Clawing Back Tuition Payments in Bankruptcy: Looking to Ancient and Recent History to Define the Future

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ABSTRACT: Tuition clawback lawsuits are a relatively recent phenomenon in bankruptcy in which trustees are attempting to recover tuition that was paid to universities by insolvent parents for their adult children's education. This Note contains an Appendix that catalogs 152 tuition clawback lawsuits to help examine and explain what is happening. Out of the cases that have been ruled on, courts have struggled with the question of whether tuition payments by insolvent parents are constructively fraudulent. More specifically, the main point of debate has been whether tuition paid by an insolvent parent for an adult child provides "reasonably equivalent value" to the debtor-parent(s). Based on an analysis of the facts of 152 tuition clawback lawsuits and the historical development of fraudulent transfer law, this Note concludes that tuition payments for an adult child do not provide reasonably equivalent value to their parents. Although this conclusion would resolve the current split on the question, it does not necessarily provide a solution that balances the rights of creditors with the rights of parents to help their children and the rights of universities to be protected. Thus, this Note proposes amendments to the Bankruptcy Code to better strike a balance between competing rights and policy considerations.

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I. INTRODUCTION

"Study the past if you would define the future."[1]

This quote, attributed to the famous Chinese philosopher Confucius, encapsulates a central theme of this Note as it explains, analyzes, and proposes solutions for a relatively new problem in bankruptcy law: tuition clawback lawsuits.[2] While the circumstances of each tuition clawback lawsuit vary significantly, each shares a basic formula. First, they involve a parent or parents who, while insolvent,[3] paid for an adult child's college tuition and relatively soon thereafter filed for bankruptcy. Then, during the bankruptcy proceedings, the trustee of the parents' bankruptcy estate attempts to use the avoidance powers bestowed by the Bankruptcy Code[4] to "claw back" the tuition that was paid by the debtor-parents from either the university to which it was paid and/or the adult child for whom it was paid. Why? Trustees—who have a duty to maximize the value of the estate for creditors[5]—claim that the

1. JAMES ALEXANDER, THE BEST CONFUCIUS QUOTES 23 (2015) (ebook).

2. *See generally* L. Alexandra Hogan, *This Vehicle Is Used to Avoid, Recover College-Tuition Payments: The 'Tuition Claw Back,'* BUSINESSWEST (Aug. 9, 2016), http://businesswest.com/blog/this-vehicle-is-used-to-avoid-recover-college-tuition-payments; Katy Stech, *Colleges Continue to Return Tuition Money in Bankruptcy Fights*, WALL ST. J.: BANKR. BEAT (Apr. 19, 2016, 11:25 AM), https://blogs.wsj.com/bankruptcy/2016/04/19/colleges-continue-to-return-tuition-money-in-bankruptcy-fights; *infra* Appendix.

3. Insolvency is defined in § 101 of the Bankruptcy Code, but a common definition typically associated with fraudulent transfers, and for purposes of this Note, is that insolvency means that "the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation," or that the debtor is not able to pay his or her debts as they become due. *See* UNIF. FRAUDULENT TRANSFER ACT § 2 (UNIF. LAW COMM'N 1984).

4. Sections 544, 548, and 550 of the Bankruptcy Code work together to permit a trustee to avoid (nullify) and recover property, or the value of property, that is inappropriately transferred by a debtor before or during bankruptcy. 5 COLLIER ON BANKRUPTCY ¶ 550.01 (Richard Levin & Henry J. Sommer eds., 16th ed. 2012); *see also infra* Section III.D.2.

5. *See, e.g.*, United States v. Aldrich (*In re* Rigdon), 795 F.2d 727, 730 (9th Cir. 1986); Bryan D. Hull, *A Void in Avoidance Powers? The Bankruptcy Trustee's Inability to Assert Damages Claims on Behalf of Creditors Against Third Parties*, 46 U. MIAMI L. REV. 263, 264 (1991).

tuition payments are fraudulent transfers, and therefore, under the Bankruptcy Code, should go to the parents' creditors.[6]

Broadly defined, a fraudulent transfer is any transfer that has "the object, tendency, or effect of . . . defraud[ing] [a creditor], or the intent of which is to avoid some duty or debt."[7] The Bankruptcy Code contains the two main types of fraudulent transfers that have repeatedly emerged throughout history[8]: A transfer can be actually fraudulent—a transfer within two years of filing for bankruptcy that was made with the actual intent to delay or prevent a creditor from obtaining the property[9]—or constructively fraudulent—a transfer within two years of filing for bankruptcy that was made while the debtor was insolvent and for which the debtor did not receive "reasonably equivalent value."[10]

When considering whether tuition payments by insolvent parents fall into either of these two types of fraudulent transfers, one can certainly imagine that a parent could actually intend to deprive creditors of money in an upcoming bankruptcy by using it to pay for a child's tuition in the present. But does or would that ever really happen? Furthermore, even if certain tuition payments were not actual fraudulent transfers, they could still be constructively fraudulent transfers if the parents made the payments while insolvent and a court determined that the tuition paid for the *adult child* did not provide reasonably equivalent value to *the parents*. If the tuition payments do not provide reasonably equivalent value to the parents who make them, then every parent who is insolvent and pays for an adult child's tuition within two years[11] of filing for bankruptcy *is* making a constructively fraudulent transfer. Is that really the conclusion the law demands? If so, *should* it be?

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6. The main fraudulent transfer provision in the Bankruptcy Code is 11 U.S.C. § 548. Trustees may also raise a fraudulent transfer claim under § 544, but only if it is allowed under state law. *See* 11 U.S.C. § 544(b)(1) (2012).

7. DEWITT C. MOORE, 1 A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS' REMEDIES AT LAW AND IN EQUITY 3 (1908). Although these transactions are most commonly referred to as "fraudulent transfers" or "voidable transactions" today, older laws and cases also refer to them as a fraudulent "conveyances," "dispositions" or "transactions."

8. *See infra* Part III.

9. 11 U.S.C. § 548(a)(1)(A) ("The trustee may avoid any transfer . . . if the debtor voluntarily or involuntarily . . . made such transfer or incurred such obligation *with actual intent* to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted . . . ." (emphasis added)).

10. *See id.* § 548(a)(1)(B). While insolvency may be the most common circumstance (and most relevant to this Note) that accompanies lack of reasonably equivalent value in a constructively fraudulent transfer, there are other circumstances besides insolvency which would also be considered of a constructively fraudulent transfer. *See id.* § 548(a)(1)(B)(ii)(II)–(IV).

11. Tuition clawback lawsuits brought under § 544 are based in state fraudulent transfer laws, which usually have look-back periods longer than two years. *See* Spencer C. Barasch & Sara J. Chesnut, *Controversial Uses of the "Clawback" Remedy in the Current Financial Crisis*, 72 TEX. B.J. 922, 926 (2009). Thus, tuition payments made far earlier than two years before the bankruptcy filing could be found to be constructively fraudulent transfers and subject to a claw back.

To analyze these issues and answer these questions, this Note looks to history, both ancient and recent. To help with this process, this Note presents an Appendix cataloging 152 tuition clawback lawsuits that have arisen, many of which are discussed and cited throughout this Note. In Part II, this Note explores why tuition clawback lawsuits are concerning, what they look like, and the society in which they have emerged. Part III examines the historical development of fraudulent transfer law, starting at its ancient origins and finishing at the modern day. Part IV, looks at tuition clawback lawsuits that have been ruled on, revealing some common patterns and the split among bankruptcy courts regarding whether tuition payments for an adult child provide reasonably equivalent value to their insolvent debtor-parents. Part V analyzes the reasoning of bankruptcy courts on both sides of the split. It analyzes the question of whether or "[w]hen is it OK for financially struggling parents to pay for a child's college education?"[12] It focuses on whether the law views these parental tuition payments as fraudulent transfers,[13] as well as whether society views them as fraudulent or impermissible debtor conduct.[14] It concurs with the majority of courts, which hold that parents do not receive reasonably equivalent value by paying tuition for their adult children and thus such payments are, at the very least, constructively fraudulent transfers. However, Part V also explains that there are many reasons why parents, even when insolvent, should be permitted to help their children obtain a college education. Lastly, Part VI proposes amendments to the Bankruptcy Code that attempt to do what fraudulent transfer laws have historically adapted to do: distinguish between honest and dishonest debtors. By doing so, the amendments seek to balance the needs and rights of parents, creditors, and universities. Part VII concludes.

12. Katy Stech, *Stech's Take: Chicago Court Decision Sides with Parent in College Tuition Dispute*, WSJ PRO BANKR. (Jan. 5, 2017, 5:45 PM), https://www.wsj.com/articles/stechs-take-chicago-court-decision-sides-with-parent-in-college-tuition-dispute-1483656312.

13. "Nullum crimen sine lege" is a legal principle that essentially means that there is no crime where there is no law against it. *See Nullum crimen sine lege*, BLACK'S LAW DICTIONARY (10th ed. 2014). *See generally* Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937) (discussing the use and meaning of the phrase).

14. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 39 (Harvard Univ. Press 2009) (1881) ("The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."); *id.* at 124 ("[S]tarting from the moral ground, [the common law] works out an external standard of what would be fraudulent in the average prudent member of the community, and requires every member at his peril to avoid that.").

II. WHY ARE TUITION CLAWBACK LAWSUITS A PROBLEM?

> "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence . . . ."[15]

Before diving deeper into an analysis of tuition clawback lawsuits and the society in which they have emerged, consider the following stories.

In July 2010, Mr. and Mrs. Weiss sold $31,715 worth of stocks.[16] Over the next two weeks, the couple used $24,430 out of those funds to pay for their daughter's college tuition at Drexel University.[17] A mere three weeks after the stock sale, and days after the last tuition payment was made, the Weisses filed for Chapter 7 bankruptcy.[18] The court eventually discharged their debts, which included over $200,000 in credit-card debt and a mortgage that exceeded the value of their $1.1 million home by $90,000.[19] Before the discharge, however, the trustee for the Weisses' bankruptcy estate sued Drexel University, and eventually the Weisses' daughter, to recover the $24,430 the Weisses paid for their daughter's tuition.[20] The parties settled the case when the Weisses' daughter agreed to pay $3,000 to her own parents' bankruptcy estate.[21]

In April 2017, a man named Larry Gideon passed away while his estate was in the middle of bankruptcy.[22] Shortly after Mr. Gideon's death, his daughter discovered a secret that her father had kept from her for nearly nine months: The trustee of her father's bankruptcy estate was suing her and her former university for nearly $90,000 that her father had paid to cover her college tuition three to six years earlier.[23]

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15. *Adams' Argument for the Defense: 3–4 December 1770*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016#LJA03d031n1-ptr (last visited March 28, 2019).

16. Complaint for Avoidance and Recovery of Fraudulent Transfer at 1, Holber v. Drexel Univ. (*In re* Weiss), No. 10-00476 (Bankr. E.D. Pa. Dec. 20, 2010).

17. *Id.* at 2.

18. *Id.* at 1–2.

19. *See* Voluntary Petition of Thomas H. Weiss and Holly M.F. Weiss at 20, 24–29, *In re* Weiss, No. 10-16864 (Bankr. E.D. Pa. Aug. 16, 2010); Discharge of Joint Debtors at 1, *In re* Weiss, No. 10-16864 (Bankr. E.D. Pa. Dec. 20, 2010).

20. *See* Complaint for Avoidance and Recovery of Fraudulent Transfer, *supra* note 16, at 2 (case against university); Complaint to Recover Avoided Transfer Pursuant to 11 U.S.C. § 550 at 2, Holber v. Weiss (*In re* Weiss), No. 12-00086 (Bankr. E.D. Pa. Feb. 8, 2012) (case against daughter).

21. Stipulation in Settlement of Amended Complaint at para. 18, Holber v. Weiss (*In re* Weiss), No. 12-00086 (Bankr. E.D. Pa. Sept. 04, 2012).

22. *See* Katy Stech, *Treatment of Tuition Payments in Bankruptcy Poses Problem for Struggling Parents*, WALL ST. J. (June 2, 2017, 2:11 PM), https://www.wsj.com/articles/treatment-of-tuition-payments-in-bankruptcy-poses-problem-for-struggling-parents-1496427104; *see also* Voluntary Petition of Larry Gideon at 1, *In re* Gideon, No. 15-50464 (Bankr. E.D. Mich. Jul. 10, 2015). Larry Gideon filed for bankruptcy nearly two years before he passed away. *See id.*

23. *See* Complaint to Avoid and Recover Transfer at 2–3, Shapiro v. Gideon (*In re* Gideon), No. 16-04939 (Bankr. E.D. Mich. Oct. 4, 2016); Stech, *supra* note 22. Fortunately for the

Although these are just two lawsuits out of the 152 which the Author has analyzed and cataloged, they are quite instructive of tuition clawback lawsuits in general. Most importantly, they show that even though each case shares a number of common features, there are circumstances in each that drastically affect our feelings regarding whether the conduct of the parents in these lawsuits was appropriate and just. Furthermore, if some of these parental tuition payments are fraudulent transfers under current law, the different underlying circumstances affect our beliefs of whether the law is correct and just.

For example, there are many cases in which a parent paid or began paying tuition for a child several years before bankruptcy, like the *Gideon* story discussed above.[24] The remoteness of these tuition payments from the commencement of bankruptcy suggests that the parents in these cases did not make the tuition payments as a way to prevent their money from going to creditors in bankruptcy. In fact, it is very possible that the prospect of bankruptcy was not in the parents' minds or plans at all at the time the tuition payments were made. On the other hand, there are also many cases in which parents behave in a way that appears to be less than honest towards their creditors, like the *Weiss* story.[25] In these cases, the facts suggest that parents were aware that bankruptcy was near and sought to use whatever funds they could to benefit their children instead leaving a larger estate for creditors in bankruptcy. Even if helping their children were the initial and most likely motivation behind the tuition payments, it seems extremely unlikely that the parents would be able to make the payments without realizing that some creditor would soon be disadvantaged in bankruptcy.

Accordingly, these cases exist along a spectrum with myriad facts and circumstances: Some cases carry greater indicia of fraudulent motives, while others show little to no evidence of suspect motives. One of the goals of this Note, explored in this Part, Part IV, and by the Appendix, is to understand and show where most tuition clawback lawsuits fall along this spectrum. Such data helps explain who is being harmed in these cases, whether tuition payments by insolvent parents belong in the realm of fraudulent transfer law at all, and what, if any, solutions are needed to better balance all parties' competing interests.

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daughter, the case was eventually dismissed because her father had received federal Parent Plus loans to pay the tuition, and the court held that the loan had never become part of Mr. Gideon's estate and thus was not avoidable. Stech, *supra* note 22.

24. See *infra* Appendix, at rows 25, 40, 47, 64, 76, 88, 90, 99, 100, 118, 125, and 138 for examples.

25. *See infra* notes 170–76 and accompanying text.

A. USING DATA TO EXPLORE THE PROBLEM

Of the 152 lawsuits cataloged with this Note, all but one case has been instigated since 2006.[26] Trustees have attempted to recover at least $6.1 million of tuition payments.[27] Universities are a defendant in almost every case, as trustees claim that universities are liable under § 550 as the "initial transferee" of the tuition payments.[28] Although universities have fought to escape these lawsuits, nearly 58% of cases that have been commenced and resolved since 2006 have resulted in universities settling the lawsuits, returning a combined total of nearly $1.2 million ($14,989 on average) to bankrupt parents' estates.[29] Because of the burden these lawsuits impose on universities, they are beginning to approach and fight these lawsuits more seriously.[30]

However, universities are not the only parties facing liability. Students for whom the tuition payments are made are just as liable under the law as they are the main beneficiaries of the tuition.[31] Most trustees have refrained from going after the debtors' children[32]—the student has been named as a

26. *See infra* Appendix. The Appendix is the Author's best attempt to find and catalog as many tuition clawback lawsuits as possible. Some tuition clawback lawsuits were intentionally left out because they delt with considerations outside the scope of this Note. *See infra* note 40. Others were likely missed and left out due to imperfections in the Author's database search criteria. Even though not perfectly comprehensive, the Appendix contains a great sample size of cases to look at. The list was updated through March 29, 2019.

27. *See infra* Appendix.

28. *See* 11 U.S.C. § 550 (2012).

29. *See infra* Appendix. The average amount of tuition that trustees have attempted to claw back from universities is $40,589, with a median of $24,870 and a range from $715 to $257,962. Comparing the average amount sought to the average amount universities have settled for, the typical settlement has constituted 36.9% of the amount sought. The largest single settlement paid by a university was $91,000. *See infra* Appendix, at row 54. When including parties other than universities who have paid to settle these claims—usually the debtor or other family members but sometimes the child-student—trustees have recovered an average of $16,455, or 40.5% of the amount sought. It is important to note that there have been many cases, at least 48, that have been dismissed or dropped for variouos reasons. When factoring in all the cases in the Appendix, trustees have recovered an average of $10,612 across all cases that have concluded.

30. *See, e.g.*, Katy Stech, *Law Firm Takes on Bankruptcy Trustees in Tuition Battles*, WSJ PRO BANKR. (June 30, 2016, 8:17 AM), https://www.wsj.com/articles/law-firm-takes-on-bankruptcy-trustees-in-tuition-battles-1467289035 (explaining that universities originally decided to settle these cases quickly or relied on inhouse counsel or small law firms in contesting them, but some have now begun to hire larger firms that specialize in higher education work).

31. *See* 11 U.S.C. § 550 ("Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544 . . . [or] 548 of this title, 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 of such transfer *or the entity for whose benefit such transfer was made* . . . ." (emphasis added)).

32. *See* Katy Stech, *What's Behind Bankruptcy Lawsuits Over College Tuition?*, WALL ST. J.: BANKR. BEAT (May 6, 2015, 2:05 PM), https://blogs.wsj.com/bankruptcy/2015/05/06/whats-behind-bankruptcy-lawsuits-over-college-tuition ("Many bankruptcy lawyers [have] said students are fair game to be sued, though trustees don't do that because it is unlikely they could afford to repay the debt.").

defendant in only 21 (14%) of lawsuits[33]—but the children have had to pay in some cases when they are named.[34] However, even if the child-student is not named as a defendant, it does not mean that there are not other potential consequences for the students. Some universities who have been sued by bankruptcy trustees have threatened harsh consequences for the debtor-parents' children, such as seeking indemnification, freezing their transcripts, or withholding their degrees.[35] Students may be the most sympathetic party in these cases because they played no direct part in their parents' insolvency or decision to file for bankruptcy, and they are the party least able to bear the financial burden of an adverse judgment or settlement. Many worry that the damage and stress caused to students and families by these lawsuits is greater than the benefit creditors can receive from them.[36]

Looking to the legal elements of the cases, while there are several instances where the facts of the case point to a high likelihood of actual fraudulent intent,[37] nearly all of these lawsuits center on the trustees' assertions that tuition payments by insolvent parents are constructively fraudulent transfers.[38] Trustees make their claims under § 548, § 544, or, as is most common, both in order to take advantage of state-specific variations in fraudulent transfer law.[39] Thus, the main question in tuition clawback

33. *See infra* Appendix.

34. *See infra* Appendix, at rows 2, 9, and 16.

35. *See* Katy Stech, *USC in Tuition Battle: Former Students Will Face Consequences*, WALL ST. J.: BANKR. BEAT (Nov 17, 2015, 1:32 PM), https://blogs.wsj.com/bankruptcy/2015/11/17/usc-in-tuition-battle-former-students-will-face-consequences ("University of Southern California lawyers said if the school is forced to return the money, it will 'be left with no choice other than to seek to recover all payments' from two former students whose parents, Charles and Claudia Ankrim, paid for their education before filing for bankruptcy in June 2013. 'Additionally, the children's transcripts from USC will be frozen,' . . . ."); Stech, *supra* note 32 ("[S]ome parents . . . [are] worried whether their child w[ill] be expelled, denied a transcript or asked to repay the school for the money it turned over.").

36. *See, e.g.*, Stech, *supra* note 32 ("The[se] lawsuits present an unexpected consequence that bankruptcy can create for families. 'It'd be horrible for a kid and their parent to have to go through this,' said Deborah Thorne, a professor of sociology at Ohio University who has studied the effects of financial distress on families."); *see also* Memorandum of Law in Support of Motion to Dismiss of University of Maryland, College Park at 6, Coan v. Univ. of Md., Coll. Park (*In re* Jabick), No. 14-05069 (Bankr. D. Conn. Apr. 14, 2015), ECF No. 7 ("[T]hese avoidance actions which attack parental-motivated transfers to third parties with clean hands . . . will, if allowed to grow, drive a wedge between parent and child.").

37. *See infra* notes 170–77 and accompanying text.

38. Approximately 27% of tuition clawback lawsuits included a claim for actual fraudulent transfers whereas 98.7% included a claim for constructive fraudulent transfers. *See infra* Appendix.

