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, *the value of such property*" from the initial transferee.[190] If *X* is like most recent graduates, a six-figure judgment for the value of the education renders *X* insolvent.

X's liability for tuition will likely bankrupt *X*. May *X* escape this judgment by seeking discharge in bankruptcy? Unhappily, *X* may find that *X*'s obligation to *D* is not dischargeable for two reasons; first, the Supreme Court may have held that judgments for receipt of a fraudulent transfer are not dischargeable.[191]

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188 *But see* Lo v. Lee, 24 Cal. App. 5th 1065, 1072–75 (2018). The court seems to be disagreeing. In that case, the California Court of Appeal accepted a lower court determination that the parent *D* received reasonably equivalent value when child *X* was educated. That should have ended the matter. If there was no fraudulent transfer, *X* is off the hook. Unnecessarily the court held *X* was not a "person benefited" under California law: the benefits of an education are not quantifiable. Therefore, *X* had no liability. It may be protested that *X*'s contract with the university was proceeds of the tuition payment. If tuition was a fraudulent transfer, then the education contract was the proceeds. Thus, even if *X* did not benefit from being educated, *X* was a transferee of a transferee and potentially liable, if indeed the tuition payment was fraudulent.

189 *See supra* text accompanying notes 34–35.

190 11 U.S.C. § 550(a)(1) (2019) (emphasis added).

191 Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1589 (2016). For detailed analysis, *see* David Gray Carlson, *The Supreme Court, Dischargeability, and Actual Fraud*, 27 Am Bankr. Inst. L. Rev. (2020) (forthcoming).

Second, the student has received an educational benefit (tuition) that must be repaid. That makes the fraudulent transfer a student loan. Student loans are not dischargeable, unless repaying it causes an undue hardship to the student.[192]

A. *Receipt of a Fraudulent Transfer*

Bankruptcy practitioners know that *giving* a conveyance intended to hinder creditors prevents *any* discharge for *D* in bankruptcy.[193] Less well-known is that *receipt* of a fraudulent transfer arguably gives rise to a nondischargeable obligation under §523(a)(2) with respect to "property . . . obtained by . . . actual fraud . . . ." This is so under one reading of the Supreme Court's perplexing decision in *Husky International Electronics v. Ritz*.[194]

In *Ritz*, *D Corp* owed C_D for goods sold on unsecured credit. No one made a misrepresentation regarding this credit sale.[195] So far, we have a breach of contract claim—archetypically dischargeable.

On the eve of *D Corp*.'s collapse, *X* (the controlling shareholder of *D Corp*.) arranged a transfer of *D Corp*. funds to another corporation (*X Corp*.) of which *X* was also a shareholder.[196] Later, *X* filed for bankruptcy.

At first glance, it would seem that *X* was no transferee of *D Corp*. property. Rather, *X Corp* was. But Texas law invites imposing liability on shareholders of a corporation if that individual "caused the corporation to be used for the purpose of perpetrating . . . an actual fraud on the obligee primarily for the direct personal benefit of the holder . . . ."[197]

C_D sought to impose liability on *X* under this statute. C_D, however, was most vague on whether C_D was seeking to pierce the veil of *D Corp*. or the veil of *X Corp*. If C_D was seeking to pierce the *D Corp*. veil, C_D's theory against *X* was breach of a sales agreement between *D Corp*. and C_D.[198] Such claims are dischargeable, provided no misrepresentations were made in getting C_D to extend unsecured credit.

192 *See* 11 U.S.C. § 523(a)(8) (2019).

193 *See* § 727(a)(2).

194 *See Husky Int'l Elecs., Inc.*, 136 S. Ct. at 1589.

195 *See id.* at 1589–90.

196 *X Corp*. is a composite of seven different subsidiaries in which *X* owned some or all the shares. *See In re* Ritz, 832 F.3d 560, 563, n.1 (5th Cir. 2016).

197 TEX. BUS. ORGS. CODE ANN. § 21.223(b) (West 2007).

198 *See In re Ritz*, 459 B.R. at 632 ("Unquestionably, the debt that [*C*] owed to it is based on *D Corp*.s breach of contract"). *See also Husky Int'l Elecs., Inc.*, 136 S. Ct. at 1591–92 (Thomas, J., dissenting) (assuming *C*'s theory against *X* was for breach of a sales contract).

