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ARTICLES

Fraudulent Conveyance Choice of Law: New York Is Not All Uniform Just Yet

Choice-of-law rules can vary significantly in different jurisdictions and, with New York's adoption of the Uniform Voidable Transactions Act, can even vary within a single jurisdiction based on the date of the alleged fraudulent transfer.

By Lauren F. Dayton – August 31, 2023

Choice of law is always an important issue in fraudulent conveyance litigation. Because limitations periods vary across jurisdictions both in the United States and abroad, whether New York or Delaware or Anguillan law applies may be the difference between an actionable claim and a dead one.

New York's adoption of the Uniform Voidable Transactions Act (UVTA) just over three years ago was a small step toward greater uniformity in this area. Before then, New York's statute of limitations for fraudulent transfer claims was the longer of six years or two years after the alleged fraudulent transfer was or could reasonably have been discovered. N.Y. C.P.L.R. § 213(1) (McKinney 2022). The UVTA shortens those periods from six years to four, applies a one-year discovery rule only to alleged actual (not constructive) fraudulent transfers, and makes both into statutes of repose. N.Y. Debt. & Cred. Law § 278. These new limitations periods are consistent with those of many other states, including Delaware, Florida, Texas, and others. The UVTA, as adopted by New York, also includes a choice-of-law provision that replaces the multi-factor approach New York courts have applied for decades.

But, critically, New York did not adopt the UVTA retroactively. N.Y. Legis. Assemb. A-5622 § 7, Reg. Sess. 2019-2020 (2019). New York's old statute of limitations and its common-law choice-of-law rules therefore continue to apply to transfers before April 4, 2020. Because the UVTA doesn't apply retroactively, practitioners litigating under New York law need to be familiar with both the pre-UVTA and post-UVTA rules and with how both are different from the rules in Delaware, where many fraudulent conveyance disputes are brought.

Choice-of-Law Framework under New York and Delaware Law

Federal courts sitting in diversity apply the choice-of-law rules of the forum state. And while some bankruptcy courts apply federal choice-of-law rules—those in the *Second Restatement*—to fraudulent conveyance claims brought in bankruptcy court, the Second and Third Circuits apply the forum's choice-of-law rules.

New York pre-UVTA—the interests analysis

Before it adopted the UVTA, New York applied its general choice-of-law rules for torts to fraudulent conveyance claims. As noted in the UVTA's official commentary, this "'factors'

approach leaves the court with great discretion and may produce unpredictable results." N.Y. Debt. & Cred. Law § 279, 2020 supp. practice commentaries.

Under the traditional New York choice-of-law analysis, courts first consider whether there is an actual conflict between the potentially applicable laws, and if there is not and one choice is New York law, New York courts apply their own law. *Int'l Bus. Machs. Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir. 2004). Note that courts often rely on the parties' failure to identify a conflict in concluding that there is no material difference between jurisdictions' laws. Parties for whom the choice of law matters should therefore be careful to identify all material differences for the court.

If there is a conflict, New York courts then apply an "interests analysis" to identify which jurisdiction has the greatest interest in seeing its law applied to the claim. *In re Thelen LLP*, 736 F.3d 213, 220 (2d Cir. 2013). Fraudulent conveyance claims are considered "conduct-regulating rules." *Id.*; *Atsco Ltd. v. Swanson*, 29 A.D.3d 465, 466 (1st Dep't 2006). For those rules, the relevant law is generally "where the tort occurred." *In re Thelen LLP*, 736 F.3d at 220; *Atsco Ltd. v. Swanson*, 29 A.D.3d at 466. New York courts reason that the location where the tort occurred "has the greatest interest in regulating behavior within its borders." *Atsco*, 29 A.D.3d at 466.

It is at this point that the analysis becomes less predictable. There is significant variation between and among state and federal courts in interpreting where the fraudulent transfer occurred for the purpose of this rule. And in one recent case, the First Department invoked the site-of-the-tort rule but also considered which jurisdiction has the "greatest interest in protecting the reasonable expectations of its residents."