39. One of the most important differences between fraudulent transfer provisions in the Bankruptcy Code and state laws is that state fraudulent transfer laws usually have a much longer "look-back period." *See* Barasch & Chesnut, *supra* note 11, at 926 (noting that the majority of states that have adopted UFTA have at least "a four-year look-back period"). The longer look-back period enables the trustee to claw back a greater number of transfers and amount in tuition than could be done under § 548 alone. *See, e.g.*, Complaint at 3–6, Chorches v. Catholic Univ. of Am. (*In re* Franzese), No. 16-05035 (Bankr. D. Conn. June 23, 2016) (attempting to claw back

lawsuits has really boiled down to whether *parents* receive reasonably equivalent value when they pay for an *adult child's* tuition.[40] So far, these lawsuits have arisen in at least 20 different bankruptcy jurisdictions,[41] and a split regarding the question of reasonably equivalent value has emerged among the few district bankruptcy courts that have ruled on the matter. This has caused uncertainty for trustees, who desire to satisfy the creditors they represent, and for the defendants, almost always universities, who wish to keep the tuition from being clawed back. The only thing that seems certain at this point is that the current trajectory of financing a college education will only lead to more of these tuition clawback lawsuits in the future.[42]

B. WHY ARE TUITION CLAWBACK LAWSUITS HAPPENING?

Tuition clawback lawsuits are actually a significant symptom of a much larger and well-known problem for today's families and society in general: the exponentially increasing expense (and potential risk) of obtaining higher education. College tuition rates increased by 1,120% between 1978 and 2012

$30,659.50 under § 548 and $64,845.50 under state law through § 544); Complaint at 3–6, Chorches v. Pa. State Univ. (*In re* Barfuss), No. 15-05045 (Bankr. D. Conn. Aug. 21, 2015) (attempting to claw back $53,265.00 under § 548 and $104,989.00 under state law through § 544).

40. Although this is the issue in the typical fact pattern and the focus of this Note, there are variations with legally significant consequences. *See infra* Appendix. For example, there have been tuition clawback lawsuits brought to recover tuition paid for minor children. *See, e.g.*, Geltzer v. Xaverian High Sch. (*In re* Akanmu), 502 B.R. 124, 127–28 (Bankr. E.D.N.Y. 2013). The Appendix of this Note contains some of these cases but does not otherwise focus on them because they are factually and legally distinct. Courts have generally held that insolvent parents' tuition payments for minor children are not fraudulent transfers. *Id.* at 135–36. Courts recognize that parents have a legal duty to ensure their minor children receive education, and even though a parent could have fulfilled this duty by sending children to public school without having to pay tuition, parents receive reasonably equivalent value by fulfilling this duty. *See, e.g.*, McClarty v. Univ. Liggett Sch. (*In re* Karolak), No. 12–61378, 2013 WL 4786861, at *3 (Bankr. E.D. Mich. Sept. 6, 2013). Courts have not come to a clear consensus whether parents have such a duty for adult children. *See infra* Section IV.B. A second variant is when parents pay for their children's tuition using federal loans. *See, e.g.*, Eisenberg v. Pa. State Univ. (*In re* Lewis), 574 B.R. 536, 537 (Bankr. E.D. Pa. 2017). The Appendix includes many of these cases, but this Note does not otherwise discuss them. Most courts have held that federal loans are not part of the debtor's estate, because the loan money goes straight to the university and could not be used for fulfilling any other debts; thus, courts never need to reach the question of reasonably equivalent value. *See id.* at 540. Lastly, in some cases parents pay for a child's tuition through their company, often using the company's or investors' funds. *See, e.g.*, Complaint to Avoid and Recover Fraudulent Transfers at 1–3, Nesse v. Pa. State Univ. (*In re* Litman Dev., Inc.), No. 10-31644 (Bankr. D. Md. June 8, 2011). Although several of these corporate debtor cases are referenced in the Appendix, this Note does not address them specifically because, in addition to a normal reasonably-equivalent-value analysis, they also implicate issues regarding corporate structure and fiduciary duties that are not present in the typical case involving parents using their own money.

41. *See infra* Appendix.

42. *See* Stech, *supra* note 2 ("Historically, tuition payments were so small that a court-appointed trustee wouldn't waste time pursuing them. But as college costs rise and more parents chip in to help their kids, bankruptcy experts predict more of these lawsuits to come.").

alone.[43] Significantly higher tuition rates have led to significantly more unstable financial conditions for students post graduation: Eight million student-borrowers collectively defaulted on more than $137 billion in student loans in 2016.[44] Furthermore, recent government budget proposals have threatened to restrict college financing, loan-forgiveness, and loan-repayment options for students, further threatening students (and their parents) who go into debt to finance college.[45] Obtaining higher education is more important than ever,[46] but for most college students affording higher education is harder than ever.[47]

This reality has caused parents and family to step in to help pay for college. The average yearly amount spent by families on college education climbed from $17,200 in 2008 to $26,458 in 2018,[48] a growth of nearly 54%. Parents cover a significant portion of these costs, paying an average of $8,891 in 2018 for children's college expenses out of their own income or savings.[49] These numbers can vary drastically among different regions in the country; for example, in 2017 families in the Northeast paid approximately 70% more on college expenses than the average family.[50] Parents in the Northeast have born the brunt of this higher percentage, "contribut[ing] significantly more from their income and savings to pay their students' college costs."[51] Many

43. Michelle Jamrisko & Ilan Kolet, *Cost of College Degree in U.S. Soars 12 Fold: Chart of the Day*, BLOOMBERG (Aug 15, 2012, 5:00 AM), https://www.bloomberg.com/news/articles/2012-08-15/cost-of-college-degree-in-u-s-soars-12-fold-chart-of-the-day. In contrast to the price of tuition, "[m]edical expenses have climbed 601 percent, while the price of food has increased 244 percent over the same period." *Id.*

44. Kim Clark, *A Record Number of People Aren't Paying Back Their Student Loans*, MONEY (Mar. 14, 2017), http://time.com/money/4701506/student-loan-defaults-record-2016.

45. *See* Emma Brown et al., *Trump's First Full Education Budget: Deep Cuts to Public School Programs in Pursuit of School Choice*, WASH. POST (May 17, 2017), https://www.washingtonpost.com/local/education/trumps-first-full-education-budget-deep-cuts-to-public-school-programs-in-pursuit-of-school-choice/2017/05/17/2a25a2cc-3a41-11e7-8854-21f359183e8c_story.html ("Funding for college work-study programs would be cut in half, public-service loan forgiveness would end and hundreds of millions of dollars that public schools could use for mental health, advanced coursework and other services would vanish under a Trump administration plan to cut $10.6 billion from federal education initiatives . . . .").

46. *See infra* notes 240–49.

47. *See infra* Section IV.B.1.

48. *Compare* SALLIE MAE & IPSOS PUBLIC AFFAIRS, HOW AMERICA PAYS FOR COLLEGE 2017, 12 fig. 2 (2017), https://news.salliemae.com/sites/salliemae.newshq.businesswire.com/files/doc_library/file/How_America_Pays_for_College_2017_Report.pdf [hereinafter HOW AMERICA PAYS FOR COLLEGE 2017] (showing the average amount spent on college by families in 2008 was $17,200), *with* SALLIE MAE & IPSOS PUBLIC AFFAIRS, HOW AMERICA PAYS FOR COLLEGE 2018, 5–11 (2018), https://www.salliemae.com/assets/research/HAP/HowAmericaPaysforCollege2018.pdf [hereinafter HOW AMERICA PAYS FOR COLLEGE 2018] (reporting that the average amount spent by families on college was $26,458).

49. HOW AMERICA PAYS FOR COLLEGE 2018, *supra* note 48, at 2, 7 fig.

50. HOW AMERICA PAYS FOR COLLEGE 2017, *supra* note 48, at 37.

51. *Id.* at 7, 37–38.

parents even reported having to work extra hours to do so.[52] Due to the highger costs and financial burden that parents and families undertake in the Northeast, it is no surprise to learn that the vast majority of tuition clawback lawsuits have arisen there.[53]

However, due to the rising costs of tuition, the financially precarious situations students who borrow endure, and the inverse relationship between the amount parents spend out their own income and savings and the amount students borrow, parents face pressure to continue contributing more each year.[54] It is in this environment, when parents who typically play a large role in funding their children's college education run into financial trouble and bankruptcy, that tuition clawbacks are most likely to occur.

III. THE HISTORICAL DEVELOPMENT OF FRAUDULENT TRANSFER LAW AND BANKRUPTCY

> "Bankruptcy is a gloomy and depressing subject. . . . But the history of bankruptcy legislation . . . is colorful; for not only does it reflect the changes in viewpoints and in economic conditions in our National history, but it also reminds us of how frequently the views and conditions of today are mere repetitions of the past."[55]

The history of bankruptcy laws and the debtor-creditor relationship is one of patterns.[56] One of the most ubiquitous patterns has also been the most problematic: fraudulent and dishonest conduct by debtors.[57] The connection

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52. *Id.* at 7.

53. *See infra* Appendix.

54. *See* HOW AMERICA PAYS FOR COLLEGE 2017, *supra* note 48, at 11–14 & figs. 1A, 1B. The percentage of college funding that students have borrowed has always peaked in those years in which assistance from parents' income and savings is at its lowest. *Id.*

55. CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 3 (1935).

56. For instance, in more modern history, economic downturns throughout U.S. history consistently led to greater demand for bankruptcy legislation to help those who were suffering financially. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14 (1995) ("Each instance of federal legislation followed a major financial disaster . . . ."); John Fabian Witt, *Narrating Bankruptcy / Narrating Risk*, 98 NW. U. L. REV. 303, 314 (2003) ("Each renewed economic downturn brought a reprise of arguments for bankruptcy legislation."). Congress responded to these demands with bankruptcy legislation that attempted to provide debtors with a fresh start but would later repeal them when the economy recovered or when Congress's views regarding debt and debtors changed. Robert J. Landry, III & David W. Read, *Erosion of Access to Consumer Bankruptcy's "Fresh Start" Policy in the United States: Statutory Reforms Needed to Enhance Access to Justice and Promote Social Justice*, 7 WM. & MARY POL'Y REV. 51, 56, 64 (2015). The United States did not have a permanent bankruptcy code with discharge of debts until 1898. Tabb, *supra*, at 13–14.

57. *See* Garrard Glenn, *Essentials of Bankruptcy: Prevention of Fraud, and Control of Debtor*, 23 VA. L. REV. 373, 379–83 (1937) (noting that bankruptcy legislation in 17th and 18th century Europe was plagued by fraudulent debtors and giving examples of how "the fraudulent bankrupt is perennial"); *id.* at 387–88 ("[F]rauds abound always . . . [because] each generation is wiser in its wickedness than those which preceded it . . . ."); *see also* Ralph C. McCullough, II, *Bankruptcy Fraud: Crime Without Punishment II*, 102 COM. L.J. 1, 1 (1997) ("The oldest bankruptcy laws

between fraud, debt and bankruptcy—whether actual, perceived, or assumed—repeatedly influenced the evolution of the debt and bankruptcy systems of various societies throughout history.[58]

In many ancient societies, insolvency itself was viewed as fraudulent, regardless of "whether the debtor was actually honest or dishonest."[59] Societies and creditors used various, severe sanctions to punish those who borrowed and failed to pay.[60] Creditors' remedies in early times were against the "body" of the debtor; for example, debtors who could not pay their debts in ancient societies could be subjected to forced labor, physically abused, sold into slavery, or even killed as payment for their debts.[61] Even when societies moved away from some of the harsher forms of execution against the body of a debtor to execution against the debtor's property,[62] many early laws expressly connected bankruptcy to the debtors' actual or assumed fraudulent conduct.[63]

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emerged as weapons for creditors to prevent the flight of such debtors and to recover what assets might remain.").

58. *See, e.g.*, Michael D. Sousa, *Bankruptcy Stigma: A Socio-Legal Study*, 87 AM. BANKR. L.J. 435, 449 (2013) ("Various bankruptcy laws adopted by Western European countries from the Middle Ages through the 1600s intentionally linked the concept of bankruptcy with acts of fraudulent conduct."); *see also supra* note 57.

59. Louis Edward Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 237 (1918).

60. *E.g.*, *id.* at 229–31 (describing the social and religious sanctions for debtors across multiple ancient societies).

61. 8 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 229 (1925); Levinthal, *supra* note 59, at 228–33. Until relatively recently, inability to pay debts could lead to imprisonment as a criminal. Sousa, *supra* note 58, at 450 (noting that debtors' prisons were in use in the United States into the mid-19th century). At times, debtors were treated even worse than criminals. *See, e.g.*, BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 97–98 (2002) (telling the story of the yellow fever epidemic that raged through Philadelphia in 1798, during which the city moved many of its criminal prisoners to a jail in the countryside to avoid the disease but left imprisoned debtors without care in the path of the disease); Sousa, *supra* note 58, at 445–50 ("During the seventeenth century, bankruptcy was particularly viewed in Europe as a 'dangerously immoral' practice, characterized as a criminal act, and sanctioned accordingly. . . . [However,] the general conditions of debtors' prisons were deplorable, and unlike the incarcerated criminal inmates, imprisoned debtors' sentences were indeterminate as to duration." (footnotes omitted)). Although the United States abolished imprisonment for failure to pay debts nearly 200 years ago, some argue that debtors' prisons still exist today. *See Ending Modern-day Debtors' Prisons*, ACLU, https://www.aclu.org/issues/criminal-law-reform/ending-modern-day-debtors-prisons?redirect=feature/ending-modern-day-debtors-prisons (last visited Mar. 28, 2019).

62. *See* Levinthal, *supra* note 59, at 232–33 ("The change from the one form of execution to the other, slow and gradual as it was, is an instance of the general evolution of legal process from the stage were retaliation is the end in view to the stage where compensation is the chief desideratum."). Although execution against the property of a debtor instead of the body of debtor has been the norm for quite some time, execution against the "body" was, until the last couple centuries, viewed as a remedy of last resort. *See* 8 HOLDSWORTH, *supra* note 61, at 230–31.

63. Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQUIRIES L. 365, 369 (2006) ("In an attempt to voice their disapproval of the deviancy associated with personal bankruptcy and to reinforce the stigma associated with bankruptcy, societies historically adopted

Even though the initial instinct of most societies was to view debt and insolvency as immoral and fraudulent, each society eventually had to reckon with the "honest but unfortunate debtor."[64] Borrowing money is part of a more complex and growing economic system,[65] and with that complexity and growth comes debtors who fall into insolvency when their honest ventures fail or misfortune strikes.[66] Furthermore, lawmakers also began to acknowledge that many of the punishments for insolvent debtors did little to remedy harms to their creditors; a person who can't pay a creditor while free certainly won't be able to do so when confined in prison.[67] Providing some form of relief for debtors would lead to more cooperation and facilitate quicker and more favorable outcomes than merely establishing punishment for wrongdoing.[68]

Thus, laws began to distinguish between those who were unable to pay due to misfortune and those who were unable to repay due to recklessness or fraud.[69] A pattern was established: Public sentiment and laws alternated between giving creditors a stronger sword—more efficient legal remedies to recover their debts and prevent or punish fraudulent conduct—and giving honest debtors a larger shield—relief from, or greater bargaining power with, incessant creditors.[70] Roman law was one of the first systems to do this,

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bankruptcy laws that emphasized the bankrupt's deceitful, quasi-criminal conduct in entering into bankruptcy, focusing on degrading the bankrupt, and imposing significant penalties on the bankrupt. . . . [B]y linking fraudulent conduct with the commencement of bankruptcy, the bankrupt automatically earned the disrespect of society.").

64. *See* Levinthal, *supra* note 59, at 237 (describing how two ancient societies adapted to accommodate honest debtors); *see also* 8 HOLDSWORTH, *supra* note 61, at 229 ("Whenever it is possible . . . some distinction is drawn between a debtor who is unable to pay by misfortune, and a debtor who is unable to pay by reason of his own recklessness or fraud.").

65. *See* 1 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 2d §§ 1:1–1:2 (explaining that the earliest transactions of merely exchanging goods did not present a need for insolvency laws, but economic interactions advanced to the point where such laws were needed); Jan H. Dalhuisen, *Roman Law of Creditors' Remedies*, *in* EUROPEAN BANKRUPTCY LAWS 1, 1 (I. Arnold Ross ed., 1974) ("[Insolvency laws] are only products of a more advanced economic system and a set-up in which there is a rather refined system of contract law.").

66. Rhett Frimet, *The Birth of Bankruptcy in the United States*, 96 COM. L.J. 160, 162 (1991) ("Eventually, . . . society changed its views such that it became believable that one could simply fall onto hard times without premeditation.").

67. *See* Philip Shuchman, *The Fraud Exception in Consumer Bankruptcy*, 23 STAN. L. REV. 735, 737 (1971) (explaining that discharge for debtors "did not come about by reason of sympathy for the insolvent's hardship," but "because penal sanctions—usually imprisonment—had not worked as anticipated"); Sousa, *supra* note 58, at 449–50 (explaining the history and decline in the use of debtors' prisons because they did not work effectively and when "imprisoned debtors could not work, they remained indigent, their debts remained unpaid, and the prisoners' dependents were often left to fend for themselves, in turn burdening the community for necessary assistance").

68. *See, e.g.*, Shuchman, *supra* note 67, at 737–38; Tabb, *supra* note 56, at 12.

69. *See, e.g.*, Shuchman, *supra* note 67, at 737–38; Tabb, *supra* note 56, at 12.

70. *See* Tabb, *supra* note 56, at 15, 18–20 (explaining the difficulties of enacting permanent bankruptcy legislation because many U.S. bankruptcy statutes were repealed shortly after enactment because the laws were either too harsh or did not effectively provide creditors with

particularly in the context of fraudulent transfers, and is regarded by many as the source of English (and subsequently American) bankruptcy law.[71]

A. *FRAUDULENT TRANSFERS UNDER ROMAN LAW*

Roman law evolved through three different types of bankruptcy proceedings on its journey of distinguishing between honest and fraudulent debtors. The first two were predecessors of what is now referred to as *involuntary* bankruptcy: proceedings instigated by creditors as a remedy against defaulting or fraudulent debtors.[72] The third type of bankruptcy proceeding was an original form of *voluntary* bankruptcy: a proceeding instigated by a debtor who seeks relief from debts or debt restructuring with creditors.[73] The voluntary bankruptcy system sought to distinguish between good and bad debtors by allowing honest debtors, those who were forced into bankruptcy through misfortune or innocent mismanagement, to turn their property over to creditors in reconciliation, claim some exemptions, and avoid the harsher punishments and stigma of the involuntary enforcement proceedings.[74]

Fraudulent transfers were an action for which a creditor could force a debtor into involuntary bankruptcy.[75] Roman law declared that a creditor could void and recover any property transferred by a debtor "in fraud of his creditors," and thus return the debtor's estate to the condition it was in before

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remedies and because of abuse by "high-rolling speculators who went through bankruptcy and then started their operations anew").

71. *See* Vern Countryman, *Bankruptcy and the Individual Debtor—And A Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 809 (1983); *see also* 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 82 (rev. ed. 1940) ("One cannot describe with any exactness the impact of Roman law upon the English thought of earlier centuries, although it was inevitable that mercantile features of [Roman law] would trickle [down] through all channels of the law merchant [throughout Europe]."); Frimet, *supra* note 66, at 162 ("While it is the Roman law that perhaps appears the least progressive in modern terms, it is most likely that it is the basis of the English bankruptcy system."); Levinthal, *supra* note 59, at 236 (claiming that "the Roman system of bankruptcy . . . is in fact the origin and fountain-head of all bankruptcy systems").

72. *See* Theodor C. Albert, *The Insolvency Law of Ancient Rome*, 28 CAL. BANKR. J. 365, 372 (2006) (noting that the *venditio bonorum* "bears a resemblance to our involuntary bankruptcy"); Max Radin, *The Nature of Bankruptcy*, 89 U. PA. L. REV. 1, 7 (1940) (defining involuntary bankruptcy). *Venditio bonorum*—a form of liquidation instigated by a single creditor when a debtor defaulted or performed an improper act to a creditor's detriment—was the earliest of the three and "was of a criminal and . . . defamatory nature." Dalhuisen, *supra* note 65, at 5. In order to better meet the needs of multiple creditors, Roman law next recognized the *bonorum distractio*, an insolvency procedure more similar to modern bankruptcy, in which the trustee would sell off the estate piecemeal, pay creditors *pro rata* out of the proceeds, and return any excess back to the debtor. *Id.* at 6; Levinthal, *supra* note 59, at 236.

73. This third type of proceeding was called *cessio bonorum*. Dalhuisen, *supra* note 65, at 7; Levinthal, *supra* note 59, at 238; *see also* Radin, *supra* note 72, at 7 (defining voluntary bankruptcy).

74. For explanations of these forms of Roman bankruptcy law, see Dalhuisen, *supra* note 65, at 2–9; and Levinthal, *supra* note 59, at 235–38.