If C_D was seeking to pierce the *X Corp*. veil, then C_D's theory was that, as a creditor of *D Corp*., C_D could reach the property *D Corp.* fraudulently transferred to *X Corp*. If, thanks to veil-piercing, *X* was the same person as *X Corp*., C_D could have judgment against *X* for receiving a fraudulent transfer. But, by virtue of *D Corp.*'s bankruptcy proceeding, such a cause of action did not belong to C_D. Rather, it belonged to *D Corp.*'s bankruptcy trustee. C_D had no business pursuing this cause of action and was indeed in violation of the automatic stay arising in the *D Corp*. bankruptcy for doing so—a fact that the Supreme Court would overlook.

To further confuse the picture, *X* was an embezzling insider of *D Corp*. This means that we are not facing a fraudulent transfer case at all! Rather, we are looking at a case of stolen funds.[199] "A thief cannot pass good title."[200] A fraudulent transfer implies the transfer of title from *D Corp*. to *X Corp*.[201] Whether we have a voluntary transfer by *D Corp*. turns on whether *X* was within the scope of his authority as *D Corp*.'s agent when *X* transferred *D Corp*. funds to *X Corp*. Typically, transfers out of the ordinary course of business must be approved by the board of directors of a corporation.[202] There is no evidence in any of the reported opinions that such authority existed.

If I am right that *X* was an embezzler and *D Corp*. was the victim of a theft, then *X Corp.* is obligated to reimburse *D Corp*. for conversion or on a restitutionary theory of unjust enrichment. *X* (the thief) is also obligated to return the stolen funds. This obligation is itself nondischargeable,[203] but it is not a cause of action that belongs to C_D. Rather, *D Corp*. owns this cause of action, and since *D Corp*. was bankrupt, the cause of action is part of *D Corp*.'s bankruptcy estate.

We shall, however, waive this point and treat *X*'s embezzlement as *D Corp*.'s fraudulent transfer to *X Corp*. But the price of this waiver is that we must

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[199] *See* Carlson, *Mere Conduit*, *supra* note 14, at 485–491.

[200] Bakalar v. Vavra, 619 F.3d 136, 140 (2d Cir. 2010).

[201] The Supreme Court, incidentally, identifies *X*, as the transferor of a fraudulent transfer, not a thief (or transferee) of funds. *See Husky Int'l Elecs., Inc.*, 136 S. Ct. at 1587 ("courts and legislature have used the term 'fraud' to describe a debtor's transfer of assets that, like Ritz's scheme, impairs a creditor's ability to collect the debt.").

[202] *See* Carlson, *Mere Conduit*, *supra* note 14.

[203] 11 U.S.C. § 523(a)(4) (2019) (preventing discharge of a claim arising from "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny"). *C* had sought to bar *X*'s liability for its breach of contract claim on this ground. The bankruptcy court dismissed this claim on the general proposition that *X*, as officer of *D Corp*., owed not fiduciary duty to the creditors of *D Corp*. Husky Int'l Elecs. v. Ritz (*In re* Ritz), 459 B.R. 623, 633–34 (Bankr. S.D. Tex. 2011). The bankruptcy court also ruled that *X* could not be denied a discharge under § 523(a)(6) ("willful and malicious injury by the debtor to another entity or to the property to another entity"). Whereas *X* did embezzle from *D Corp*., *X* did not injure any property of *C*. *Id.* at 635.

consider that *X* was acting in the proper scope of his authority when he caused *D Corp*. to transfer funds to *X Corp*. for no fair consideration. The presence of a fraudulent transfer means that *X* is to be acquitted of the charge of embezzlement.

Initially, the bankruptcy court in *Ritz* ruled that *X* was not liable for *D Corp*.'s breach of contract claim to C_D.[204] And even if such a debt did exist, the court opined, it would be dischargeable. Bankruptcy Code § 523(a)(2), thought the bankruptcy court, requires a misrepresentation of fact by *X*, and *X* made no misrepresentations.[205] *X* simply embezzled funds from *D Corp*. on behalf of *X Corp*.