First Department's Decision in *Atsco*: Debtor's Principal Place of Business

In *Atsco Ltd. v. Swanson*, 29 A.D.3d 465 (1st Dep't 2006), the First Department applied the site-of-the-tort rule in a situation where the debtor was a Malaysian citizen who transferred assets out of Malaysia, and where the creditors were domiciled in Japan and the Cayman Islands, and concluded Malaysian law applied. As part of its recitation of the legal test it was applying, the First Department invoked dicta from the New York Court of Appeals that, for conduct-regulating torts, the site of the tort assumed primary importance because of that "jurisdiction's interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct, and in the admonitory effect that applying its law will have on similar conduct in the future." *Id.* at 466 (quoting *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 198 (N.Y. 1985)).

Based on the reasoning in *Atsco*, the First Department understood the "locus" to be the *place of the debtor's conduct*. The Second Circuit has, in the context of a non-fraudulent-transfer negligence claim, concluded that the place where the tortious conduct occurred controls over the place where the injury was felt. *Licci v. Lebanese Canadian Bank, SAL,* 672 F.3d 155, 158 (2d Cir. 2012). And recent federal district court decisions have reasoned that a fraudulent transfer occurs at the location of the wrongful conduct—there, the debtor's principal place of business. *See, e.g.*, *CBF Indústria De Gusa S/A v. AMCI Holdings, Inc.*, No. 13 Civ. 2581, 2023 WL

185493, at *21 (S.D.N.Y. Jan. 13, 2023); *ArcelorMittal N. Am. Holdings LLC v. Essar Glob. Fund Ltd.*, No. 21 Civ. 6975, 2022 WL 4334665, at *20 (S.D.N.Y. Sept. 19, 2022).

First Department's Decision in *Wimbledon*: Creditor's Principal Place of Business

In a recent case, the First Department has taken a different tack. In *Wimbledon Fund, SPC v. Weston Capital Partners Master Fund II, Ltd.*, 184 A.D.3d 448 (1st Dep't 2020), the First Department quoted the legal standard from *Atsco*, including how the law of where the tort occurred will generally apply, and the locus jurisdiction's interests. But the First Department invoked first among the contacts the plaintiff's domicile (the Cayman Islands). The First Department went on to note that the recipient of the allegedly fraudulent transfer was also domiciled in the Cayman Islands and that the Cayman Islands had "the greatest interest in protecting the reasonable expectations of its residents," the plaintiff and transferee. *Id.* at 450. Those two contacts, the First Department reasoned, were more significant than the debtor's domicile (in Texas) or the location of the bank account where the funds were transferred (New York).

It is difficult to square the First Department's approach in *Wimbledon* with its approach in *Atsco* (not withstanding *Wimbledon*'s explicit invocation of that language). The First Department did not explicitly say that it thought the location of the tort was the creditor's principal place of business, so its conclusion may be as simple as it thought the two contacts with the Cayman Islands were more significant than the debtor's principal place of business, which was the only contact with Texas it mentioned. But the fact that *Wimbledon* started with the creditor's principal place of business and separately addressed the interest of that jurisdiction in "protecting the reasonable expectations of its residents," without addressing Texas's own interest in protecting the debtor's reasonable expectations, suggests a focus on the creditor's contacts and interests that is inconsistent with *Atsco*.

There is also language from the Second Circuit in the context of a fraudulent conveyance action specifically, that because a tort's locus is generally "the place where the injury was inflicted," the most significant contact is the creditor's principal place of business. *In re Thelen LLP*, 736 F.3d 213, 220 (2d Cir. 2013). *Thelen*, however, did not draw a bright line. And because in that case the plaintiff was a liquidating trust for a law firm that had dissolved, the injuring and injured entities were essentially the same, and the court's decision to select New York law over California law amounted to a rule that the place of business is more significant than the place of incorporation. But there were also some pre-*Thelen* district court fraudulent conveyance cases that had also concluded the place of the injury was the most significant contact. *See, e.g.*, *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 192 (S.D.N.Y. 2006); *Drenis v. Haligiannis*, 452 F. Supp. 2d 418, 427 (S.D.N.Y. 2006).

The takeaway is that the First Department has interpreted the site of the tort to be the debtor's principal place of business, although its most recent case makes that interpretation less certain.