75. *See* Tabb, *supra* note 56, at 8.

the transfer was made.[76] The word "fraud" in these Roman laws meant "prejudice" or "disadvantage," rather than deceit or misrepresentation as we commonly use the word "fraud" today.[77] This meant that the fraud element was established by showing "any act or forbearance by which a debtor diminished the amount of his property divisible among his creditors."[78]

Roman law originally required that a creditor prove that the debtor made a transfer with the *actual intent* "of diminishing the assets available for the creditors."[79] However, lawmakers eventually found the burden of proving actual intent to be too high, and Roman law began recognizing that the intent to defraud or harm creditors would be *presumed* whenever the transfer was made without valuable consideration *or* while the debtor was insolvent.[80] If a creditor proved that a debtor made a fraudulent transfer, the debtor was forced into involuntary bankruptcy and forfeited all the protections and benefits available in voluntary bankruptcy; furthermore the law adopted yet another presumption that *all* transfers made by the debtor during the "suspicious period," usually 30 days before bankruptcy, were *per se* fraudulent and could be recovered by creditors.[81]

B. EARLY ENGLISH BANKRUPTCY AND FRAUDULENT TRANSFER LAW

Just as the Romans had to establish a way to fight against fraudulent transfers as they developed bankruptcy systems, one the main purposes of the earliest bankruptcy statutes in England was preventing fraudulent transfers.[82]

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76. Max Radin, *Fraudulent Conveyances at Roman Law*, 18 VA. L. REV. 109, 109 (1931) (citing J. INST. 4.6.6).

77. The Latin word in the statute was "*fraus*." *Id.* at 111. The Latin word for fraud as it is more commonly understood today, deceit or misrepresentation to take advantage of another, was "*dolus*." *Id.*

78. S. Whitney Dunscomb, Jr., *Proposed Amendments to the Federal Bankruptcy Law*, 2 COLUM. L. REV. 313, 318 (1902).

79. *See id.*

80. 4 THE DIGEST OF JUSTINIAN 78 (Alan Watson ed., 2009); Dunscomb, *supra* note 78, at 318; *see also* Albert, *supra* note 72, at 395 ("Lucius Titius, having creditors, transferred all his property to his freedmen . . . . [A]lthough it was not suggested that Titius proposed to commit fraud, still as he knew that he had creditors, and alienated all his property, he should be understood to have had the intention of defrauding them . . . ." (quoting J. INST. 42.9.17)).

81. 1 GLENN, *supra* note 71, at 82–83.

82. *See* Radin, *supra* note 72, at 2–3 n.8. Although English common law recognized a cause of action for fraudulent transfers, economic and commercial growth and increasingly prevalent fraud quickly showed Parliament that statutory remedies were a necessity. *See* ORLANDO F. BUMP, A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS 5–6 (4th ed. 1896) ("[T]he law of fraudulent conveyances is founded upon the principles of common honesty, demanded by and adapted to the exigencies of commerce, and, if every memorial of the present law were blotted out, it would spring up again in nearly its present shape."); 8 HOLDSWORTH, *supra* note 61, at 230–33 (describing the development of insolvency and fraudulent transfer laws within the common law and the eventual need for legislation); Tabb, *supra* note 56, at 7 ("[T]he common law execution writs . . . did not address the distinct problems presented by a debtor's

During the 14th century, many debtors attempted to escape their debts by giving all their property to friends and fleeing to places of sanctuary where creditors and law enforcement officials could not touch them, only to later return and retrieve their property once creditors dropped their claims.[83] Parliament enacted the statute of 50 Edward III, c. 6 in 1376 to address such situations.[84] If a creditor could prove that the debtor and his friends colluded in such conduct to avoid a creditor, the creditor could recover the property in question "as if no such gift had been made."[85]

Although having a statutory remedy against fraudulent transfers was a step in the right direction, this law and its immediate progeny were ineffective and dishonesty persisted.[86] Parliament responded with new statutes.[87] Many of the later statutes, such as the Statute of 34 & 35 Henry VIII, specifically targeted fraudulent debtors[88] and carried a heavier criminal and penal focus to signal to debtors the severity of fraudulent acts against creditors.[89] The penalties in the statute for fraudulent debtors and those who aided them were severe.[90] However, in spite of the collective action, remedies, and harsher penalties 34 & 35 Henry VIII provided, fraudulent actions by debtors, particularly fraudulent transfers, continued to increase.[91]

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multiple defaults. Creditors needed protection from defaulting debtors and from each other." (footnotes omitted)).

83. *See* 1 GLENN, *supra* note 71, at 84–85 (noting that this action was known as "taking sanctuary" and the laws prohibiting such actions were known as "sanctuary laws").

84. Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 11–12 (1919).

85. *Id.* (quoting 50 Edward III, c. 6 (1376)).

86. *Id.* at 13.

87. *Id.* at 12–14.

88. Levinthal, *supra* note 84, at 14–15 & n.51 (noting that the statute was named "An Act against such persons as do make Bankrupt" and discussing its meaning). The statute of 34 & 35 Henry VIII contained two main features that are present in our modern bankruptcy system: "a summary collection or realization of the assets, and . . . an administration or distribution for the benefit of all creditors." *Id.* at 14. Because of these features, it is often regarded by some as the first bankruptcy law passed in England. Tabb, *supra* note 56, at 7.

89. *See* CHARLES JORDAN TABB, LAW OF BANKRUPTCY § 1.6, at 36 (3d ed. 2014) (explaining that 34 & 35 Hen. 8, c. 4 (Eng. 1542) is commonly regarded as the first bankruptcy law in England and it "viewed debtors as criminals"); Levinthal, *supra* note 84, at 17 ("The Statutes of Henry VIII and Elizabeth treated the bankrupt as a criminal who cheated honest men of their debts.").

90. *See* Levinthal, *supra* note 84, at 15–16 (noting that the punishment for debtors and friends who engaged in fraudulent transfers or fraudulent bankruptcy claims was to require forfeiture of double the value of the property at stake in the fraud).

91. *Id.* at 16; *see also* 13 Eliz. c. 5 (1570) (declaring that the act, which came after 34 & 35 Hen. 8, c. 4, was for preventing fraudulent transfers which had been "more commonly used and practysed in these dayes then hathe ben seene or hard of heretofore"); 13 Eliz. c. 7 ("[N]otwthstandinge the Statute made agaynst Bankruptes [34 & 35 Henry] . . . those kynde of psons have and doo still encrease into greate and excessive numbers, and are lyke more to do, yf some better pvysion be not made for the Repression of them . . . .").

This led Parliament to enact a more comprehensive bankruptcy act in 1570, the Statute of 13 Elizabeth.[92] The Statute of 13 Elizabeth was the first English statute that defined fraudulent transfers broadly by its elements rather than by specific acts.[93] It defined a fraudulent transfer as a transfer that was made with the "end[,] [p]urpose and [i]ntent to delaye[,] hynder[,] or defraude [c]reditors" and allowed such transfers to be voided and reclaimed.[94] Although 13 Elizabeth was originally enacted as a penal law to protect, raise revenue for, and be enforced by the crown,[95] common law rulings,[96] and then statutory amendments,[97] extended its provisions to allow both creditors and bankruptcy trustees to avoid and recover fraudulent transfers. It was in this form, possessing both a penal and civil nature, that 13 Elizabeth would later provide the foundation of fraudulent transfer law in the United States.[98]

By the early 18th century, the balancing act of distinguishing between honest and fraudulent debtors and the fight against fraudulent transfers reached its climax. Until that time, bankruptcy was a completely involuntary affair and was solely a tool to aid creditors: The relief it provided "was not *for* debtors, but *from* debtors."[99] Dissatisfied with the continuing prevalence of debtor fraud, Parliament had repeatedly enacted harsher penalties for bankrupts, at times proclaiming they were worse than criminals.[100] During this same time, however, Parliament began to more frequently observe that

92. 13 Eliz. c. 7; *see also* Tabb, *supra* note 56, at 7–8 (noting that the Statute of 13 Elizabeth was more comprehensive than those which preceded it).

93. *See* 13 Eliz. c. 5 (declaring that the act was "[f]or the avoyding and abolysshing of faigned, covenous and fraudulent Feoffmentes Gyftes Graunts Alienations Conveyaunces Bondes Suites Judgementes and Executions").

94. *Id.*; *see also* PETER A. ALCES, THE LAW OF FRAUDULENT TRANSACTIONS 5-107 (1989) (crediting the Statute of 13 Elizabeth with coining the phrase "intent to hinder, delay, or defraud").

95. *See* ALCES, *supra* note 94, at 5-11 to 5-12 ("The Statute [of 13 Elizabeth] was originally intended to protect the sovereign; indeed, it was penal in nature, with one half of the fraudulently transferred property escheating to the state."); *see also* 1 GLENN, *supra* note 71, § 61c, at 92–94 (noting that a bankruptcy act was passed in the same session as the Statute of 13 Elizabeth that focused more strongly on creditors' rights, but the bankruptcy act was essentially ignored because the government preferred to recover money for itself by prosecuting under 13 Elizabeth).

96. *See* Mannocke's Case (1571) 73 Eng. Rep. 661, 661–62 (extending 13 Elizabeth's remedies to creditors).

97. *See* 1 GLENN, *supra* note 71, at 96–98.

98. *See infra* Section III.D.

99. Tabb, *supra* note 56, at 8.

100. *See* Emily Kadens, *The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law*, 59 DUKE L.J. 1229, 1238–39 (2010) (quoting a member of Parliament around 1590 who said, "These bankrupts are worse than thieves [who] rob by the highway for necessity; but these are double thieves because they were put in trust with many men's goods, which by breaking they undo many." (alteration in original)); Levinthal, *supra* note 84, at 17 ("Parliament enacted in the Act of 21 Jac. I, c. 19 (1623), that pillory and the loss of an ear should be the penalty imposed upon debtor[s] who failed to show that bankruptcy was due solely to misfortune.").

insolvency was sometimes truly the result of inescapable misfortunes.[101] With these competing interests and beliefs in mind, Parliament enacted the Statute of Anne, bringing both more lenient and more severe consequences for bankrupt debtors.[102] The statute was the first to allow a discharge of debts, if the debtor was honest and willing to cooperate in the bankruptcy proceedings.[103] On the other hand, the statute also raised the stakes for debtors who committed fraudulent acts in connection with their debts or bankruptcy, subjecting them to the death penalty.[104] Although extreme from today's perspective, the crown and Parliament believed such drastic measures were necessary to prevent the increasingly prevalent harm caused by fraudulent debtors.[105]

C. *ACTUAL FRAUD,* TWYNE'S CASE*, AND THE EMERGENCE OF MODERN CONSTRUCTIVELY FRAUDULENT TRANSFER LAWS*

Like fraudulent transfer under Roman law before it, 13 Elizabeth required proof that the debtor possessed an "actual, *subjective* intent to hinder, delay, or defraud" a creditor at the time of the transfer.[106] Because fraud is secretive by nature, proving actual intent was often very difficult for creditors.[107] Roman law had responded to this issue by creating a *per se* presumption of fraud in certain circumstances, but English common law was traditionally reluctant to presume fraud.[108] However, for 13 Elizabeth to ever obtain its goal of preventing fraudulent transfers, the English courts had to

101. Kadens, *supra* note 100, at 1245–46; Levinthal, *supra* note 84, at 18.

102. 4 & 5 Ann. cc. 3, 4.

103. TABB, *supra* note 89, at 37. The Statute of Anne also allowed a bankrupt to receive "a small stipend from their estate with which to begin again," another action designed to promote the fresh start principle of bankruptcy. Kadens, *supra* note 100, at 1261.

104. TABB, *supra* note 89, at 37; *see also* Charles J. Tabb, *The Top Twenty Issues in the History of Consumer Bankruptcy*, 2007 U. ILL. L. REV. 9, 18 ("The 'stick' in the statute was the introduction of the death penalty for debtors who did not cooperate. Parliament, fed up with over a century of egregious cases of fraudulent debtor behavior, capped by the notorious frauds of one Thomas Pitkin in 1704, took desperate measures to stem the tide of fraud."). For a detailed account of the Thomas Pitkin scandal, see Kadens, *supra* note 100, at 1255–60.

105. 4 Ann. c. 17, § 1 ("Persons have and do daily become [b]ankrupt[,] not so much by reason of [l]osses and unavoidable [m]isfortunes[,] as to the [i]ntent to defraud and hinder their [c]reditors of their just [d]ebts and [d]uties to them due and owing.").

106. Peter A. Alces & Luther M. Dorr, Jr., *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U. ILL. L. REV. 527, 529 (emphasis added); *see* TABB, *supra* note 89, at 569.

107. *See* TABB, *supra* note 89, at 569 ("As one might expect, debtors rarely announce their fraudulent intentions for the world to hear."); *see also* ALCES, *supra* note 94, at 5-33 ("The Statute of 13 Elizabeth was premised on slippery notions of intent to defraud and without elaboration presented often insurmountable evidentiary problems for courts faced with the allegation that a creditor had been prejudiced by a fraudulent disposition.").

108. WILLIAM ROBERTS, A TREATISE ON THE CONSTRUCTION OF STATUTES 13 ELIZ. C. 5 AND 27 ELIZ. C. 4 RELATING TO VOLUNTARY AND FRAUDULENT CONVEYANCES 520 (2d ed. 1825) ("The common law of England abhors every species of covin and collusion; but [it was] tender of *presuming* fraud from circumstances . . . .").

begin the process of objectifying the intent element of fraudulent transfer laws.[109]

The process of objectification began with the recognition of "badge[s] of fraud" in *Twyne's Case*.[110] The facts of *Twyne's Case* are as follows. While a creditor's (Mr. C) action to recover from a debtor (Pierce) was pending, Pierce secretly conveyed all of his property to his friend Twyne, who was also a creditor.[111] Although Twyne took title to all of Pierce's property, he allowed Pierce to physically retain some of the property and treat it as his own.[112] Soon thereafter, a court entered judgment in the first case against Pierce in favor of Mr. C.[113] When Mr. C went to collect from Pierce and discovered that the little property Pierce still possessed had been conveyed to Twyne, he brought an action against Twyne to void the prior transfer due to fraud.[114]

Proving that Pierce actually intended to defraud Mr. C by making a transfer of all his property to Twyne was very difficult, however. Even though Pierce's transfer obviously prevented Mr. C from collecting the debt, there was no clear evidence that Pierce made the transfer with the intent to hinder or defraud Mr. C rather than with the intent to satisfy the debt he owed to Twyne.[115] Despite this dilemma, the court held that the transfer was fraudulent and therefore void.[116]

In its reasoning, the court pointed to six specific circumstances from which it could appropriately infer that Pierce had *actual* intent to defraud Mr. C.[117] These specific circumstances became known as "badges of fraud."[118] As courts came across more suspicious circumstances, the number of badges of

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109. *See* Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 830 (1985) ("The difficulty that courts and legislatures have faced for hundreds of years has been one of trying to define what kinds of transactions hinder, delay, or defraud creditors.").

110. Twyne's Case (1601) 76 Eng. Rep. 809, 810; 3 Co. Rep. 80 b; *see also* ALCES, *supra* note 94, at 5-33 (noting that by the willingness of the court to look at the totality of the circumstances, as opposed only to the debtor's manifest intent, *Twyne's Case* began "the objectification of fraudulent disposition law"). Although many scholars now acknowledge that *Twyne's Case* represents more of a preference payment, as opposed to a fraudulent transfer, it is still regarded as "[t]he foundational fraudulent conveyance case." TABB, *supra* note 89, at 579.

111. *Twyne's Case*, 76 Eng. Rep. at 810–11.

112. *Id.*

113. *Id.* at 811.

114. *Id.* at 811–12.

115. *Id.*

116. *Id.*

117. *Id.* at 812–14; *see also* ALCES, *supra* note 94, at 5-21, 5-33 to 5-34 (explaining the significance of *Twyne's Case* and introducing the "badges of fraud").

118. These original "badges of fraud" were (1) that the gift was general (meaning that the debtor reserved little to nothing for herself); (2) the debtor retained possession of and used as his own the property allegedly transferred to another party; (3) the transfer was secretive; (4) the transfer was made pending a judgment in favor of a creditor; (5) the transferee held the goods only in trust for the debtor; and (6) the deed claimed that the transfer was bona fide. TABB, *supra* note 89, at 570.

fraud grew,[119] and by looking for these badges of fraud, future courts held with increasing frequency that "transaction[s] [were] . . . fraudulent conveyance[s] even though no specific evidence suggested that the debtor tried to profit at his creditors' expense."[120] Courts acknowledged that there are certain transactions that, regardless of any expressed wrongful intent, have the natural and probable tendency to delay, hinder, or defraud creditors and are not actions that individuals acting in good faith perform when transacting business.[121] As the law presumes that people intend the necessary consequences of their actions, those actions provided "conclusive evidence of fraud."[122]

Twyne's Case was a major step towards the objectification of the fraud element of fraudulent transfer law and a victory for the principle that statutes protecting against fraudulent transfers ought to be construed equitably and liberally.[123] It was this trend that eventually led some courts not only to accept badges of fraud as a way to *infer* actual intent, but also to begin viewing some badges of fraud as sufficiently wrongful as to create a *legal presumption* of fraudulent intent, irrespective of expressed intent.[124] Similar to the presumption adopted in Roman law, the two most prominent badges that led to a presumption of fraud on creditors were when a debtor was insolvent and

119. *See id.*

120. Baird & Jackson, *supra* note 109, at 830.

121. *See* BUMP, *supra* note 82, § 42.

122. *Id.* § 242.

123. 1 MOORE, *supra* note 7, at 16–17 ("[B]ecause fraud and deceit abound in these days more than in former times . . . all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud." (alteration in original) (quoting *Twyne's Case*, 76 Eng. Rep. at 815–16)).

124. *See* John C. McCoid II, *Constructively Fraudulent Conveyances: Transfers for Inadequate Consideration*, 62 TEX. L. REV. 639, 641 n.8 (1983); Douglas G. Baird, *One-and-a-Half Badges of Fraud* 3 (The Univ. of Chi. Law Sch. Coase-Sandor Inst. for Law & Econ., Working Paper No. 693, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2475180 ("As the doctrine developed, the badges of fraud ceased to be merely proxies for fraud that was hard to prove and instead covered transactions that, although perhaps not fraudulent, were ones to which creditors would object nevertheless."). This evolution, from requiring actual intent to presuming intent in some circumstances, occurred primarily in the courts of equity because the courts of law typically required proof of fraud or sufficient badges of fraud to infer intent. *See* Chesterfield v. Janssen (1750) 26 Eng. Rep. 191, 224.

made a transfer for no or inadequate consideration.[125] Transfers with these characteristics became known as constructively fraudulent transfers.[126]

D. FRAUDULENT TRANSFER LAWS IN THE UNITED STATES

Fraudulent transfer law spread to the United States early in its history through common law rulings and statutes at the state level that recognized or significantly copied 13 Elizabeth and the progeny of *Twyne's Case*.[127] Many Courts bought in on the idea that fraudulent transfer law should be construed and enforced to prevent debtors from performing actions that society deemed objectionable.[128] Although the doctrine of constructive fraudulent transfers may be overbroad in some circumstances and cover transactions that truly had no fraudulent motive whatsoever, many courts believed that recognizing constructive fraudulent transfers was necessary to protect commerce, enforce creditors' rights, and promote society's standards of honest conduct.[129] Courts

125. *See* Partridge v. Gopp (1758) 28 Eng. Rep. 647, 648; Herne v. Meeres (1687) 23 Eng. Rep. 591, 591; *see also* Baird, *supra* note 124, at 4 ("As fraudulent conveyance law evolved, two badges of fraud gained particular prominence: transfers made while insolvent and transfers for less than reasonably equivalent value. Courts . . . . saw no need to look for other signs of mischief. Many suspect transactions share these two badges, and innocent ones rarely do. A constructive fraudulent conveyance is merely an actual intent fraudulent conveyance that has two badges so important that there is no need to make further inquiry."). *But see* McCoid, *supra* note 124, at 656–57 (discussing the development of constructive fraud and suggesting that inadequate consideration alone may not justify an inference of fraud).

126. *See, e.g.*, Frank R. Kennedy, *Involuntary Fraudulent Transfers*, 9 CARDOZO L. REV. 531, 537–38 (1987).

127. ALCES, *supra* note 94, at 1-15; *see also* Gardner v. Cole, 21 Iowa 205, 209–10 (1866) ("The statute of 13 *Elizabeth* . . . [was] mainly, if not wholly, declaratory of the common law . . . [and is] in this State, part of the *unwritten law*.").

128. *See, e.g.*, Boyd & Suydam v. Dunlap, 1 Johns. Ch. 478, 484–85 (N.Y. Ch. 1815); Brice v. Myers, 5 Ohio 121, 121–22 (1831); *see also* Reade v. Livingston, 3 Johns. Ch. 481, 505–06 (N.Y. Ch. 1818) ("[T]he Court[] [must teach] that the claims of justice are prior to those of affection. The inclination of my mind is strongly in favor of the policy and wisdom of the rule, which absolutely *disables* a man from preferring, by any arrangement whatever, and with whatever intention, by *gifts* of his property, his children to his creditors."); Baird & Jackson, *supra* note 109, at 831–32 (noting that transfers were deemed constructively fraudulent not because the costs of proving intent were too high, but because the transfers are "inherently objectionable").