C_D appealed from the bankruptcy court's decision that denied *X*'s liability to C_D. The district court affirmed. The district court did find, however, that *X* could be liable for the breach of contract if *X* made a fraudulent transfer. That is to say, the district court viewed *X* as the transferor, not the transferee.[206] It must have been the case, however, that the district court pierced the *X Corp*. veil and confounded this with piercing the *D Corp*. veil.[207]

The district court nevertheless affirmed the bankruptcy court. The fraudulent transfer to *X Corp*. was not a misrepresentation to C_D to induce C_D to extend unsecured credit to *D Corp*. The Court of Appeals affirmed the district court along the same lines.[208]

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204 *Id.* at 632–33.

205 *Id.* at 635.

206 Husky Int'l Elecs. v. Ritz (*In re* Ritz), 513 B.R. 510, 537 (S.D. Tex. 2014). ("He drained [*D Corp*.] of funds and fraudulently transferred those funds to other entities under his control and/or ownership . . . .") (alteration added).

207 In support of the conclusion is the fact that the district court relied on Spring St. Partners IV, L.P. v, Lam, 730 F.3d 427 (5th Cir. 2013), which had been handed down after the bankruptcy court's opinion in *Ritz*. In *Lam*, *D* conveyed a valuable thing to *X Corp*., of which *X* was shareholder. *D* then filed for bankruptcy. C_D then sued *X* because *X Corp*. received a fraudulent transfer. The court of appeals upheld a judgment against *X*. for the fraudulent transfer received by *X Corp*. The district court's reliance on *Lam* leads to the view that the *X Corp*. veil was the one being pierced. On remand, the bankruptcy court emphasized that *X* was the recipient of *D Corp*.'s fraudulent transfer. This assumes piercing the *X Corp*. veil. Husky Int'l Elecs. v. Ritz (*In re* Ritz), 567 B.R. 715, 761–62 (Bankr. S.D. Tex. 2017).

208 *See* Husky Int'l Elecs., Inc. v. Ritz (*In re* Ritz), 787 F.3d 312, 316–21 (5th Cir. 2015).

By the time the Supreme Court took the case, no court had actually held that *X* was liable on C_D's claim.[209] The Supreme Court assumed that *X* had already been held liable to C_X[210]—but for what?

A plausible reading of *Ritz* is that *X* was liable because *X Corp*. had received a fraudulent transfer from *D Corp*. (That is, the Supreme Court had assumed that the *X Corp*. veil had been pierced to establish *X*'s liability). This reading is consistent with the following passage from *Ritz*: "[T]he recipient of a transfer—who, with the requisite intent, also commits fraud—can 'obtai[n]' assets 'by' his or her participation in the fraud. If that recipient later files for bankruptcy, any debts 'traceable to' the fraudulent conveyance will be nondischargeable under § 523(a)(2)(A)."[211] Such a reading of *Ritz* is bad news for students. *Ritz* may mean that a money judgment against a fraudulent transfer recipient is not dischargeable in bankruptcy when parent *D* intended to hinder creditors.

Students, however, may be able to distinguish *Ritz* on the facts. In *Ritz*, *X* was an active participant in the fraud. *X* was the controlling shareholder of *D Corp*., who caused *D Corp*. to issue checks to *X Corp*. Students may be less blameworthy; they may be passive recipients of fraudulent tuition. Therefore, money judgments for passive receipt of a fraudulent transfer may still be dischargeable in spite of *Ritz*.

Students are certainly capable of conspiring with their parents with regard to tuition payments. That is undoubtedly a finding of fact. Nondischargeability certainly follows if the student knows the parent is insolvent at the time the tuition is paid. If the theory in tuition cases, however, is constructive fraudulent transfer, then a tuition case differs from that of *Ritz*. The theory in *Ritz* was *actual* fraudulent transfer (though there was *also* an overlapping constructive fraudulent transfer theory). And the words in Bankruptcy Code § 523(a) are *actual fraud* (not constructive fraud).[212]

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209 *Compare* Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1585 (2016) ("The District court held that Ritz was personally liable for the debt under Texas law . . . .") *with* Husky Int'l Elecs. Inc., v. Ritz (*In re* Ritz), 832 F.3d 560, 562 (5th Cir. 2016) (on remand, "[w]e are . . . required to consider the issue that we pretermitted on [*C*'s] appeal to this court: whether [*X*] owes a debt to [*C*] under Texas law. We do so because if [*X*] is not liable to [*C*] under Texas law, then there is no debt to discharge and the question of the deniability of a discharge under § 523(a)(2)(A) is moot").