The Second Circuit has said in the context of a different conduct-regulating, non-fraudulent-conveyance tort that the place of the defendant's (there, the debtor's) conduct is the most significant. But in a more recent fraudulent conveyance case, it focused on the place of the injury—the creditor's principal place of business (albeit in a situation where the debtor's and creditor's places of business were the same). Given this uncertainty, litigants should not assume that a court applying New York law will find dispositive either the principal place of business of the debtor (in state court) or the creditor (in federal court).

New York post-UVTA—the law of the debtor's place of business

The approach under the UVTA is straightforward: The court applies the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred. N.Y. Debt. & Cred. Law § 279(b) (McKinney). As the commentary to the UVTA explains, this approach treats fraudulent transfer rules as priority rules, rather than tort-based claims. N.Y. Debt. & Cred. Law § 279, 2020 supp. practice commentaries. Under the UVTA, a debtor is located at its "place of business." N.Y. Debt. & Cred. Law § 279(a)(2) (McKinney). If the debtor has more than one, the court applies the law of the "place of its chief executive office." N.Y. Debt. & Cred. Law § 279(a)(3) (McKinney). New York courts applying the UVTA have dismissed fraudulent conveyance claims where the plaintiff asserted a claim under the law of a state other than the place of the debtor's chief executive office. *See, e.g.*, *Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.*, 150 N.Y.S.3d 894 (Sup. Ct. N.Y. Cty. 2021).

As noted above, this statutory choice-of-law rule applies to transfers governed by New York law that occurred on or after April 4, 2020.

The takeaway is that for transfers on April 4, 2020, or later, the rule is extremely clear: The court will apply the law of the debtor's chief executive office.

Delaware—the *Second Restatement*'s "most significant relationship" test

Delaware courts apply the *Second Restatement*'s "most significant relationship" test to both contract and tort claims. *See Travelers Indem. Co. v. Lake*, 594 A.2d 38, 41 (Del. 1991). Under that approach, Delaware courts consider first the broad "general principles" listed in section 6 of the *Second Restatement*. They then consider the contacts described in the *Second Restatement* that are most relevant to the type of action. (As a practical matter, courts generally skip to the relevant contacts and analyze only those). There is no section in the *Restatement* that specifically addresses fraudulent transfer claims, so Delaware courts generally consider the contacts relevant for tort actions in *Second Restatement* § 145. Those contacts are (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered.

Some courts applying Delaware law have also applied the contacts for restitution actions in *Second Restatement* § 221, which are fairly similar to the tort contacts. *See, e.g.*, *In re FAH Liquidating Corp.*, 572 B.R. 117, 129 (Bankr. D. Del. 2017). Where the parties' relationship involved a contract with a choice-of-law provision, some Delaware courts have considered that as well. *See, e.g.*, *id.* at 130 (supply agreements); *In re Physiotherapy Holdings, Inc.*, No. 13-12965(KG), 2017 WL 5163515, at *3 (Bankr. D. Del. Nov. 6, 2017) (leveraged buy-out).

The *Second Restatement* approach is a multi-factor balancing test, and its application reflects the diversity of fact patterns that courts confront with fraudulent transfer claims. It is difficult to draw generalizations, but there are several examples of courts applying Delaware law giving less weight to the place of incorporation than to the place where the conduct occurred or where the injury was felt. *See, e.g.*, *id.*; *Cliffs Nat. Res. Inc. v. Seneca Coal Res., LLC*, No. 17 Civ. 567, 2017 WL 5148426, at *2 (D. Del. Oct. 31, 2017); *In re W.R. Grace & Co.*, 281 B.R. 852, 855 (Bankr. D. Del. 2002).

The takeaway is that Delaware courts apply the *Second Restatement*'s multi-factor balancing test and generally consider the place of the injury, the place of the conduct, the parties' domicile and place of incorporation, and the place where the parties' relationship is centered, as well as any choice-of-law provision in a related contract between the parties. How courts weigh the factors will depend on the facts of the particular case, but courts applying Delaware law may give more weight to the place where the conduct occurred or where the injury was felt over the parties' place of incorporation.

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