129. *See, e.g.*, *Reade*, 3 Johns Ch. at 505–06 ("Though hard cases may arise in which we should wish the rule to be otherwise . . . more good will ensue to families, and to the public at large, by a strict adherence to the rule, than by rendering it subservient to circumstances, or by making it to depend upon a fraudulent intent, which is so difficult to ascertain, and frequently so painful to infer."); *see also* Baird & Jackson, *supra* note 109, at 830–31 ("[A] *per se* [fraudulent transfer] rule may treat some transactions in which a debtor was not trying to hinder, delay, or defraud his creditors as fraudulent conveyances. The number of cases in which an insolvent debtor gives away something for nothing but is not trying to hinder, delay, or defraud his creditors, however, may be sufficiently small that it is preferable to treat all these cases as fraudulent conveyances." (emphasis added)).

in other jurisdictions disagreed, however,[130] resulting in a diverse mix of rulings and standards all across the country.[131]

By the early 20th century, it became clear that fraudulent transfer laws needed more consistency and uniformity, especially because commercial transactions had grown increasingly sophisticated and interstate in nature.[132] In 1918, the Uniform Law Commission attempted to provide clarity for the future of fraudulent transfer law by drafting the Uniform Fraudulent Conveyance Act ("UFCA").[133]

1. The Uniform Fraudulent Conveyance Act

The UFCA's purpose was to resolve the conflicting opinions among the states regarding the distinction between actual fraud and constructive fraud, the appropriateness of presuming intent, and the definition of insolvency.[134] The UFCA's drafters believed too many jurisdictions "ha[d] pushed presumption of fraud as a fact to an unwarranted extent," and they adamantly expressed that intent could not be presumed in any way under statutes regarding *actual* fraudulent transfers.[135] Thus, under the UFCA, the definition of an actual fraudulent transfer remained essentially the same as it had been penned in 13 Elizabeth, requiring evidence of actual fraudulent intent.[136]

However, the UFCA did not kill the practice of voiding fraudulent transfers through finding constructive fraud by drawing this line; instead, the UFCA's drafters decided to codify constructive fraudulent transfers as a separate provision.[137] For a transfer to be constructively fraudulent under the UFCA, a trustee had to show that (1) the debtor did not receive "fair consideration" for the transfer and (2) such transfer occurred while the

130. *See* Kennedy, *supra* note 126, at 539. Some jurisdictions sought to eliminate constructive fraud as a basis for fraudulent transfers through legislation. *Id.* In others, courts simply refused to recognize constructively fraudulent transfers, explaining that insolvency or inadequate consideration are no more important than any other badges of fraud and only a showing of actual intent will lead to finding a fraudulent transfer. *E.g.*, Jaeger v. Kelley, 52 N.Y. 274, 275 (1873).

131. *See* James Angell McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 405–06 (1933).

132. ALCES, *supra* note 94, at 1-16.

133. *Id.* at 5-12 to 5-13; *see* UNIF. FRAUDULENT CONVEYANCE ACT, Prefatory Note (UNIF. LAW COMM'N 1918).

134. UNIF. FRAUDULENT CONVEYANCE ACT, Prefatory Note. Originally, 26 jurisdictions enacted the UFCA, but updates in the bankruptcy code and the promulgation of a new uniform law led to its replacement in all but a few states. TABB, *supra* note 89, at 561 (noting that as of 2013, the UFCA only remains the law in New York and Maryland).

135. UNIF. FRAUDULENT CONVEYANCE ACT, Prefatory Note.

136. *See id.* § 7 ("Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.").

137. *Id.* § 9.

debtor was insolvent,[138] had unreasonably small capital, or was about to incur debts beyond his ability to pay.[139]

Under the UFCA, fair consideration had two elements: (1) the property received, or antecedent debt satisfied was a fair equivalent of and "not disproportionately small [as] compared" to the property that was transferred, and (2) that the property was given and "received in good faith."[140] In determining whether a transfer was made with "fair consideration," the UFCA's drafters believed that it was most important to first determine whether the *transferee* acted in good faith and then consider whether the consideration given by that transferee was a reasonable equivalent of the property received.[141]

The addition of good faith to the fair consideration analysis did not escape scrutiny. Critics have argued that adding good faith to the analysis was unnecessary, because all that truly matters to creditors and bankruptcy trustees is that the asset transferred out of the estate is replaced with one of roughly the same value, not whether the parties to the transaction acted in good faith.[142] Others argued that bringing a good faith analysis into the test for consideration was confusing and led courts to inconsistent and "futile[] attempts at line-drawing."[143]

Regardless of the drafter's approach and subsequent commentary, as states began to adopt the UFCA courts had to flesh out what "fair consideration" meant and how it fit in with prior case law. This led to "a catalog of tests" that defined equivalence and fairness, but most courts at least agreed on two main points: The question should be analyzed from the creditor's point of view and fair consideration did not mean perfect equivalence.[144]

2. The Bankruptcy Reform Act of 1978: Big Changes for Fraudulent Transfers in Bankruptcy Proceedings

Fraudulent transfer provisions were frequently included in the federal government's many attempts to establish a permanent bankruptcy system. Both the Bankruptcy Acts of 1867 and 1898 declared that actual fraudulent

138. *Id.* § 2(1) ("A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.").

139. *See id.* § 6.

140. *Id.* § 3.

141. *Id.*

142. *See, e.g.*, ALCES, *supra* note 94, at 5-65.

143. *See, e.g.*, Note, *Good Faith and Fraudulent Conveyances*, 97 HARV. L. REV. 495, 505 n.56 (1983).

144. ALCES, *supra* note 94, at 5-59 & n.259. Some courts held that a difference between value and price received had to be substantial, stating that "inadequacy of price does not mean an honest difference of opinion as to price, but a consideration so far short of the real value of the property as to startle a correct mind or shock the moral sense." Zellerbach Paper Co. v. Valley Nat'l Bank, 477 P.2d 550, 555 (Ariz. Ct. App. 1970).

transfers were an act of bankruptcy and allowed trustees to avoid and recover fraudulent transfers for the bankruptcy estate.[145] The Bankruptcy Law of 1938, also known as the Chandler Act, was the first time the Bankruptcy Code internalized specific elements outlining both actual and constructive fraudulent transfers when it adopted language similar to the UFCA.[146] Trustees were permitted to void and recover fraudulent transfers, both constructive and actual, but only if they were made within one year of filing.[147]

The most important version of fraudulent transfer laws in the Bankruptcy Code came in the Bankruptcy Reform Act of 1978, which established the Code that is still in place today. First, like many versions before it, § 544 of the current Code allows a bankruptcy trustee to inherit any claim that a creditor would have against the bankrupt debtor under the laws of the state where the debtor lives.[148] In other words, "[t]he trustee may . . . 'step into the shoes' of a creditor and avoid the debtor's transfers of property or property interests that could have been avoided by the creditor outside of bankruptcy."[149]

Second, the Act of 1978 altered some of the elements required to find constructive fraud instead of relying on the UFCA's elements.[150] Under § 548, a trustee may avoid any actual or constructive fraudulent transfer that a debtor made within two years of filing for bankruptcy.[151] The requirements for proving actual fraud remain the same as they were under 13 Elizabeth and the UFCA: A creditor must prove an "actual intent to hinder, delay, or defraud."[152] Importantly, however, the Act changed the "fair consideration" test for constructive fraud to a test looking for "reasonably equivalent value."[153] Accordingly, to prove constructive fraud a trustee must prove both

145. *See* An Act to Establish a Uniform System of Bankruptcy Throughout the United States §§ 35, 39, ch. 176, 14 Stat. 517, 534–36 (1867); An Act to Establish a Uniform System of Bankruptcy Throughout the United States §§ 3, 67(e), 70(e), ch. 541, 30 Stat. 544, 546–47, 564–66 (1898) (codified at 11 U.S.C. §§ 21(a)(1), 107(e) (1916)). The provisions regarding fraudulent transfers in the 1898 act were stronger than those in the 1867 act because the 1898 act only looked at the intent and knowledge of the debtor to find fraudulent intent, whereas the older law required the transferee to also know of the debtor's fraud or insolvency. *See* EDWIN C. BRANDENBURG, THE LAW OF BANKRUPTCY 662 (2d ed. 1901).

146. *See* ALCES, *supra* note 94, at 5-13.

147. Chandler Act § 67(d), ch. 575, 52 Stat. 840, 844, 877–88 (1938) (codified at 11 U.S.C. § 107 (1940)).

148. *See* 11 U.S.C. §§ 502, 544(b) (2012); *see also* Barasch & Chesnut, *supra* note 11, at 926 ("In cases in bankruptcy court, the trustee can bring avoidance proceedings under either the Bankruptcy Code or state fraudulent transfer laws.").

149. Hull, *supra* note 5, at 264.

150. *See* Steph McEvily, Note, *The New Bankruptcy Act: A Revision of Section 67d—The Death of a Dilemma*, 7 HOFSTRA L. REV. 537, 539 (1979).

151. 11 U.S.C. § 548.

152. *Id.* § 548(a)(1)(A).

153. ALCES, *supra* note 94, at 5-13.

that a debtor was insolvent at the time of the transfer and "received less than a reasonably equivalent value" for the property transferred.[154]

Neither the Code nor its legislative history provide a reason why Congress changed "fair consideration" to "reasonably equivalent value" or a definition for "reasonably equivalent value."[155] There is evidence that some members of Congress believed that the change was merely "a semantic difference."[156] However, subsequent interpretations of the change suggest that most agree that Congress made the change to purposefully eliminate the good faith test that existed in the UFCA's "fair consideration" analysis.[157]

There is disagreement, however, about what the elimination of the good faith analysis means. Some argue that Congress intended to expand the coverage of constructive fraud because trustees are now able to avoid transfers without reasonably equivalent value even if the parties acted in good faith.[158] Others disagree, arguing that even if Congress did wish to deemphasize the good faith requirement, Congress's silence on the matter suggests it did not mean to significantly expand the provision's powers of avoidance.[159] Regardless, it is clear that "Congress left to the courts the obligation of marking the scope and meaning of [reasonably equivalent value]," and courts have struggled and still struggle to define it today.[160]

3. The Uniform Fraudulent Transfers Act

In response to the changes made to constructive fraudulent transfer provisions in the Bankruptcy Code, the Uniform Law Commission produced

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154. 11 U.S.C. § 548(a)(1)(B)(i), (ii)(I). There are three other financially suspect circumstances that, combined with a lack of receiving reasonably equivalent value, can lead to a finding of constructive fraud. *See id.* § 548(a)(1)(B)(ii)(II)–(IV).

155. *See* Lisa Pendley, Comment, *In re* BFP*: Mortgage Foreclosures and the Bankruptcy Code's "Reasonably Equivalent Value,"* 8 DEPAUL BUS. L.J. 227, 233–34 (1996). Congress did, however, define "value" as "property, or satisfaction or securing of a present or antecedent debt of the debtor." 11 U.S.C. § 548(d)(2)(A).

156. 2 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 191 (Alan N. Resnick & Eugene M. Wypyski eds., 1979).

157. *See* UNIF. FRAUDULENT TRANSFER ACT, Prefatory Note (UNIF. LAW COMM'N 1984) ("[T]he Bankruptcy Code . . . eliminat[ed] good faith on the part of the transferee or obligee as an issue in the determination of whether adequate consideration is given by a transferee or obligee.").

158. *See, e.g.*, 5 COLLIER ON BANKRUPTCY ¶ 548.05[1][b] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 1997) ("In a significant change from the 'fair consideration' standard, 'reasonably equivalent value' does not contain a good faith component.").

159. *See, e.g.*, Marie T. Reilly, *A Search for Reason in "Reasonably Equivalent Value" After* BFP v. Resolution Trust Corp., 13 AM. BANKR. INST. L. REV. 261, 266 (2005) ("Congress may have meant the new term to eliminate the significance of the transferee's good or bad faith in an action to avoid a transfer under section 548. But, the legislative history contradicts the assertion that Congress meant to expand radically the trustee's avoiding powers to include transfers to a noncolluding, arms length transferee." (footnote omitted)).

160. *See* Cooper v. Ashley Commc'ns, Inc. (*In re* Morris Commc'ns NC, Inc.), 914 F.2d 458, 466 (4th Cir. 1990); *see also* Reilly, *supra* note 159, at 267 ("Since 1978, Congress has failed to clarify its intention.").

the Uniform Fraudulent Transfer Act ("UFTA") in 1984 to bring state fraudulent transfer laws in harmony with federal bankruptcy law.[161] The UFTA contains nearly identical language to the Bankruptcy Code's fraudulent transfer sections, and the drafters expressly noted that the UFTA, like the Bankruptcy Code, also intended to eliminate the good faith test that was present in the UFCA.[162] The UFTA has been adopted in 43 states and the District of Columbia,[163] and thus is the most common version of state fraudulent transfer law.[164]

E. POLICIES AND PATTERNS

Exploring the development of fraudulent transfer laws across multiple societies throughout history leads one to see a common underlying policy: "persons must be just before they can be generous, and . . . debts must be paid before gifts can be made."[165] It also shows the common pattern that societies have followed in making their laws. First, any course of action pursued by a debtor with *actual* intent to defraud a creditor by transferring property has been repeatedly and instinctually condemned and prohibited by society and the law.[166] After providing for remedies against actual fraudulent transfers, governments then realize that there are many actions "which, at first sanction of the law and in their own nature, are honest, but in the change of times and by new relations, become unjust and intolerable."[167] In other words, what is completely honest and acceptable for most people to do may be inappropriate and discouraged for people who are insolvent, even if those people do not act with fraudulent intent.[168] This was and is the purpose of recognizing

161. UNIF. FRAUDULENT TRANSFER ACT, Prefatory Note (UNIF. LAW COMM'N 1984).

162. *Id.*

163. TABB, *supra* note 89, at 561.

164. There have since been amendments proposed and adopted by the Uniform Law Commission in 2014 to rename the UFTA as the Uniform Voidable Transactions Act, among other changes. *See* UNIF. VOIDABLE TRANSACTIONS ACT, Prefatory Note (2014 Amendments) (UNIF. LAW COMM'N 2014). Besides changing the name, the amendments did not substantially change the UFTA. *See id.* As many as 20 jurisdictions have adopted the amendments, but because there is not substantive change to the fraudulent transfer sections of the Act and most states still have the UFTA, this Note will only make references to the UFTA. *See Voidable Transactions Act Amendments (2014) - Formerly Fraudulent Transfer Act*, UNIF. LAW COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=64ee1ccc-a3ae-4a5e-a18f-a5ba8206bf49 (last visited March 29, 2019).

165. BUMP, *supra* note 82, at 283; *see also* MELVILLE MADISON BIGELOW, THE LAW OF FRAUDULENT CONVEYANCES 78 (1911) ("[A]uthorities are agreed . . . . 'A man should be just before he is generous.' The courts have proceeded upon this precept *more* than upon the strict words of the statute; or rather the 'intent to hinder, delay, or defraud' of the statute has been construed in the light of the precept." (emphasis added)).

166. *See* ROBERTS, *supra* note 108, at 521.

167. "*Quae natura videntur honesta esse, temporibus sunt inhonesta.*" *See id.* at 521, *translated in* 14 JEREMY TAYLOR, THE WHOLE WORKS OF THE RIGHT REV. JEREMY TAYLOR 238 (3d ed. 1828).

168. *See* BIGELOW, *supra* note 165, at 1–2 ("When the common conscience would repudiate conduct, apart perhaps from mere breach of contract, there is guilt; it matters not that the

constructive fraud: to prevent those acts by debtors that, due to the debtors' circumstances, cannot be performed "in justice to [their] creditors, i.e., without delaying them in the enforcement of their rights."[169]

IV. LESSONS FROM TUITION CLAWBACK LAWSUITS

When analyzing tuition clawback lawsuits, almost all of which have claims based on constructive fraud, one must remember these patterns and policies and how they apply to these cases. Are an insolvent parent's tuition payments for an adult child one of those things that by its nature is good and honest but due to a change of times and circumstances becomes intolerable? Would a policy of allowing an insolvent parent to pay for as much of an adult child's education as they desire enable generosity to rob justice?

This Part will first look at cases in which courts analyzed whether insolvent parents made tuition payments with actual fraudulent intent. This will provide a better understanding of the suspect circumstances that sometimes accompany the naturally innocent action of paying a child's tuition. After that, this Part examines the reasoning and principles relied on by courts on both sides of the tuition clawback split.

A. TUITION PAYMENTS BY INSOLVENT PARENTS AS ACTUAL FRAUDULENT TRANSFERS

Trustees alleged actual fraud in about 27% of the tuition clawback lawsuits examined.[170] However, even in some tuition clawback lawsuits where trustees did not allege actual fraudulent intent, the facts of the cases strongly suggest that parents purposefully decided to pay tuition instead of their creditors. Similar to the facts in *Twyne's Case,* multiple cases involved parents who made tuition payments right before or after receiving an adverse judgment in a civil lawsuit.[171] In one of those cases, the parents even admitted that they made the transfer because their accounts were about to be garnished due to the adverse judgment.[172] Some cases involved insolvent parents who liquidated assets to pay for their children's tuition only a few months or weeks before declaring bankruptcy.[173] At least 32 cases involved parents who made all or most of the tuition payments within six months of filing for

offender, whether believing all acts of the kind rightful, or not in fact knowing just what he is doing, may have intended no wrong, and so may have a clear conscience."); *see also* Baird & Jackson, *supra* note 109, at 832 ("A birthday gift of cash by an insolvent debtor injures creditors just as much when his intentions are innocent as when they are not, and one can presume creditors would ban them if they could.").

169. BIGELOW, *supra* note 165, at 78; *see also* TAYLOR, *supra* note 167, at 238–39 (noting that power is given to governments to correct the laws in order to address situations that become intolerable due to circumstance or the passage of time).

170. The Author's research revealed that actual fraud was claimed in 41 of 152 cases. *See infra* Appendix.

171. See *infra* Appendix, at rows 1, 8, 12, 23, 28, and 83 for examples.

172. *See infra* Appendix, at row 83.

173. *See, e.g.*, *infra* Appendix, at rows 2 and 9.

bankruptcy,[174] and at least 22 cases involved parents who misappropriated funds from their business to pay for their children's tuition.[175] There have even been at least eight lawsuits in which the debtor-parents paid for tuition using money obtained from running a Ponzi scheme or some other illegal activity.[176]

Out of all these lawsuits in which trustees alleged actual fraudulent transfers, only five reached the point where a judge ruled on the claims of actual fraud.[177] In none of them did the judge find that the transfers were actually fraudulent. However, the judges did provide some useful insight as to how they approach actual fraud in cases where the transactions in question are usually naturally innocent, like tuition payments for a child. Their decisions demonstrate that the pattern of transactions and the length of time they occurred for are important factors in determining whether *actual* fraudulent intent is present.

In *Sikirica v. Cohen (In re Cohen)*[178] and *Shearer v. Oberdick (In re Oberdick)*,[179] the debtors were both found jointly and severally liable for their former law

174. *See infra* Appendix. This number includes each case in which the number of transfers made less than six months before filing for bankruptcy was at least half the total number of transfers. As the Appendix shows, there are many other cases in which parents paid for tuition payments within six months of filing, but more than half were made outside of the six month time frame. Furthermore, because many complaints did not specify the exact dates when tuition payments were made, this number could be much higher.

175. See *infra* Appendix, at rows 3, 4, 14–16, 18, 25, 30, 31, 34. 40, 48, 49, 59, 71, 101, 102, 112, 141, 143, 148, and 149 for examples. Although the Author has only listed 22 instances in which parents used corporate funds to pay for a child's tuition, there are many more that are not included in the list, particularly cases when corporate funds were used to pay for minor children's tuition.

176. See *infra* Appendix, at rows 15, 25, 40, 48, 71, 97, 130, and 152 for examples. Again, there were more that were not included in this Appendix because the tuition payments were for a minor child.