210 "The district court held that [*X*] was personally liable for the debt under Texas law." *See* Husky Int'l Elecs., Inc., 136 S. Ct. at 1585.

211 *Id.* (internal citations omitted).

212 According to Justice Sotomayor:

Prior to *Ritz*, the leading case on receipt of fraudulent transfers was *McClellan v. Cantrell*.[213] Here, the court distinguishes sharply between constructive and actual fraudulent transfers:

> The fraud exception to the dischargeability of debts in bankruptcy does not reach constructive frauds, only actual ones . . . . To transfer property for less than adequate consideration may be desperate, foolish, or imprudent, and the receipt of such a transfer a pure windfall, but neither the transfer nor the receipt is in and of itself dishonest, and so neither is an appropriate ground for refusing to allow the debtor to discharge the debt arising from the transfer and thus to get on with his life without the debt hanging over his head.[214]

Courts may use this ploy to limit the consequences of *Ritz* on behalf of students. But the ploy depends on the finding that the parent was not guilty of an actual fraud when the parent wrote the tuition check.[215] If the check was written against the background of obvious insolvency, then the parent can be found to have the bad intent. After all, it is part of the black-letter definition of intent that an actor intends the result he knows is certain to occur.[216] Indeed, insolvency at the time of transfer is a "badge of fraud"—evidence of actual intent to hinder, delay or defraud.[217] Many constructive fraudulent transfers are also actual fraudulent transfers.[218]

> Actual fraud" has two parts: actual and fraud. The word "actual" has a simple meaning in the context of common-law fraud: It denotes any fraud that "involv[es] moral turpitude or intentional wrong. "Actual" fraud stands in contrast to "implied" fraud or fraud "in law," which describe acts of deception that "may exist without imputation of ad faith or immorality." Thus, anything that counts as "fraud" and is done with wrongful intent is "actual fraud.

Id. at 1586 (citing Neal v. Clark, 95 U.S. 704, 709 (1878) (alteration added).

213 McClellan v. Cantrell, 217 F.3d 890, 893–95 (7th Cir. 2000).

214 *Id.* at 894. *McCllellan* would not seem to be a real fraudulent transfer case. A fraudulent transfer requires a transfer of *debtor* property with intent to hinder, etc. *McClellan* involved the transfer of a machine encumbered by an unperfected security interest. The conveyance of *D*'s equity to *X* was arguably honest and appropriate. *See* U.C.C. § 9-401(a) (AM. LAW INST. & UNIF. LAW COMM'N 2010) ("whether a debtor's rights in collateral may be voluntarily . . . transferred is governed by law other than this article."). The wrong in the case was when *X* sold the machine to a bona fide purchaser who took free and clear of the security interest, and when *X* converted the Article 9 proceeds to her own use. *See* U.C.C. § 9-317(b) (AM. LAW INST. & UNIF. LAW COMM'N 2010). Properly, *X*'s debt for conversion was nondischargeable Bankruptcy Code § 523(a)(6).

215 Derek Huish reports that allegations of actual fraud exist in 27% of the cases as of 2019. *See* Derek A. Huish, Note, *Clawing Back Tuition Payments in Bankruptcy: Looking to Ancient and Recent History to Define the Future*, 104 IOWA L. REV. 2151, 2159, 2189 (2019).

216 Van Fossen v. Babcock & Wilcox Co., 522 N.E.2d 489, 504 (Ohio 1988) (defining an intentional tort as "an act committed . . . with the belief that such injury is substantially certain to occur").

217 UNIF. FRAUDULENT TRANSFER ACT § 4(b)(9) ("In determining actual intent under subsection (a)(1), consideration may be given, among other factors to where . . . (9) the debtor was insolvent or became insolvent shortly after the transfer was made . . . .").