177. *See* Shearer v. Oberdick (*In re* Oberdick), 490 B.R. 687, 699–70 (Bankr. W.D. Pa. 2013); Sikirica v. Cohen (*In re* Cohen), No. 07-02517, 2012 WL 5360956, at *3–4 (Bankr. W.D. Pa. Oct. 31, 2012), *vacated in part and remanded by* Cohen v. Sikirica, 487 B.R. 615 (W.D. Pa. 2013); Banner v. Lindsay (*In re* Lindsay), No. 08-9091, 2010 WL 1780065, at *13 (Bankr. S.D.N.Y. May 4, 2010); Davis v. Davenport (*In re* Davenport), 147 B.R. 172, 183 (Bankr. E.D. Mo. 1992). The fifth case, *DeGiacomo v. Sacred Heart Univ., Inc.* (*In re Palladino)*, contained an actual fraud claim that was different than traditional actual fraud claims (and will not be discussed at length here) because the trustee alleged that actual fraud should be presumed since the tuition payments were made with funds received through the parents' Ponzi scheme. DeGiacomo v. Sacred Heart Univ., Inc. (*In re* Palladino), 556 B.R. 10, 13–15 (Bankr. D. Mass. 2016). The court held that the Ponzi scheme presumption could not apply in the tuition payment context because the transfers were not made in furtherance of the scheme. *Id.* at 14. The Ponzi scheme presumption is a valid theory that has been applied in other contexts, however. *See, e.g.*, Schneider v. Barnard, 508 B.R. 533, 541, 547 (E.D.N.Y. 2014) (relying on the ponzi scheme presumption to hold that debtor's transfers were actually fraudulent).

178. *In re Cohen*, 2012 WL 5360956, at *1.

179. *In re Oberdick*, 490 B.R. at 693–94.

firm's breach of a lease agreement in a civil action.[180] Cohen filed for bankruptcy shortly before the court entered final judgment in the civil case,[181] and Oberdick filed for bankruptcy shortly after the plaintiff of the civil action attempted to collect judgment against him.[182] In each case, the trustees alleged that both individuals had their paychecks deposited into entireties accounts shared with their wives, even though they both faced large judgments against them, and some funds from these entireties accounts were subsequently used to pay for their children's tuition.[183] The trustees argued that depositing the paychecks into the entireties accounts, making it entireties property shared with their non-bankrupt wives, effectively shielded the money from creditors and that the debtors had performed this act in an attempt to hinder, delay, or defraud such creditors.[184] Although the transfers included significant badges of fraud—such as transfer to an insider (their wives), transfer while insolvent, and transfer pending or in response to legal judgments—the judges in the Bankruptcy Court for the Western District of Pennsylvania rejected the trustees' arguments in both cases.[185]

In the first case decided, *In re Cohen*, the court emphasized the fact that both Cohen and his wife had deposited their paychecks into the entireties account for at least 20 years.[186] Furthermore, there was no evidence that Cohen's increasingly troubled financial situation led to any change in how he deposited his money nor that he continued to deposit into the entireties account specifically to put funds out of the reach of creditors.[187] The judge in *In re Oberdick* also emphasized that the debtor had consistently deposited his paychecks into the entireties account for at least 16 years before the lawsuit and subsequent judgment against him.[188] In both cases, the courts concluded that because the funds from the entireties accounts that were eventually used to pay for tuition were not placed in the accounts with actual fraudulent

180. *See generally* Trizechahn Gateway L.L.C. v. Titus, 930 A.2d 524 (Pa. Super. Ct. 2007) (naming David I. Cohen and David G. Oberdick as codefendants along with their law firm), *rev'd in part and remanded,* Trizechahn Gateway L.L.C. v. Titus, 976 A.2d 474 (Pa. 2009).

181. *In re Cohen*, 2012 WL 5360956, at *2.

182. *In re Oberdick*, 490 B.R. at 694.

183. *See In re Cohen*, 2012 WL 5360956, at *2, *9; *In re Oberdick*, 490 B.R. at 694–95, 711.

184. *See* 11 U.S.C. § 522(b)(3)(B) (2012) ("[A]ny interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law . . . ."). Because an interest in the debtors' income was transferred to their wives, the fraudulent transfer cases brought by the trustees actually named the debtors and their wives as defendants.

185. *See In re Cohen*, 2012 WL 5360956, at *4; *In re Oberdick*, 490 B.R. at 699–700.

186. *See In re Cohen*, 2012 WL 5360956, at *4.

187. *Id.*

188. *In re Oberdick*, 490 B.R. at 700.

intent, then no fraudulent intent could be extended to the tuition payments.[189]

In another case, *Banner v. Lindsay (In re Lindsay)*, a bankruptcy judge in New York also found a lack of sufficient evidence to find actual fraudulent intent, but only because the court held that the burden of proof was clear and convincing evidence rather than by a preponderance of the evidence.[190] The situation also involved a bankrupt debtor who, after being adjudged liable in a civil lawsuit, sold or mortgaged some of his vehicles to pay his son's tuition at a foreign university.[191] Many if not all of the most common badges of fraud were present in this case, but the court did not feel it had clear and convincing evidence to find actual fraudulent intent when compared to the competing naturally innocent intent of wanting to provide an education for a child.[192]

These cases illustrate the difficulty courts face when evaluating whether a debtor committed a naturally innocent act, like paying for a child's tuition, with fraudulent intent. The courts seemed too hesitant to infer actual fraudulent intent by evaluating the presence of badges of fraud and instead focused too much on finding a *subjective* intent to defraud.[193] They forgot that, historically, fraudulent transfer laws have sought to prevent fraud as determined by "the common conscience"[194] and that actual intent is more properly a question of whether "on the facts the average man would have intended wrong."[195]

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189. *In re Cohen*, 2012 WL 5360956, at *14; *In re Oberdick*, 490 B.R. at 722. In *In re Oberdick*, however, although the judge did not find that tuition payments for the debtor's children were actual or constructive fraudulent transfers, the judge held that tuition payments for a son of the debtor's friend and payments for the debtor's children to take school trips to Italy were constructively fraudulent. *In re Oberdick*, 490 B.R. at 712.

190. Banner v. Lindsay (*In re* Lindsay), No. 06-36352, 2010 WL 1780065, at *13 (Bankr. S.D.N.Y. May 4, 2010) ("The Plaintiff would have prevailed [on an actual fraudulent transfer claim] pursuant to these statutes if the burden had been a preponderance of the evidence."). There has been a split amongst various jurisdictions over whether the burden of proof for actual fraudulent transfers is preponderance of the evidence or clear and convincing evidence. The UVTA has fixed this dilemma by establishing the preponderance of the evidence standard as the appropriate burden of proof for actual fraudulent transfers. UNIF. VOIDABLE TRANSACTIONS ACT § 4(c) (UNIF. LAW COMM'N 2014).

191. *In re Lindsay*, 2010 WL 1780065, at *2. There were additional suspicious transactions such as transferring the title of his family's house and other assets to be held solely by his wife. *Id.*

192. *Id.* at *13. The claim of actual fraud was brought under New York's fraudulent transfer provision which requires clear and convincing evidence. *Id.* at *1. It is unknown what would happen in this case if a § 548 action would have been brought as well since preponderance of the evidence is generally the actual fraud standard for fraudulent transfers.

193. *See* BIGELOW, *supra* note 165, at 445–46 (noting that in cases that involved naturally innocent conduct, courts historically put strong emphasis on finding a "personal intention to defraud" in order to find actual fraud).

194. *See id.* at 1–2.

195. *Id.*; *see also* BUMP, *supra* note 82, at 21 ("Every man is presumed to intend the necessary consequence of his act, and if an act necessarily delays, hinders or defrauds creditors, then the law presumes that it is done with a fraudulent intent.").

Now that the most recent amendments to the UFTA clarify that the burden of proof for actual fraudulent transfers is preponderance of the evidence,[196] courts may begin finding actual fraudulent intent in close cases like *In re Lindsay*. However, it remains extremely difficult for a judge to conclude that an insolvent parent who makes a tuition payment for a child intends, wholly or primarily, to defraud or hinder creditors instead of doing it to help the child. This shows both why constructive fraudulent transfer provisions are needed and why almost every trustee has relied on them in attempting to claw back tuition.

B. PARENTAL TUITION PAYMENTS AND THE DEBATE REGARDING "REASONABLY EQUIVALENT VALUE"

The fundamental question for a constructive fraudulent transfer in any lawsuit is whether the debtor received reasonably equivalent value for the transfer.[197] Generally, courts have concluded that the answer "depends on the circumstances of each case and not on a fixed mathematical formula."[198] In part, it is this reliance on case-by-case analysis that has led to a difference of opinion and split among federal bankruptcy courts. The split is the result of a deep fault line caused by a clash between creditors' rights and society's ideals, between peoples' duties owed to creditors and duties owed to their children. Understanding the split, and the courts' fundamental disagreement about how a parent can use her money on the eve of bankruptcy, is essential to answering whether tuition payments by insolvent parents are fraudulent transfers and understanding the correct way to allocate rights. This Section first reviews the cases where courts have held that parents do receive reasonably equivalent value, followed by reviewing those cases where courts have held that they do not.

1. Cases Where Courts Found that Parents Receive Reasonably Equivalent Value

Bankruptcy courts that have made favorable rulings towards the position that parents receive reasonably equivalent value from tuition payments for their children have focused on two main arguments: (1) parents are fulfilling a *societal* expectation or duty by paying for their children's college education, and (2) by helping their children obtain a college education, parents avoid

196. *See supra* note 190.

197. Technically, a trustee must prove that the debtor was insolvent when the transfer was made and that the transfer did not result in reasonably equivalent value. While whether the debtor truly was insolvent at the time of the transfer is in issue in some cases, see, e.g., Roach v. Skidmore Coll. (*In re* Dunston), 566 B.R. 624, 637–40 (Bankr. S.D. Ga. 2017), it is not an issue in most, and this Note accepts the assumption that trustees only bring claims when it is quite clear that the debtor was insolvent.

198. Lisle v. John Wiley & Sons, Inc. (*In re* Wilkinson), 196 F. App'x 337, 341 (6th Cir. 2006) (citations omitted).

future financial burdens by helping their children become more financially independent. These courts justified their rulings by looking at the larger social circumstances and policy considerations involved in these cases rather than a strict economic analysis. They were not afraid to assert that value, in many circumstances, is much broader than an "overly rigid" analysis based on dollars and cents.[199]

First, some courts have based their decisions on policy considerations: They have stated that they "ha[ve] little hesitation in recognizing that there is something of a societal expectation that parents will assist with [undergraduate education] expense[s] if they are able to do so."[200] "[S]uch expenses are reasonable and necessary for the maintenance of the Debtor's family," at least for an undergraduate education.[201] These courts believe that societal expectations and the necessity of higher education as an aspect of supporting one's family in today's world sufficiently establish an obligation on parents to help provide a higher education for one's children,[202] even if there is no actual legal duty that does so.[203] Because the tuition payments were "made out of a reasonable sense of parental obligation," fulfilling that obligation was "value" and sufficient to protect the tuition payments from being clawed back.[204]

On the other hand, accepting that parents have no binding legal duty to help provide higher education for adult children, the court in *DeGiacomo v.*

199. *See* DeGiacomo v. Sacred Heart Univ., Inc. (*In re* Palladino), 556 B.R. 10, 15 (Bankr. D. Mass. 2016).

200. *E.g.*, Shearer v. Oberdick (*In re* Oberdick), 490 B.R. 687, 712 (Bankr. W.D. Pa. 2013). It is important to note that the exact question in *In re Oberdick* and *In re Cohen* was not whether parents receive reasonably equivalent value when paying for an adult child's tuition. *See In re Oberdick*, 490 B.R. at 711–12; Sikirica v. Cohen (*In re* Cohen), No. 07-02517-JAD., 2012 WL 5360956, at *9–10 (Bankr. W.D. Pa. Oct. 31, 2012). The question was different because the tuition payments came out of entireties bank accounts owned by the debtors and the debtors' wives, and Pennsylvannia law says that transfers made to an entireties account are only constructively fraudulent if they are not used on "necessities." *See In re Oberdick*, 490 B.R. at 711–12; *In re* Cohen, 2012 WL 5360956, at *9–10. Thus, the question was whether tuition payments for adult children were sufficiently a necessity to hold that the transfers to the entireties accounts were not constructively fraudulent. *See In re Oberdick*, 490 B.R. at 711–12; *In re* Cohen, 2012 WL 5360956, at *9–10. Despite this difference, the analysis and reasoning of the courts in these cases were significantly analagous to the main question at issue here, and the *In re Oberick* and *In re Cohen* courts' reasoning has been cited favorably in some cases that do analyze the reasonably-equivalent-value question at issue in this piece. *See, e.g.*, Eisenberg v. Pa. State Univ. (*In re* Lewis), 574 B.R. 536, 541 (Bankr. E.D. Pa. 2017) (agreeing with *In re Cohen* and *In re Oberdick*, in dicta, that "[a] parent's payment of a child's undergraduate college expenses is reasonable and necessary expense for maintenance of the family and for preparing family members for the future").

201. *In re Cohen*, 2012 WL 5360956, at *10. In an interesting act of line drawing, the court explained that graduate tuition payments were *not* reasonable and necessary for the maintenance of a family because "children in graduate school are well into adulthood." *Id.*

202. *E.g.*, *In re Oberdick*, 490 B.R. at 712.

203. *See id.* at 712; *In re Cohen*, 2012 WL 5360956, at *10.

204. *In re Oberdick*, 490 B.R. at 712; *In re* Cohen, 2012 WL 5360956, at *9; *see In re Lewis*, 574 B.R. at 541.

Sacred Heart University (In re Palladino) took a different path.[205] Here the court held that the debtor-parents received reasonably equivalent value that was economic and sufficiently concrete, not just because they fulfilled some obligation.[206] The debtor-parents had testified that the tuition payments were not just made out of a familial obligation to help their child avoid crushing debt; paying the tuition would also place their daughter "in the best position to go to graduate school, secure a job and become financially self-sufficient by finding her own place to live, paying her own bills and paying for her own food."[207] The tuition payments were thus an investment to escape the financial burden of supporting their daughter in the future.[208]

The court agreed with this argument, holding that a college education directly contributed to a financially self-sufficient daughter, which in turn provided a sufficiently concrete and quantifiable economic benefit to the debtor-parents.[209] In doing so, the court stated that although "reasonably equivalent value" is required for a transfer to not be a constructively fraudulent transfer, the emphasis of that analysis should be on the word "reasonably."[210] Tuition is an investment, and like any other investment in a person's health, skills, or well-being, no one knows what the outcome will be at the time tuition is paid or if the investment will be "worth it."[211] Therefore, the court concluded, "future outcome cannot be the standard for determining whether one receives reasonably equivalent value at the time of a payment."[212] Even though a college education does not guarantee that a child will not need further financial assistance in the future, parents receive an economic *quid pro quo* because "[a] parent can *reasonably* assume that paying for a child to obtain an undergraduate degree will enhance the financial well-being of the child . . . . and reasonable equivalence is all that is required" by the statute.[213]

2. Cases Where Courts Found that Parents Do Not Reasonably Equivalent Value

The majority of courts that have heard parental tuition clawback lawsuits have adamantly held that debtor-parents do not receive reasonably equivalent value from tuition payments for adult children. These courts have focused on a definition of value that rests in the very purpose of fraudulent transfer law:

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205. DeGiacomo v. Sacred Heart Univ. (*In re* Palladino), 556 B.R. 10, 15–16 (Bankr. D. Mass. 2016).

206. *Id.*

207. *Id.*

208. *Id.* (saying that "a financially self-sufficient daughter . . . [would be] an economic break to [them]").

209. *Id.* at 16.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* (emphasis added).

"value is limited to economic benefits that preserve the net worth of the debtor's estate for the benefit of creditors."[214] According to these courts, parental tuition payments fail to provide value that preserves net worth because (1) any value received by parents is not sufficiently economic, concrete or quantifiable, and (2) parents do not have a legal duty to help provide higher education for an adult child.[215]

According to the majority of courts, before ever considering any degree of reasonableness, the first stop in a reasonably-equivalent-value analysis is "value," and value means economic benefit.[216] Although paying for a child's tuition may confer some benefit to a parent, it is at most an indirect, non-economic benefit that cannot adequately be quantified.[217] A bankruptcy judge in Connecticut recently explained that "[i]t may be reasonable for parents to believe that investment in their child's college education will enhance the financial well-being of the child. . . . [and] that their child will someday reimburse them for the cost of tuition or otherwise confer an economic benefit in return," but such benefit is speculative and not a *quid pro quo*.[218] Although some courts have held that a future expectation of an economic benefit with some chance of a positive return confers value as long as the expectation is legitimate and reasonable, looking at the totality of circumstances surrounding tuition payments by insolvent parents, the Connecticut bankruptcy judge concluded that parents do not have a legitimate and reasonable expectation of a positive-return economic benefit simply by paying tuition for their children.[219]

Second, these courts have emphasized that although some courts have held that "value" can stem from transfers that satisfy a legal or contractual

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214. Boscarino v. Bd. of Trs. of Conn. State Univ. Sys. (*In re* Knight), No. 15-21646, 2017 WL 4410455, at *3 (Bankr. D. Conn. Sept. 29, 2017) ("The decisions in fact turn on the statutory purpose of conserving the debtor's estate for the benefit of creditors." (quoting Rubin v. Mfrs. Hanover Tr. Co., 661 F.2d 979, 992 (2d Cir. 1981))).

215. *See, e.g.*, *id.* at *4; Roach v. Skidmore Coll. (*In re* Dunston), 566 B.R. 624, 636–37 (Bankr. S.D. Ga. 2017); Gold v. Marquette Univ. (*In re* Leonard), 454 B.R. 444, 454–59 (Bankr. E.D. Mich. 2011). *See generally* Chorches v. Catholic Univ. of Am., 16-1964, 2018 WL 3421318 (D. Conn. July 13, 2018) (holding that parents do not receive reasonably equivalent value for mutliple reasons and discussing prior cases reaching the same outcome).

216. *See, e.g.*, Geltzer v. Oberlin Coll. (*In re* Sterman), 594 B.R. 229, 236 (Bankr. S.D.N.Y. 2018) ("The Court does not question whether the Debtors' decision to send money to or for the benefit of their adult daughters for their college education was economically prudent. But, unfortunately, the economic "benefit" identified by the Defendants does not constitute "value" under the NYDCL or the Bankruptcy Code."); *In re Knight*, 2017 WL 4410455, at *5; *In re Leonard*, 454 B.R. at 454–55.

217. *E.g.*, *In re Leonard*, 454 B.R. at 456–59.

218. *In re Knight*, 2017 WL 4410455, at *6 ("[S]peculation about another's ability to repay in the future and their willingness to do so, however reasonable, does not amount to a *quid pro quo* and certainly does not provide economic value to current creditors."); *see In re Leonard*, 454 B.R. at 457–58.

219. *In re Knight*, 2017 WL 4410455, at *6.

obligation,[220] parents do not have any legally binding obligation to help provide a college education for their *adult* children.[221] At most, parents have a familial or moral obligation to help an adult child in such circumstances, and it is quite clear that a debtor cannot receive reasonably equivalent value through fulfilling a purely moral or familial obligation.[222]

The natural consequence of these conclusions is that allowing tuition payments by insolvent parents on the eve of bankruptcy unfairly diminishes the net worth of the estate that will be distributed to creditors. These courts have concluded that fraudulent transfer law allows only those transfers that result in an economic benefit that reasonably preserves the economic "net worth of the debtor's estate for the benefit of creditors."[223] Because any benefit the parent receives contains no economic value for present-day creditors, it is not an economic benefit of reasonably equivalent value.[224] Furthermore, although helping a child with tuition payments may fulfill some moral or familial obligation owed to that child, such obligations are properly irrelevant to a "value analysis 'for the obvious reason that the depletion of resources available to creditors cannot be offset by the satisfaction of moral obligations.'"[225]

In summary, these courts argue that tuition payments for adult children by insolvent parents soon before filing for bankruptcy are always, at the very least, constructively fraudulent transfers, because parents do not receive a value that results in economic value that is available to the debtor's creditors in bankruptcy.

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220. *See, e.g.*, Cox v. Nostaw, Inc. (*In re* Cent. Ill. Energy Coop.), 521 B.R. 868, 873 (Bankr. C.D. Ill. 2014); Geltzer v. Xaverian High Sch. (*In re* Akanmu), 502 B.R. 124, 131 (Bankr. E.D.N.Y. 2013).

221. *E.g.*, *In re Sterman*, 594 B.R. at 237; Roach v. Skidmore Coll. (*In re* Dunston), 566 B.R. 624, 637 (Bankr. S.D. Ga. 2017); Banner v. Lindsay (*In re* Lindsay), No. 06-36352, 2010 WL 1780065, at *9 (Bankr. S.D.N.Y. May 4, 2010). It is important to note, however, that the real issue for most courts is not whether tuition is for primary/secondary school or college, but rather whether the child for whom tuition is being paid has reached the age of majority. *See, e.g.*, *In re Sterman*, 594 B.R. at 238–39 (holding that even though college tuition paid for a child after the age of majority does not provide reasonably equivalent value to parents, all college tuition paid for that same child while she was still a minor did provide reasonably equivalent value).

222. *E.g.*, Zeddun v. Griswold (*In re* Wierzbicki), 830 F.3d 683, 689–90 (7th Cir. 2016); Coan v. Fleet Credit Card Servs., Inc. (*In re* Guerrera), 225 B.R. 32, 37 (Bankr. D. Conn. 1998); Christians v. Crystal Evangelical Free Church (*In re* Young), 152 B.R. 939, 948 (D. Minn. 1993), *rev'd on other grounds*, 141 F.3d 854 (8th Cir. 1998).

223. *In re Knight*, 2017 WL 4410455, at *3, *5–6; *see also In re Dunston*, 566 B.R. at 637 (concluding that the debtor did not receive reasonably equivalent value because she "did not discharge or satisfy any legal duty or obligation to [pay her child's college tuition], nor did she increase her assets in any way that could be used to pay her creditors").

224. *In re Knight*, 2017 WL 4410455, at *6–7 ("'[N]on-economic benefits in the form of a release of a possible burden on the marital relationship and the preservation of the family relationship' cannot confer reasonably equivalent value . . . ." (first alteration in original) (quoting *In re* Bargfrede, 117 F.3d 1078, 1080 (8th Cir. 1997))).

225. *Id.* (quoting *In re Guerrera*, 225 B.R. at 37).

3. A Possible Middle Ground?

In another recent case, the court admitted that a parent "receive[s] at least some *intangible* value" by paying for an adult child's college tuition because the debtor would be "less worried about her son's future economic prospects."[226] But instead of categorically concluding that a parent could *never* receive reasonably equivalent value by paying tuition for a child, the court stated that the record was insufficient to determine the equivalence of value at that point in time.[227] The court asked that future pleadings provide answers to questions such as whether the debtor's son had graduated, whether he had been able to secure employment, and whether his degree was necessary for or contributed to his finding employment?[228] This court's approach seems to walk a middle ground between the courts that find sufficient economic value to parents and those that do not. It seems to accept that a parent does receive value by helping fund a child's college education, but that the court will require the parent to show that the investment in the child's education did lead, is leading, or with reasonable certainty will lead to a concrete economic benefit.

V. LOOKING AT POLICY AND ECONOMICS, RESOLVING THE SPLIT, BUT SEEING A NEED

> [A] careful study of bankruptcy involves several well worn propositions. First, there is always the fraudulent debtor: and never yet, so far as human experience goes, has it been proper to legislate in bankruptcy matters without providing for his case.[229]

There are currently 15 tuition clawback lawsuits pending, the most important being *In re Palladino*, which is pending in the First Circuit Court of Appeals.[230] The First Circuit will be the highest authority to decide whether parents receive reasonably equivalent value when paying college tuition for an adult child, and its decision will be extremely influential on the decisions of other courts in the future. Regardless of what the First Circuit decides, however, this Note takes the position that tuition payments for adult children do not provide reasonably equivalent value to parents.

First and foremost, this conclusion is based on how courts have generally interpreted and analyzed "reasonably equivalent value" across myriad cases and fact patterns. Generally, the starting point for courts is to compare the value of the benefit or property received with the value of the property

226. Slobodian v. Pa. State Univ. (*In re* Fisher), 575 B.R. 640, 647 (Bankr. M.D. Pa. 2017) (emphasis added).

227. *Id.* The court presented this analysis in response to the defendant-university's motion to dismiss. *See id.* at 642.

228. *Id.* at 647–48.

229. Glenn, *supra* note 57, at 373.

230. DeGiacomo v. Sacred Heart Univ. (*In re* Palladino), 556 B.R. 10 (Bankr. D. Mass. 2016).

transferred.[231] That value need not be a direct benefit to the debtor; the debtor may receive reasonably equivalent value indirectly even if the initial benefit of the transfer is to a third party.[232] However, it is quite clear that the benefit must be economic; psychological or emotional benefits, such as securing the love and affection of family members, rarely, if ever, constitute reasonably equivalent value.[233]

Courts have placed such high importance on finding economic value because they want to understand the transfer's net effect on the debtor's estate, i.e., the impact on the funds available to the creditors.[234] It is this factor, determining whether the transfer reasonably preserved or diminished the economic value of the debtor's estate, that has most often become the "primary consideration" for courts conducting a reasonably-equivalent-value analysis.[235] Generally, courts only desire to avoid fraudulent transfers that have somehow diminished the estate and left unsecured creditors worse off than they were before the transfer.[236] Based on these points, the cases that find that parents do not receive reasonably equivalent value are much more in line with precedent than those that found they do receive reasonably equivalent value.

To better understand why this Note takes the position that reasonably equivalent value is lacking, it is important to remember the policies and patterns that have driven fraudulent transfer law for centuries: (1) the law should prevent and punish actual fraudulent conduct by debtors, and the doctrine of constructive fraudulent transfers is most useful in those situations in which actual fraud is difficult to prove; (2) debtors should be just before they are generous; and (3) naturally innocent actions can become objectionable and wrongful due to their surrounding circumstances or effects. An analysis of these factors also shows, however, that although the law may already view tuition payments by insolvent parents as fraudulent transfers, the law does not currently possess the proper balance of competing rights and social interests.

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231. Barber v. Golden Seed Co., 129 F.3d 382, 387 (7th Cir. 1997) (citation omitted).

232. *See* McClarty v. Univ. Liggett Sch. (*In re* Karolak), No. 13-04394, 2013 WL 4786861, at *3 (Bankr. E.D. Mich. Sept. 6, 2013) ("It is well settled that reasonably equivalent value can come from one other than the recipient of the payments, a rule which has become known as the indirect benefit rule." (quoting Lisle v. John Wiley & Sons, Inc. (*In re* Wilkinson), 196 Fed. App'x 337, 342 (6th Cir. 2006))).

233. *See, e.g.*, Hanrahan v. Walterman (*In re* Walterman Implement, Inc.), No. 07–09043, 2007 WL 2901151, at *3 (Bankr. N.D. Iowa Sept. 28, 2007) ("The requirement of reasonably equivalent value in the Bankruptcy Code is designed to protect unsecured creditors from depletion of the estate. It is distinct from the consideration necessary to form a legally binding contract. Consideration does not qualify as reasonably equivalent value if it does not provide a financial benefit to the debtor and thus to the creditors." (citations omitted)).

234. *See, e.g.*, Warfield v. Byron, 436 F.3d 551, 560 (5th Cir. 2006); Cohen v. Sikirica, 487 B.R. 615, 626 (W.D. Pa. 2013).

235. *Warfield*, 436 F.3d at 560 ("The primary consideration in analyzing the exchange of value for any transfer is the degree to which the transferor's net worth is preserved.").

236. *See id.*; *Cohen*, 487 B.R. at 626.

A. THE LAW ALWAYS PROTECTS AGAINST ACTUAL FRAUDULENT TUITION PAYMENTS

The first policy is met regardless of what happens in the debate over parental tuition payments and reasonably equivalent value, because any tuition payment made by a parent with the *actual* intent to hinder or defraud their creditors is clearly a fraudulent transfer and subject to avoidance. The trouble, of course, is finding sufficient evidence of actual intent. Although no court has held that a parental tuition payment was actually fraudulent, this Note has shown that there have been multiple instances in which the circumstances around parental tuition payments were sufficiently suspicious that courts could have found actual intent.[237] The difficulty has always been, and will continue to be, that courts struggle to conclude that a parent's tuition payment for a child is motivated more by an intent to deprive creditors of what they are entitled to than it is by love and care for the child. For that reason, the next two policy considerations become even more pertinent, and the need to hold that tuition payments by insolvent parents are constructively fraudulent becomes clearer.

B. PARENTAL TUITION PAYMENTS DO NOT RESULT IN REASONABLY EQUIVALENT VALUE AND VIOLATE THE JUSTNESS BEFORE GENEROSITY PRINCIPLE

The principle that a debtor should be just before she is generous has always arisen when an insolvent debtor transfers property for the sole benefit of a family member or a friend.[238] Because it is so natural for family members and close friends to assist one another with large financial costs, courts have struggled to adopt consistent rules regarding when money given to or paid on behalf of a family member provides reasonably equivalent value for the insolvent debtor himself.[239] This Section will first look at the strongest arguments as to why tuition payments do provide reasonably equivalent value

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237. *See supra* Section IV.A.

238. *See* Bos. Trading Grp., Inc. v. Burnazos, 835 F.2d 1504, 1508 (1st Cir. 1987) (noting that the concern with these transfers is that a debtor prefers that the property go towards benefitting a family member rather than to a creditor who is a stranger or adversary). In this case, Justice Stephen Breyer, while on the First Circuit Court of Appeals, held that transfers for the benefit of family members often are fraudulent transfers. *Id.*

239. *Compare* Henkel v. Green (*In re* Green), 268 B.R. 628, 651–52 (Bankr. M.D. Fla. 2001) (holding that the parent's gift of $50,000 to their daughter to be used for her wedding or however she desired was a constructively fraudulent transfer because it did not provide reasonably equivalent value), *with* Montoya v. Campos (*In re* Tarin), 454 B.R. 179, 183–84 (Bankr. D.N.M. 2011) (holding that debtor-parents received reasonably equivalent value from transfers made to pay for their daughter's wedding because they were able to "listen and dance to the music, eat the food" and otherwise benefit from the wedding that was paid for). The *In re Tarin* court distinguished its case from *In re Green* by saying that *In re Green* was a direct transfer of money for which the debtors received nothing tangible. *In re Tarin*, 454 B.R. at 182. The court acknowledged that it may have ruled differently if the money for the wedding had first been passed through the daughter as opposed to the wedding service providers directly, although it did not explain how this is different in fact or effect. *See id.* at 182 n.2.

and/or why society and the law should allow them even if they don't. It will then counter these points and explain why it is improper, as both a legal and social principle, to allow insolvent parents to pay for an adult child's college tuition so close to bankruptcy.

1. Why Tuition Payments Near Bankruptcy by Insolvent Parents for Their Adult Children Are or Should Be Appropriate

Looking at the nature of the family and society's expectations regarding it, the bankruptcy courts that have held that parents receive reasonably equivalent value from tuition payments have focused on two lines of thought: (1) parents are fulfilling a societal expectation or duty by paying for their children's college education, and (2) by helping their children obtain a college education, parents avoid future financial burdens by helping their children become more financially independent.[240] There are many important and valid points to these arguments.

There may be a general expectation in society that parents should help their adult children obtain a higher education. Courts have long recognized the ever-growing necessity of receiving a higher education.[241] Many commentators who have spoken regarding children's rights to obtain higher education assert that "[c]ompletion of higher education today is unquestionably tied to financial stability and independence."[242] However, despite the evidence showing the importance of higher education and the worsening financial burdens associated with it,[243] no state statute has ever required married parents to pay for a child's college education.[244]

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240. *See supra* Section IV.B.1.

241. *See* Esteb v. Esteb, 244 P. 264, 267 (Wash. 1926) ("Where the college graduate of that day was the exception, to-day such a person may almost be said to be the rule."). "[A person] who is unable to secure a college education is generally handicapped in pursuing most of the trades or professions of life, for most of those with whom he is required to compete will be possessed of that greater skill and ability which comes from such an education." *Id.*

242. *E.g.*, Monica Hof Wallace, *A Federal Referendum: Extending Child Support for Higher Education*, 58 U. KAN. L. REV. 665, 671 (2010) (quoting Michele M. Benedetto, *The Key to Successful Independence: State-Funded Post-Secondary Educational Assistance for Emancipated Foster Youth*, 23 ST. JOHN'S J. LEGAL COMMENT. 383, 392 (2008)).

243. *See supra* Section II.B; *see also* Wallace, *supra* note 242, at 670–73 (discussing trends in higher education and the financial difficulty associated with providing higher education for children).

244. *See* Sally F. Goldfarb, *Who Pays for the "Boomerang Generation"?: A Legal Perspective on Financial Support for Young Adults*, 37 HARV. J.L. & GENDER 45, 94 & n.325 (2014) ("Although some commentators have broached the idea of requiring married parents to pay college support, family law statutes and cases have not taken that path." (footnote omitted)). The federal financial aid system, FAFSA, has a section that asks about "expected family contribution," but no family is legally obligated to contribute. *See How Aid is Calculated*, FED. STUDENT AID, https://studentaid.ed.gov/sa/fafsa/next-steps/how-calculated (last visited Mar. 29, 2019) ("Your [Expected Family Contribution] is not the amount of money your family will have to pay for college, nor is it the amount of federal student aid you will receive."). Most courts to consider the question have held that the FAFSA section does not sufficiently show that a parent is required to help fund an adult child's education for purposes of determining reasonably equivalent value, though a split

There is no denying that parents are providing greater financial support for adult children than ever before, even though it is not tied to any legal duty. In addition to paying for their children's college education,[245] parents are having adult children return to live with them more frequently. One source reported that in 2011, 53% of 18 to 24-year-olds and 39% of 18 to 34-year-olds reported living with their parents or had done so recently.[246] By 2015, one in every three adults between the ages of 18 and 34 were living with their parents.[247] Even when children are able to live away from home, many parents continue to provide financial support by paying for costs such as child care or cellphone bills, and at least one economist has suggested that a parent can expect to spend around $42,280 in 2005 dollars on a child just between the ages of 17 and 34.[248] The path to adulthood is longer and different than it was in the past, and courts and legislatures are still adjusting to this new social norm.[249]

Furthermore, even though tuition payments for adult children diminish parents' estates by not providing any immediate economic equivalent, there are categories of transfers that also diminish the estate but are not usually fraudulent transfers: payments for services and consumable goods. Some

exists on the question. *See, e.g.*, Boscarino v. Bd. of Trs. of Conn. State Univ. Sys. (*In re* Knight), No. 15-21646, 2017 WL 4410455, at *5 (Bankr. D. Conn. Sept. 29, 2017) (finding that debtor was not obligated to pay for her son's college tuition). This does not mean, however, that no child is entitled to financial support to obtain a college education; children of divorced parents are often entitled to parental assistance with funding higher education either through child support or separate divorce agreements. *See* Wallace, *supra* note 242, at 669–70, 673–83 (discussing the historical and current laws regarding child support payments for higher education for children of divorced parents). This issue has emerged in at least three tuition clawback lawsuits, and thus far judges have upheld parental obligations to pay for college that stem from divorce. *See, e.g.*, *infra* Appendix, at rows 57, 72, and 111. Some commentators have argued that these types of laws should extend to all children, even those with married parents. *See generally* Lawrence Chinsky, Note, *"Opening the Floodgates": Adult Children Suing Their Parents for College Support: Has the Law in New Jersey Gone Too Far or Not Far Enough?*, 68 RUTGERS U. L. REV. 827 (2016) (making the argument that child support for education should be extended to adult children of married parents in certain circumstances); Scott A. Hall, Note, *In the Best Interests of the Child and the State: A Call for Expansion of Iowa's Postsecondary Education Subsidy Law*, 57 DRAKE L. REV. 235 (2008) (arguing that Iowa's child education subsidy for children of divorce should be extended to children of married and un-married parents).

245. *See supra* Section II.B.

246. Goldfarb, *supra* note 244, at 53.

247. JOHNATHAN VESPA, THE CHANGING ECONOMICS AND DEMOGRAPHICS OF YOUNG ADULTHOOD: 1975–2016, at 1–2, U.S. CENSUS BUREAU (2017), https://www.census.gov/content/dam/Census/library/publications/2017/demo/p20-579.pdf.

248. *See* Anna Bahney, *The Bank of Mom and Dad*, N.Y. TIMES (April 20, 2006), http://www.nytimes.com/2006/04/20/fashion/thursdaystyles/the-bank-of-mom-and-dad.html (referencing findings of economics professor Bob Schoeni).

249. *See* Goldfarb, *supra* note 244, at 50–54; *see also* Aimee Picchi, *The New American Adult: Mom and Dad Help Pay the Bills*, CBS NEWS (July 27, 2018, 11:12 AM), https://www.cbsnews.com/news/the-new-american-adult-mom-and-dad-help-pay-the-bills (describing how parents support their adult children more than ever in our current economy and many young adults are delaying major milestones like marriage, buying a home and financial independence).

courts and commentators believe that payments for services or completely consumable goods provide reasonably equivalent value, even though it does nothing to further the policy of preserving the net worth of the estate for creditors.[250] This certainly makes sense for common consumables like groceries, utilities, clothing, transportation costs and basic recreational activities;[251] we would not want to live with a bankruptcy system in which insolvent debtors could not sustain life for themselves and their families. 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.[252] 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.[253]

2. Counterpoints and Conclusion: Tuition Payments by Insolvent Parents are Constructively Fraudulent Transfers

The arguments above provide compelling support for finding that parents do or should receive reasonably equivalent value by paying for their children's tuition; however, the current body of case law regarding reasonably equivalent value simply does not.[254] The law regarding reasonably equivalent value and consumable goods is murky and unsettled. While food is a necessity

250. *See, e.g.*, Janvey v. Golf Channel, Inc., 487 S.W.3d 560, 575–76 (Tex. 2016) ("[T]he 'requirement of 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.'" (quoting Pummil v. Hemker (*In re* Richards and Conover Steel, Co.), 267 B.R. 602, 612 (8th Cir. BAP 2001))); Marine Midland Bank-New York v. Batson, 332 N.Y.S.2d 714, 717 (Sup. Ct. 1972) ("[A] 'fair consideration' for a conveyance can be a consumable item which in ordinary use leaves over nothing."); *see also* 5 COLLIER ON BANKRUPTCY ¶ 548.05 [2][a] (applying a creditor's perspective "does not mean . . . that the value received by the debtor must be something on which creditors can levy; particular with respect to valuable services, such as legal or other similar professional services, courts will not factor in a lack of tangible increase in physical assets," but courts will "discount intangible and transitory assets and rights that have value only to the debtor").

251. *Janvey*, 487 S.W.3d at 575 ("A construction of the term "value" that would automatically or effectively exclude consideration in the form of consumable goods or services—for example, food, utilities, internet or telephone services, office supplies, and employee compensation or benefits—is simply unsupportable under a plain reading of the statute.").

252. *See, e.g.*, Allard v. Flamingo Hilton (*In re* Chomakos), 69 F.3d 769, 772 (6th Cir. 1995) (holding that the legal gambling provided reasonably equivalent value because it was a form of an investment and the debtor received entertainment and other intangible values by gambling comparable to dining at a fine restaurant); Bohm v. Dolata (*In re* Dolata), 306 B.R. 97, 143 (Bankr. W.D. Pa. 2004) (holding that a gambling loss of over $42,500 could not be recovered as a fraudulent transfer because gambling gave the debtors a right to money if the gambling was successful); *see also* Samson v. U.S. W. Commc'ns, Inc. (*In re* Grigonis), 208 B.R. 950, 952, 956 (Bankr. D. Mont. 1997) (holding that an insolvent debtor received reasonably equivalent value from paying for psychic services through a 900 telephone service).

253. *See supra* note 252 and accompanying text.

254. *See supra* Part V.

for all people, it is unclear how courts would treat a "lavish feast" that, although purchased at a fair market rate, diminishes the insolvent debtor's estate by far more than required to meet the debtor's need to eat.[255] While even insolvent debtors should be able to enjoy life, what should courts decide regarding "Broadway shows and exclusive sporting events, . . . hourly charges for music, sports or language lessons, . . . and all forms of recreational travel?"[256] Furthermore, even if a consumable good bought for oneself provides reasonably equivalent value, whether necessary or not, it is highly unlikely that any valuable consumable bought for or given to another gives the necessary economic value to the debtor giving it.[257]

Analogously, in the tuition context, the argument essentially is that a debtor who pays for her own education receives reasonably equivalent value but does not when paying for another's tuition. Under the current state of the law, although paying for a child's tuition is generous and perhaps even necessary,[258] permitting an insolvent debtor to do so would allow generosity to rob justness. Courts, state legislatures, and Congress have consistently recognized the need for constructively fraudulent transfers because "no man has so absolute a power over his own property, as that he can alienate the same, when such alienation directly *tends* to delay[,] hinder, or defraud his creditors."[259] The point of fraudulent transfer law is to preserve the debtor's estate as much as possible to satisfy the debtor's obligations to creditors. Even though parents may relieve themselves of future financial burdens by contributing to a child's education today, the benefit is speculative and unclear, and does nothing to preserve the bankruptcy estate for the protection of today's creditors.

Even if this result is logical, is it fair? Would most in society agree that tuition payments should be deemed fraudulent transfers just because the law states that transfers are constructively fraudulent whenever they are (1) made by an insolvent debtor and (2) do not provide reasonably equivalent value to the debtor?[260] Do these two factors alone sufficiently signal imminent harm to creditors in the situation of parental tuition payments such that an insolvent parent's tuition payments for his or her adult children are objectionable in the eyes of the law and society?

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255. ALCES, *supra* note 94, at 5-61.

256. *Samson*, 208 B.R. at 956.

257. *See, e.g.*, Henkel v. Green (*In re* Green), 268 B.R. 628, 651–52 (Bankr. M.D. Fla. 2001) (holding that wedding gift of $50,000 was a fraudulent transfer); Scarsdale National Bank & Trust Co. v. Lubin (*In re* Lubin), 61 B.R. 511, 514 (Bankr. S.D.N.Y. 1986) (finding a fraudulent transfer when "the debtor transferred funds to her daughter to cover the cost of a trip to Europe and to pay her daughter's automobile loan").