218 Kettering, *Choice of Law*, *supra* note 31, at 357.

Thus, the student obtains a discharge if the parent has no intent to hinder creditors or, if such intent exists, the student had no knowledge of this intent.[219]

B. The Fraudulent Transfer as a Type of Student Loan

Even if *Ritz* is not an obstacle to dischargeability, another problem impedes the student's discharge. The fraudulent transfer to *X* (the student) qualifies as a student loan. Under Bankruptcy Code § 523(a)(8) student loans are not dischargeable "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents . . . . "[220]

Student loans are accorded much definition in Bankruptcy Code § 362(a)(8). One of the definitions applies to receipt of a fraudulent education. According to § 523(a)(8)(A)(ii), a general discharge does not operate on "an obligation to repay funds received as an educational benefit . . . ." The student *X*, *ex hypothesi*, is the initial transferee of tuition from insolvent parent *D*. Fraudulent transfer law requires *X* to repay these funds to *D*'s bankruptcy trustee. Thus, unless *X* can show undue hardship, *X* has still received an educational benefit that, according to fraudulent transfer theory, must be repaid. Thus, the fraudulent transfer constitutes a nondischargeable student loan.

C. The Student's Obligation to Reimburse a School Held Liable for Fraudulent Tuition

The first two subsections cover the case where the school is accorded a bona fide transferee defense because it is the transferee of a transferee and *X* is the initial transferee of the tuition gift. Suppose, contrary to what has been argued here, the school has to pay as initial transferee. If the school is liable, then *X* must pay all the same. Because the school's contract is with the student and because the payment has been avoided, the school may sue *X* for the tuition.

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219 *See* Sauer Inc v. Lawson (*In re* Lawson), 791 F.3d 214, 220 (1st Cir. 2015), *cert. denied*, 136 S. Ct. 2443 (2016):

> [T]he debtor-transferee must herself be "guilty of intent to defraud" and not merely be the passive recipient of a fraudulent conveyance. Such intent may be inferred from her acceptance of a transfer that she knew was made for the purpose of hindering the transferor's creditor(s), but it may not be implied as a matter of law.

220 On what constitutes an undue hardship, *see generally* Richard B. Keeton, *Guaranteed to Work or It's Free!: The Evolution of Student Loan Discharge in Bankruptcy and the Ninth Circuit's Ruling in* Hedlund v. Educational Resources Institute Inc., 89 Am. Bankr. L.J. 65, 74–94 (2015); Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. Cin. L. Rev. 405 (2005).

Because they may be avoided as preferences or as fraudulent transfers, payments in general can never be considered final. An example is *Security First National Bank v. Brunson (In re Coutee)*.[221] In this case, a law firm guaranteed a bank loan to the client. The firm paid the bank slightly before bankruptcy, using the client's settlement that the firm has received from a personal injury defendant. The firm's guaranty was seemingly satisfied and discharged. But when the client's bankruptcy trustee recovered the bank's payment as a voidable preference, the law firm's obligation under the guaranty revived. The bank's payment turned out to have been conditional, and its avoidance put the parties in *status quo ante*.

Thus, if there really is a fraudulent transfer in the picture, it is *X*, now well-educated and with an advanced degree from the School of Hard Knocks, that pays the tuition bill. Either *X* has a nondischargeable liability to the bankruptcy trustee of her parents, or the university may sue *X* for ultimately failing to pay tuition—a claim that is also not dischargeable (in the absense of undue hardship).

CONCLUSION

Tuition payments to universities by insolvent parents on behalf of their adult children may be fraudulent transfers. This depends on whether the parent received reasonably equivalent value when an adult child received the golden gift of education. Courts are split on this question, and on this point I am agnostic. But I have also shown that universities are not the *initial* transferees of fraudulent tuition. Rather, the student is the initial transferee. The school receives student dollars even when the parent cuts a check directly to the university. If this is recognized, the nightmare of "mere conduit" analysis can be discarded as an unnecessary fiction. Universities that educate in good faith are never liable because an insolvent parent wrote a tuition check directly to a university.

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221 *See In re* Coutee, 984 F.2d 138, 140–41 (5th Cir. 1993).