258. *See* Meir Statman, *Yes: Don't Have Your Children Start Life with Crippling Debt*, in *Should Parents Pay for Their Children's College Education?*, WALL ST. J. (March 16, 2014, 8:35 PM), https://www.wsj.com/articles/should-parents-pay-for-their-childrens-college-education-1394466608.

259. Partridge v. Gopp (1758), 28 Eng. Rep. 647, 648 (emphasis added).

260. *See* 11 U.S.C. § 548(a)(1)(B) (2012).

The answer seems, in many instances, to be yes. Although difficult for some to agree with, the judge in *Boscarino v. Board of Trustees of Connecticut State University (In re Knight)* explained that the answer "is easier to understand from the perspective of creditors."[261] Most creditors "would probably be unwilling to volunteer to provide a financial subsidy to enhance the insolvent debtor's family relationships by allowing the debtor to put valuable property beyond their reach."[262] Other judges that have analyzed the appropriateness of tuition payments before bankruptcy, during bankruptcy, or while completing a creditor repayment plan post-bankruptcy have shared this view. Many have emphasized that no bankruptcy proceeding, whether Chapter 7 liquidation or Chapter 13 reorganization, may be used by debtors as a tool to better position themselves to pay for children's college education.[263]

Judge Kaplan's opinion in *In re Godios* does the best job of explaining this position and is easily applicable to the situation of pre-petition tuition payments for adult children:

> Platitudes abound to the effect that bankruptcy affords the "honest but unfortunate" debtor a "fresh start," but not a "head start." These Debtors are honest, but not unfortunate. The[y] don't need a "fresh start." What they hope for from the Court is a "head start" on their children's higher education. . . . [Mr. Godios] states [it] "is [his] responsibility."
>
> But what he asks of the Court is that his unsecured creditors get nothing so that he may undertake that responsibility. Were the Court to grant his and his wife's request, what would this Court say

261. Boscarino v. Bd. of Trs. of Conn. State Univ. Sys. (*In re* Knight), No. 15-21646, 2017 WL 4410455, at *3 (Bankr. D. Conn. Sept. 29, 2017) (quoting Zeddun v. Griswold (*In re* Wierzbicki), 830 F.3d 683, 689–90 (7th Cir. 2016)).

262. *Id.*

263. *See, e.g.*, *In re* Walker, 383 B.R. 830, 838 (Bankr. N.D. Ga. 2008) ("[T]he Court finds that the totality of the Debtors' financial circumstances indicates that granting relief under Chapter 7 would be an abuse. The Debtors have the income to pay a meaningful dividend to unsecured creditors. The impetus for the filing of their petition was not illness, calamity, or job loss. Instead, it appears to the Court that the Debtors simply reordered their priorities once their two oldest children reached college age. . . . The Court is not implying that supporting college-age children is not admirable when parents have the means to do so. However, the Court agrees with its learned colleagues that supporting adult children at the expense of unsecured creditors is not permissible."); *In re* Hess, No. 07-31689, 2007 WL 3028422, at *3 (Bankr. N.D. Ohio Oct. 15, 2007) ("While a parent's desire to assist a child who is pursuing a college degree is laudable, a debtor is not free to do so at the expense of her unsecured creditors."); U.S. Tr. for the W. Dist. of Va. v. Harrelson, 323 B.R. 176, 179 (Bankr. W.D. Va. 2005) (finding that debtors' budget, which included their adult children's college expenses, was unreasonable because they were under no duty to pay for such expenses); *In re* Studdard, 159 B.R. 852, 856 (Bankr. E.D. Ark. 1993) ("A parent's desire to provide a child with . . . a college education at the institution of his or her choice is generally laudable, but under these circumstances, the amount of the debtors' expenditures is excessive. The debtors owe no duty to their children to provide them with nonessential luxuries while the debtors' unsecured creditors receive no payment on their just claims.").

> to the countless parents who believe that paying their debts is *also* a responsibility, and who therefore exhaust the "college fund" to do so? What would it say to the countless parents who must painfully say to their sons or daughters, "We have bills to pay. We can't afford to send you to an expensive college"?[264]

Many people and families are very upset that trustees bring these lawsuits, but the fact remains that parents do not have a legal or constitutional obligation to pay for higher education (with the exception of some divorce agreements) and there are many people who simply can't afford to pay for their children's college education.[265] As the Supreme Court has recognized, "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[266] Although obtaining a higher education is extremely important, when some reports suggest that anywhere from 25% to 33% of recent college graduates are working in jobs that don't even require their college degree,[267] the decision to attend college must be one based on an honest and effective cost-benefit analysis of the child's interests and mental aptitude by both parents and the child.

Paying for an adult child's tuition while insolvent and soon thereafter filing for bankruptcy is making a fraudulent transfer. Frankly, allowing

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264. *In re* Godios, 333 B.R. 644, 647–48 (Bankr. W.D.N.Y. 2005).

265. *See* Stech, *supra* note 30 ("I'm not happy about these education cases, but there are plenty of folks who can't afford to send their children to college, and there doesn't seem to be a constitutional right to send your child to college, as much as some folks would like there to be." (quoting bankruptcy Judge Ann Nevin)).

> My objection is based on my concern, my fear, that allowing this settlement to go forward lends a fragment of credence to the Trustee's idea that is the basis of his action.
>
> I ask that not a penny be approved to go to the Trustee so that there is not a penny's worth of validity to an action that is an attack on the value of education in America, in the world, to Civilization, to Humanity.
>
> Trustee Geltzer's argument is an affront to a vision of civilization that Humanity has embraced for centuries. This is not just about the bankruptcy code, New York State, or even America. This is about the value of the law, of knowing the difference between right and wrong.

Letter from Bruce Sterman, Geltzer v. Oberlin Coll. (*In re* Sterman), No. 18-01015 (Bankr. S.D.N.Y. Nov. 13, 2018), ECF No. 35 (registering Mr. Sterman's objection to settlement in the tuition clawback lawsuit in which two of his daughters and their university were named as defendants).

266. Troxel v. Granville, 530 U.S. 57, 65 (2000). This right includes the right for parents "to direct the upbringing and education of children under their control." *Id.* (quoting Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925)).

267. *See* STEPHEN J. ROSE, MISMATCH: HOW MANY WORKERS WITH A BACHELOR'S DEGREE ARE OVERQUALIFIED FOR THEIR JOBS?, URBAN INSTITUTE 2 (2017), https://www.urban.org/sites/default/files/publication/87951/college_mismatch_final_2.pdf (finding that 25% of college graduates are over-qualified for their post-graduation jobs). *See generally* Jaison R. Abel et al., *Are Recent College Graduates Finding Good Jobs?*, 20 CURRENT ISSUES IN ECONS. & FIN. 1 (2014).

insolvent parents to deplete their estates to pay for an adult child's education and to subsequently use bankruptcy to escape obligations to creditors that would have been at least partially fulfilled by the funds used to pay the tuition would allow parents to abuse the bankruptcy system.

Although such an assertion may sound extreme, it is important to remember that this is not the first time that a naturally innocent and respected activity has been found to be fraudulent under the bankruptcy code. In the 1980s and 90s, bankruptcy trustees began challenging charitable contributions and religious tithing payments that insolvent debtors made before filing for bankruptcy or wished to pay as part of a bankruptcy repayment plan.[268] These lawsuits not only challenged society's ideals and the theories underlying fraudulent transfer actions, but also, especially in regards to tithing, posed serious questions of whether debtors' First Amendment rights were being violated.[269] In the end, the controversy led to a split among various courts, and it was Congress, not the courts, that entered to accommodate social policy considerations into the bankruptcy code by enacting the Religious Liberty and Charitable Donation Protection Act of 1998 to protect tithing and other donations from clawbacks.[270]

3. The Need for a Middle Ground

If the desire of this Note was to allow all tuition payments by insolvent parents shortly before bankruptcy to be clawed back by bankruptcy trustees, this Note could end here. However, this Note has also described the reality of a rapidly changing society in which children need help reaching economic independence more than ever.[271] Obtaining a higher education is one of the best ways to have a longer and healthier life,[272] and many in society would agree that opportunities to learn and obtain a higher education are essential to our "pursuit of Happiness."[273]

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268. *See* Peter Califano, *A Surprising Defendant in Bankruptcy Avoidance Litigation*, 12 COM. L. BULL. 20, 20 (1997) (noting that the first successful tithing clawback lawsuit occurred in 1992 and that it evolved into a trend as other bankruptcy courts followed). *See generally* Robert J. Bein, Comment, *Robbing Peter to Pay Paul: Charitable Donations as Fraudulent Transfers*, 100 DICK. L. REV. 103 (1995) (discussing clawback lawsuits involving charitable contributions and tithing); Todd J. Zywicki, *Rewrite the Bankruptcy Laws, Not the Scriptures: Protecting a Bankruptcy Debtor's Right to Tithe*, 1998 WIS. L. REV. 1223 (discussing tithing clawback lawsuits and suggesting amendments to the bankruptcy code).

269. *See* Zywicki, *supra* note 268, at 1230–33, 1247 (introducing the theory behind tithing clawback lawsuits and explaining the difficulties they pose for debtors and religious institutions).

270. *See id.* at 1269–76.

271. *See supra* Sections II.B, V.B.1.

272. *See The Happy State of College Graduates*, COLLEGESTATS.ORG, https://collegestats.org/2013/05/the-happy-state-of-college-graduates (last visited Mar. 29, 2019) (summarizing multiple reports that found that those with college degrees often live longer and are less likely to get divorced than those with only a high school diploma).

273. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see, e.g.*, Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972) (explaining that the concept of "liberty" protected by

Although this Note takes the position that tuition payments by insolvent parents for their adult children are fraudulent transfers, it has also analyzed enough evidence and policy considerations to demonstrate why clawing back tuition in every case in which an insolvent parent paid tuition for an adult child is not justified or beneficial to society overall. A solution that allows all clawbacks or no clawbacks would lead to a problem of either over- or under-inclusion. If a court does not allow any trustee to claw back tuition payments as constructively fraudulent transfers, creditors would be harmed because debtors would have free reign to pay tuition up to the moment of bankruptcy. On the other hand, if courts allowed all parental tuition payments that fulfilled the current definition of a constructively fraudulent transfer to be clawed back, there would be too many honest debtors affected who may have already begun to assist their children before the fear of bankruptcy was sufficiently realized.

At this point, it seems clear that a middle ground is needed. In proposing a solution, this Note echoes the sentiment expressed in *In re Knight*, that tuition payments by insolvent parents are correctly fraudulent transfers as Congress intended the statute to be interpreted, and, like in the case of tithing and charitable contributions, it should be left up to Congress to balance "a debtor's social obligations and their obligations to creditors [in a way] that only Congress can achieve."[274] It is time for the law, yet again, to adopt a solution that does a better job of distinguishing the honest and unfortunate debtor from the debtor that seeks to take advantage of creditors and the bankruptcy system.

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the 14th Amendment includes the right "to engage in any of the common occupations of life, [and] to acquire useful knowledge"); Letter from Thomas Jefferson to George Wythe (Aug. 13, 1786), https://founders.archives.gov/documents/Jefferson/01-10-02-0162 ("I think by far the most important bill in our whole code is that for the diffusion of knowlege among the people. No other sure foundation can be devised for the preservation of freedom, and happiness."); *see also* Phillip Moeller, *Why Learning Leads to Happiness*, U.S. NEWS & WORLD REP. (Apr. 10, 2012), https://money.usnews.com/money/personal-finance/articles/2012/04/10/why-learning-leads-to-happiness ("Education has been widely documented by researchers as the single variable tied most directly to improved health and longevity. And when people are intensely engaged in doing and learning new things, their well-being and happiness can blossom."); Dan Rockmore & Michael Evans, *The Right to Pursue Happiness is the Right to Pursue Education*, HUFFPOST (Jan. 23, 2017, 12:09 PM), https://www.huffingtonpost.com/entry/the-right-to-pursue-happiness-is-the-right-to-pursue_us_5886337ee4b08f5134b62314 ("The pursuit of happiness and the pursuit of education are no longer separate issues in America. . . . [P]retty much any measure of happiness and economic success . . . between college and high school graduates continues to grow.").

274. Boscarino v. Bd. of Trs. of Conn. State Univ. Sys. (*In re* Knight), No. 15-21646, 2017 WL 4410455, at *5 (Bankr. D. Conn. Sept. 29, 2017); *see also* Mangan v. Univ. of Conn. (*In re* Hamadi), 597 B.R. 67, 69 n.1 (Bankr. D. Conn. 2019) ("This is not the first time this Court has seen a trustee attempt to recover tuition payments a debtor parent made to a university on behalf of adult children. . . . Absent a legislative fix, the Courts will continue to wrestle with the conundrums presented by these types of cases.").

VI. A LEGISLATIVE SOLUTION TO BALANCE COMPETING INTERESTS

To provide a solution that is specifically tailored to pre-bankruptcy tuition payments by insolvent parents and the circumstances and expectations of society, this Note has analyzed the historical development and purposes of fraudulent transfer law and the most common fact patterns of 152 tuition clawback lawsuits. Even though the vast majority of insolvent parents likely do not make tuition payments for their children intending to harm their creditors, the transfers are at least constructively fraudulent, and in some circumstances they should be found actually fraudulent.

This Note proposes amendments to the Bankruptcy Code that attempt to honor and balance the interests of creditors on one side, and families and universities on the other. A proper balance can be achieved by allowing trustees to claw back only those tuition payments which contain the greatest signs of fraudulent intent. In addition to the traditional constructive fraudulent transfer elements—insolvency and lack of reasonably equivalent value—the amendments look to (1) how close the payments were made to when the debtor filed for bankruptcy, and (2) when parents began paying, and how consistently they paid, their adult children's tuition. After presenting the amendments, this Note explains why other proposed legislative solutions would be less consistent with the purposes of fraudulent transfer law and inadequately respect creditors' rights.

A. A SOLUTION THAT DISTINGUISHES BETWEEN INSOLVENT PARENTS BASED ON THEIR CONDUCT

First, 11 U.S.C. § 548 should be amended to add the following language after § 548(a)(2):

> (3) A transfer or obligation is not voidable under subsection (a)(1)(B) of this section against an institution of higher education, as defined in 20 U.S.C. § 1001, if the transfer made or obligation incurred by the debtor was in furtherance of a relative's undergraduate education, and the transfer was made—
>
> (A) more than one year before the date of the debtor's filing a petition for bankruptcy; or
>
> (B) more than six months before the date of the debtor's filing a petition for bankruptcy, if such transfer was consistent with the practices of the debtor in making transfers to further the undergraduate education of that relative for at least two years before the date of the filing of the petition.

Adopting this amendment would not mean that tuition payments by an insolvent parent for an adult child within two years of bankruptcy are not constructively fraudulent transfers under the law. The amendment merely creates three distinct results regarding whether tuition payments that are

constructively fraudulent transfers may be clawed back by trustees in bankruptcy: There would be some tuition payments that are always protected from being clawed back, some that may be clawed back in certain circumstances, and some that can always be clawed back.[275]

First, the amendment protects all tuition payments made for a relative[276] of the debtor more than one year before the debtor filed for bankruptcy from being clawed back as a constructively fraudulent transfer under 11 U.S.C. § 548(a)(1)(B). In other words, the amendment means that the law would allow insolvent parents to make any number of tuition payments for adult children up to a year before bankruptcy. It must be emphasized, however, that neither this nor any other amendment discussed below affects that applicability of the actual fraud provision, 11 U.S.C. § 548(a)(1)(A), to a parent's tuition payments for *any* relative. The law regarding actual fraudulent transfers would remain unchanged; if a trustee can prove that any tuition payment within two years of bankruptcy was made with *actual fraudulent intent*, the tuition payment is avoidable.

By protecting tuition payments made more than a year before the bankruptcy petition from being clawed back in bankruptcy, this amendment seeks to recognize and accommodate changing societal trends and expectations. Young adults rely on their parents for financial support more than they have in the past.[277] To say that every tuition payment made for an adult child within two years (or even longer) before bankruptcy is a constructively fraudulent transfer is too harsh and likely inconsistent with society's desires.[278] Instead of punishing universities and students for conditions outside their control, this amendment seeks to respect what society likely deems as acceptable behavior—paying for an adult child's education

275. Although it may seem complicated to create three categories with different conditions for constructively fraudulent tuition payments instead of the simple dichotomy that currently exists, the multiple categories allow for greater accuracy in targeting only those tuition payments that were most likely to have been made with fraudulent intent. Furthermore, setting different conditions for pre-bankruptcy actions that occur in different time frames is not uncommon in the Bankruptcy Code. *See, e.g.*, 11 U.S.C. § 541(b)(5)–(6) (2012) (allowing only $6,425 of certain education contributions to not be counted as part of the bankruptcy estate when made one to two years before bankruptcy but not designating any cap for contributions made more than two years before bankruptcy).

276. Although most of the current lawsuits focus on tuition payments made by insolvent *parents* for their children, the Author felt it was appropriate to extend this provision to "relatives" of the debtor, not just the debtor's children. Under the Bankruptcy Code, relative is defined as an "individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree." 11 U.S.C. § 101(45). This extension would be to prevent future litigation if an insolvent debtor desires to pay tuition expenses for a grandchild, great-grandchild, or niece or nephew. Of the cases evaluated, there are at least two in which the trustee sued a grandparent for providing tuition for a minor child. *See* Bailey v. Brunswick Sch., Inc. (*In re* Crow), No. 18-02004 (Bankr. D. Wyo. Feb. 5, 2018); Moratzka v. Taylor (*In re* Taylor), No. 13-04341 (Bankr. D. Minn. Dec. 20, 2013).

277. *See supra* Sections II.B, V.B.1.

278. *See supra* Sections II.B, V.B.1.

even if insolvent—but still draws a line where that behavior is likely to become less acceptable—one year before bankruptcy.[279] Respecting these considerations related to education and society's expectations in this amendment is important and acceptable; the Bankruptcy Code is no stranger to recognizing that even individuals who are approaching or in bankruptcy may need allowances to help fund a relative's education.[280]

Second, subsection (3)(B) of the amendment would provide conditional protection for tuition payments made six to twelve months before the debtor files for bankruptcy. A tuition payment made six to twelve months before filing for bankruptcy will not be avoidable as long as the debtor made consistent tuition payments for the relative for at least two years before filing for bankruptcy.[281] This provision provides a middle ground between creditors' and debtors' interests, where the facts of the case will determine whether the trustee can recover from the university. For the same reasons given for the first part of the amendment, this part of the amendment allows for even more tuition payments to be protected from being clawed back if the debtor's actions carry greater indicia of proper motive. However, if these

279. Although the one-year time frame may seem arbitrary, it is based on common fact patterns of the cases in the Appendix: Many parents stopped making tuition payments about one year before bankruptcy. Furthermore, the one-year time frame is consistent with time frames contained in other parts of the Bankruptcy Code that address education-related policy considerations. *See* 11 U.S.C. § 541(b)(5) (declaring that funds placed in a Coverdell education savings account more than 365 days before the bankruptcy petition are not included among the property of the bankruptcy estate available to creditors); *id.* § 541(b)(6) (declaring that contributions to a 529 education plan or funds used to buy a tuition credit at least 365 days before the debtor filed for bankruptcy are not included as property within the bankruptcy estate and are thus not available to creditors).

280. *See, e.g.*, 11 U.S.C. § 541(b)(5)–(6) (declaring that "funds placed in an education individual retirement account," tuition credits, or contributions to a 529 savings plan for the benefit of a child or grandchild are not included among the property of the bankruptcy estate and thus are unavaiable to creditors in bankruptcy); *id.* § 707(b)(2)(A)(ii)(IV) (making education expenses for dependent minor children a possible allowed expense when calculating the Bankruptcy Code's means test).

281. The amendment's phrase regarding consistency would be left to the courts to interpret. It should not mean that a debtor would have to pay for the same amount of tuition each semester or even every semester during that time frame. To determine consistency, this Note recommends a two-prong test based on consistency in (1) the *timing* and *number* of tuition payments made, and (2) the *amount* of tuition paid. For example, there must be enough evidence to show that the debtor has frequently helped his or her relative for at least two years before the debtor filed for bankruptcy. More payments being made as bankruptcy approaches may suggest an intent to deprive creditors. If a debtor has made consistent payments over that span, the court would next look to the amounts being paid. Evidence showing that the debtor began making larger contributions to their relative's tuition as bankruptcy approached than they had commonly done before would weigh in favor of finding that the debtor was not consistent in their payments. The increased contribution amount may suggest that the debtor began contributing more towards tuition knowing that bankruptcy was approaching, and thus is suggestive of actual fraudulent intent. The importance of consistency in determining the presence of fraudulent intent can be seen in the cases discussed *supra* Section IV.A.

conditions are not met, all tuition payments up to a year before the bankruptcy petition may be clawed back.

The conditions for protection—length of time the tuition was paid and the consistency of those payments—are appropriate proxies for determining the likelihood of fraudulent intent.[282] Parents who consistently make tuition payments long before they file for bankruptcy are those who likely began paying the tuition while still sufficiently paying creditors, and the least likely to have begun paying tuition simply because bankruptcy was near. Conversely, the closer to filing for bankruptcy that the parents began making tuition payments, or increased the frequency or amount contributed towards tuition, the greater the probability is that they were consciously aware that they were using funds that would soon go to creditors in bankruptcy.

Lastly, for transfers made within six months of filing for bankruptcy, the amendment would accept the law as it stands. Most bankruptcy courts will likely (and should) continue to hold that all tuition payments by an insolvent parent for an adult child near bankruptcy are constructively fraudulent. The tuition payments can thus be clawed back from universities or the student for whom it was paid. Tuition payments made so close to bankruptcy are those that are the most likely to have been made with actual fraudulent intent, i.e., the parents knew that the money used for the tuition payments is money that would otherwise very soon pass to creditors in bankruptcy. Thus, if bankruptcy is six months away or less, the amendment expresses the expectation that funds should always be saved for creditors.

Next, 11 U.S.C. § 544 should also be amended to include a subsection (b)(3):

> (b)(3) Paragraph (1) shall not apply to any transfer that is a tuition payment or any other transfer made or obligation incurred by the debtor in furtherance of a relative's undergraduate education that is not covered under section 548(a)(1)(B), by reason of section 548(a)(3). Any claim by any person to recover a transfer 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.

This provision would extend the impact of the amendment to § 548 discussed above to actions based on state law under § 544. This means that even if state law would allow a creditor to claw back a tuition payment, a bankruptcy trustee would no longer have power to claw back any tuition payment that is not subject to being clawed back under § 548.[283]

The goal of these amendments is that the tuition payments that would be clawed back would only be those that are most likely to have been made with

282. *See supra* Section IV.A.

283. Although this amendment would prevent bankruptcy trustees from using state law to claw back tuition payments in bankruptcy, a creditor could still use state law to potentially do so in circumstances unrelated to bankruptcy.

actual fraudulent intent or are most objectionable to society. There is a still a problem, however. The parties that are returning the tuition payments to the bankruptcy estate, most often universities (sometimes the students) are almost certainly acting in good faith when receiving (or benefiting from) these tuition payments. A mechanism is needed to provide a remedy, at least for universities,[284] to hold the parents who actually pay the tuition while insolvent and so close to bankruptcy more accountable. The following, using contract principles and the bankruptcy code, is one way that this could be done.

First, whenever parents make payments directly to a university for tuition or other educational expense, universities should require the parents to sign a contract.[285] The contract could contain provisions to protect universities against the parents' potential bankruptcy—and thus the possibility of a tuition clawback lawsuit—by using language similar to that found in settlement agreements that include protections against a potential future bankruptcy.[286]

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284. As the cases in the Appendix show, trustees very rarely seek to claw back the tuition payments from the students for whom they are paid. Because the students are at in school or at most only a couple of years out of college, they usually have little to no funds to pay to the bankruptcy estate. *See supre* note 32. Furthermore, suing the debtor's child does not sit well with most in society and causes much stress to the families involved. *See supra* notes 36, 265 and accompanying text. In some cases where the student has been held responsible for giving back the value of the tuition money, the parents themselves (or other family members) usually end up finding a way pay the estate. *See infra* Appendix, at rows 7, 12, 33, 48, 83, and 131. For these reasons, remedies for universities are the main concern.

285. By directly, I mean that the parent by check or otherwise pays the tuition directly to the school. If an insolvent parent just gives money to the student to be used for college, the bankruptcy trustee has a claim against the child, but the university has a strong defense as a secondary transferee who took for value and in good faith. *See* 11 U.S.C. § 550(b)(1). This good faith defense is a potential solution to protect universities if parents who pay for tution are forced to deposit into a university-run but student-controlled account. *See Structured Finance Protects Tuition Payments from Fraudulent Transfer Suits*, AM. BANKR. INST.: ROCHELLE'S DAILY WIRE (April 5, 2018), https://www.abi.org/newsroom/daily-wire/structured-finance-protects-tuition-payments-from-fraudulent-transfer-suits (discussing a case that held that structuring tuition payment systems to pass money through students rather than directly to universities allows universities to assert good faith defense). However, it is still unclear if that structure will always fall into the realm § 550(b)(1). *Tuition Payments by Insolvent Parents (Likely) Constitute Fraudulent Transfers*, AM. BANKR. INST.: ROCHELLE'S DAILY WIRE (Dec. 3, 2018), https://www.abi.org/newsroom/daily-wire/tuition-payments-by-insolvent-parents-likely-constitute-fraudulent-transfers (discussing how there are many questions about passing tuition through students first and that tuition payments by insolvent parents are likely fraudulent transers). Furthermore, restructuring a payment system likely requires much more work and cost on the university's part than requiring parents to sign a contract.

286. *Cf. How to Minimize Bankruptcy Risks In Settlement Agreements*, HOLLAND & HART (Aug. 15, 2002, 12:00 AM), https://www.hollandhart.com/how-to-minimize-bankruptcy-risks-in-settlement-agreements (discussing potential consequences for plaintiffs when a defendant's bankruptcy follows a settlement agreement and some contractual remedies plaintiffs can seek to protect their settlement). One key difference, however, is that contracts regarding tuition are needed to create a potential claim when they end up breached. Settlement agreements, on the other hand, are contractual agreements that resolve some pre-existing claim.

Provisions would vary depending on how often universities require tuition and other payments, whether parents pay the whole tuition or contribute only part, and how frequently parents choose to help fund the education for their children. However, the general purpose should be to contractually show that the parents are voluntarily undertaking a contractual duty to pay the tuition (whether in part or full) and in return are receiving education for their child. The contract could even specify that the parents are still liable for the value of payment if the tuition money is later clawed back in bankruptcy.

With this kind of contract, a trustee's recovery of the tuition payments under § 550 would create a claim for the university that would be treated as if it existed before the commencement of the bankruptcy.[287] In other words, the university would have the right to assert an unsecured, and most likely dischargeable,[288] claim against the debtor's bankruptcy estate. However, even with this change, the university may only be able to get cents on the dollar for its claim and perhaps nothing at all.

Thus, in order to provide meaningful relief for universities and hold parents accountable, the Bankruptcy Code would need to be amended to make claims that arise from the avoidance of tuition payments in bankruptcy a non-dischargeable claim. An amendment could be inserted after § 523(a)(19) and would provide that a discharge in bankruptcy would not discharge any debt:

> (a)(20) arising out of a recovery action under section 550, if the transfer avoided under section 544 or 548 was made to a certified institution of primary, secondary, or higher education in furtherance of a relative's undergraduate education.

Making claims arising from tuition clawbacks nondischargeable would mean that universities who must return the value of the tuition payments to the bankruptcy estate will have a mechanism through which to be reimbursed by the parents who paid the tuition in the first place.

Looking at all parties, this scenario would partially appease trustees —allowing them to clawback any tuition payments made up to one year before the bankruptcy filing—partially appease parents—as any tuition payment more than a year before bankruptcy is protected—and almost completely appease universities—allowing them to keep all tuition payments made more than a year before bankruptcy and recover any clawed-back tuition from the parents. It would certainly be reasonable for changes to stop here with this

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287. *See* 11 U.S.C. § 502(h) ("A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.").

288. Comm'ns Workers of Am., Local No. 11500 v. Akridge (*In re* Akridge), 71 B.R. 151, 154 (Bankr. S.D. Cal. 1987), *aff'd and remanded*, 89 B.R. 66 (B.A.P. 9th Cir. 1988) ("Generally, debts stemming from breaches of contract are not excepted from discharge.").

new allocation of rights. However, this Note suggests that the lines need to be drawn in a slightly more even way. The purpose of bankruptcy is to allow debtors to obtain a fresh start. Allowing universities to recover, in some circumstances, up to a year's worth of tuition payments may be too large of a burden to put on parents just emerging from bankruptcy. Furthermore, because trustees represent creditors parents have an interest in helping pay for their children's education even when insolvent, universities should also be asked to bear some of the costs to society when parents who pay for children's tuition subsequently fall into bankruptcy.

Thus, one more provision could be added to the Bankruptcy Code in 11 U.S.C. § 550 after subsection (b):

> (c) A transfer made by the debtor to a certified institution of primary, secondary, or higher education in furtherance of a relative's undergraduate education that is avoided under section 544 or 548 is a claim arising under this section for purposes of section 502(h) only if it was made within six months of the date of the filing of the petition.

This provision would still give universities a nondischargeable claim to recover from parents, but only the value of tuition that was paid within six months of the bankruptcy filing that was clawed back. Tuition payments made within six months of bankruptcy are those that are most justifiably considered fraudulent transfers. Such a provision would still give universities a way to recover some tuition that has been clawed back without overburdening parents emerging from bankruptcy. It thus better balances the rights between trustees, parents, and the universities.

B. WHY OTHER PROPOSED LEGISLATIVE SOLUTIONS ARE INADEQUATE

This Note is not the first source to suggest a legislative solution to this issue. After learning about tuition clawback lawsuits from a news article, one Congressman sponsored a bill in 2015 that would prevent trustees from bringing tuition clawback lawsuits.[289] The bill proposed amending the definition of *transfers* so that tuition payments by parents are expressly *not* transfers subject to the constructive fraudulent transfer portions of § 548.[290] The bill was introduced and sent to committee but died at the end of the 114th Congress with no further action taken. Legislators in some states have amended their state fraudulent transfer laws to state that payments to universities are not avoidable if the payment "was made . . . by a parent or guardian on behalf of a minor or adult child in furtherance of the child's undergraduate education," attempting to prevent trustees from recovering

289. *See* Protecting All College Tuition Act of 2015, H.R. 2267, 114th Cong. (2015).

290. *See id.*; Katy Stech, *Bill Proposes Ban on Tuition Clawbacks in Bankruptcy*, WALL ST. J.: BANKR. BEAT (May 12, 2015, 3:29 PM), https://blogs.wsj.com/bankruptcy/2015/05/12/bill-proposes-ban-on-tuition-clawbacks-in-bankruptcy.

tuition payments by parents under § 544.[291] One student writer has proposed that § 548 be amended to include a definition of "reasonably equivalent value" that expressly states that tuition payments made by parents for their children result in reasonably equivalent value.[292]

While these proposed solutions are well intentioned, they inadequately balance each party's competing interests and are not in line with the purposes of fraudulent transfer law. First, to expressly state that parental tuition payments for adult children result in reasonably equivalent value is not in line with the current body of law analyzing reasonably equivalent value and would improperly allow debtors to diminish their estates before bankruptcy. Second, each proposal only focuses on remedying the harm to the universities and children of the bankrupt parents. They do not adequately account for the interests of creditors and the harm they endure when parents pay for a child's education in lieu of paying antecedent debts. Lastly, these solutions ignore the reality that although there are many honest insolvent parents who simply want to help their children, the cases cataloged in the Appendix show that many parents have made tuition payments under highly suspicious circumstances. These circumstances strongly suggest that at least some parents consciously used money for tuition payments that they knew would otherwise go to creditors in bankruptcy. Any legislative solution must recognize this evidence and not allow dishonest debtor-parents to free ride on our compassion for honest and misfortunate ones.

Another student writer has proposed legislative amendments to the Bankruptcy Code that escape some of these inadequacies.[293] The proposed amendment would mirror Congress's solution to clawback lawsuits involving tithing and charitable donations by allowing parents to spend up to 15% of their income on educational expenses each year.[294] Although such an amendment acknowledges that tuition payments by insolvent parents are fraudulent transfers and attempts to respect creditors' interests in preserving the bankruptcy estate, it does so half-heartedly and inadequately. It completely ignores one of the key factors of fraudulent transfer law: timing. Under the 15% solution, a debtor could transfer significant sums of money as tuition payments for a child on the eve of bankruptcy without any repercussions. Creditors would only be able to recover these funds if they could prove the parents acted with actual fraudulent intent, which, as

291. *See, e.g.*, Conn. Gen. Stat. Ann. § 52-552i(f) (West Supp. 2018). It is important to remember that even though a state may find one of these as an appropriate solution, it will only prevent a bankruptcy trustee from recovering payments that typically could be avoided under § 544; such state-level amendments do nothing to affect a trustee's ability to recover under § 548.

292. Andrew Mackenzie, Note, *The Tuition "Claw Back" Phenomenon: Reasonably Equivalent Value and Parental Tuition Payments*, 2016 COLUM. BUS. L. REV. 924, 950.

293. *See* Jenna C. MacDonald, Note, *Out of Reach: Protecting Parental Contributions to Higher Education from Clawback in Bankruptcy*, 34 EMORY BANKR. DEV. J. 243, 273–76 (2017).

294. *Id.* at 275–76.

discussed above, is very hard to do in cases like these. In fact, the amendment seems to stop caring about intent entirely, permitting parents to actually or constructively hinder, delay and defraud their creditors, as long as they don't do it too much. Thus, although the 15% solution is perhaps the best proposal so far, it at best provides only partial protection for creditors and does not adequately respect the principles and purposes of fraudulent transfer law.

Therefore, this Note's proposed solution provides a better balance between creditors', families', and universities' rights, and more fully honors the purposes and traditions of fraudulent transfer law. It better aligns with the tradition of promoting justness to creditors over generosity to family members by confirming that tuition payments by insolvent parents for their adult children soon before bankruptcy are fraudulent transfers. It respects that the timing of payments is extremely important in determining if a transfer is constructively fraudulent, because the timing of a transfer is much more suggestive of the probable intent behind the transfer than is the value of the transfer. Lastly, by proposing a mechanism that seeks to prevent only those parental tuition payments that carry the greatest probability of fraudulent intent, it provides a consciously tailored middle ground that allows insolvent parents to help their children when their conduct suggests honesty, without weakening or eliminating their duty to repay or preserve their estate for creditors as bankruptcy approaches.

VII. CONCLUSION

Tuition clawback lawsuits present a very tricky issue for society and bankruptcy courts to address. In fact, the very name of fraudulent transfer seems wholly incompatible with something as beneficial and laudable as a parent helping a child to obtain an education. History and case law leads to the conclusion that tuition payments by insolvent parents are at least constructively fraudulent, and likely actually fraudulent at times. Fraudulent transfer law has always promoted the principle that debtors ought to be just before they are generous.

However, tuition payments for an adult child raise significant policy considerations of an ever-changing world that need to be balanced against creditors' rights. The amendments proposed in this Note attempt to do that, realizing and permitting transfers to be clawed back when they are most suspect, but creating protections fo parents who, through their conduct, are least likely to be acting fraudulently. The proposed amendments to the Bankruptcy Code can do this, and by doing so it can become a system that promotes a better balance between justice and generosity in tuition clawback lawsuits.

	Case[295]	Filed[296]	Amount[297]	Actual Fraud[298]	Constructive Fraud[299]	Timing of Transfers[300]	Child Sued[301]	Results[302]	Additional Facts
1	Davis v. Davenport (*In re* Davenport), 147 B.R. 172 (Bankr. E.D. Mo.)	(10/13/92)	$24,993	548	No	Within 1 year of filing	Yes	For Defendant	Debtor made multiple transfers to family members after being sued. Made transfers for son's tuition and used son's education account for himself. Transfers were for nearly $25,000 when tuition was only $3,315.
2	Ries v. Boston Coll. (*In re* Lindeman), No. 06-03475 (Bankr. D. Minn.)	11/22/06	$19,865	548	548	1 month before filing	Yes	Settled Son = $10,000 Univ.= $3,230	Assets liquidated two months before bankruptcy.
3	Hanrahan v. Walterman (*In re* Walterman Implement, Inc.), No. 07-09043 (Bankr. N.D. Iowa)	02/16/07	$21,764	No	548	All within 6 months of filing	Yes	Settled	Debtor used business funds to pay for daughter's tuition. Judge held that love and affection are not reasonably equivalent value. Settled by father on personal conditions.
4	Wells v. Schoolcraft Coll. (*In re* RJ's Towing), No. 08-05041 (Bankr. E.D. Mich.)	09/05/08	$739	548	548	1 month before filing	No	Settled $715	Corporate bankruptcy. One of the owners used funds to pay tuition for his niece.
5	Rainsdon v. Cal. Baptist Univ. (*In re* Wooldridge), No. 08-08076 (Bankr. D. Idaho)	11/12/08	$1,341	No	548	1 month before filing	No	Settled $1,340	Parents purchased a cashiers check that could be used only to pay California Baptist University.
6	Williamson v. Brown Univ. (*In re* Flores), No. 09-07080 (Bankr. D. Kan.)	10/30/09	$44,394	548	548	< 6 mos. = 2 6-12 mos. = 1 >12 mos. = 1	Yes	Settled $6,500	Two transfers made within 3 months of bankruptcy.

295. If a ruling was made on a dispositive question in the case and was reported, the citation may be to the reported ruling. The vast majority are only citations to the original case number.

296. The date presented is the filing date of the initial complaint. Any date accompanying a significant ruling on the matter is marked by parentheses.

297. The amount is the total highest amount of money claimed by the trustee through all fraudulent transfer claims related to tuition payments rounded to the nearest dollar.

298. This section reports whether a claim of actual fraudulent transfer was made, and if so, reports which sections the claims were made through.

299. This section reports whether a claim of constructive fraudulent transfer was made, and if so, reports which sections the claims were made through.

300. This section reports the timing between the tuition payments and the debtors' filing for bankruptcy. The total number of transfers made during the relevant time periods is specified, unless otherwise noted.

301. This reports whether the trustee sued the debtors' child who tuition was paid for instead of or in addition to the institution to which it was paid.

302. This section reports the status of the case. Settlement amounts are those paid by universities, unless otherwise specified that an amount was paid by the student-child or the student-child's family. Dropped represents a case that was voluntarily dismissed without a settlement.

7	Williamson v. Imperial Coll. London (*In re* Flores), 426 B.R. 350 (Bankr. D. Kan.)	(02/25/10)	$49,064	548	548	Within 3 months of filing	Yes	Settled Family = $49,064	Imperial College London was released as defendant because the court determined in did not have jurisdiction over it. Trustee later noted that settlement with family retrieved all funds requested.
8	Banner v. Lindsay (*In re* Lindsay), 2010 WL 1780065 (Bankr. S.D.N.Y)	(05/04/10)	$35,055	544/548	544/548	Within 4 months of filing	Yes	For Trustee Paid $35,055	Bankrupt husband had a large judgment debt. Parents sold or put liens on vehicles in order to pay for son's tuition at a foreign university.
9	Holber v. Drexel Univ. (*In re* Weiss), No. 10-00476 (Bankr. E.D. Pa.)	12/20/10	$24,430	No	548	1 month before filing	Yes	Settled Child = $3000	Parents liquidated stocks and prepaid tuition for their daughter. University refunded tuition, but trustee sued the daughter after she failed to return the money to the estate and university rightfully claimed it.
10	Tabas v. Talmudic Coll. of Fla. (*In re* Stern), No. 11-01733 (Bankr. S.D. Fla.)	02/25/11	$100,000	No	548	Within 2 years of filing	No	Dropped	Trustee dropped the case because it was becoming too expensive.
11	Wolff v. Georgetown (*In re* Gaetjens), No. 11-00182 (Bankr. D. Md.)	03/10/11	$78,509	No	548	<6 mos. = 9 6-12 mos. = 6 >12 mos. = 5	No	Settled $58,882	Transfers to university were systematic and for at least 18 months before filing.
12	Menotte v. Lafayette Coll. (*In re* Rudolph), No. 11-01828 (Bankr. S.D. Fla.)	03/25/11	$71,808	544/548	544/548	Within 2 years of filing	Yes	Settled Family = $71,808	Mother prepaid for 2 years of son's tuition just before she was ordered to repay alimony to former husband. She had been paying son's tuition out of a trust in his name.
13	Gold v. Marquette Univ. (*In re* Leonard), 454 B.R. 444 (Bankr. E.D. Mich.)	(04/08/11)	$21,527	No	548	<6 mos. = 3 6-12 mos. = 1	No	Settled $10,290	Judge held that parental tuition payments do not provide reasonably equivalent value.
14	Nesse v. Pa. State Univ. (*In re* Litman Dev. Inc.), No. 11-00441 (Bankr. D. Md.)	06/08/11	$28,689	No	548	6-12 mos. = 2 >12 mos. = 1	No	Settled $17,500	Corporate bankruptcy. President of company used finds to pay for child's tuition.
15	Luria v. Full Sail Univ. (*In re* Taylor, Bean & Whitaker Mortgage Corp.), No. 11-00443 (Bankr. M.D. Fla.)	08/19/11	$49,435	544/548	544/548	Within 1 year of filing	No	Dropped	Lee Farkas, who made the transfer, was later found guilty for 16 counts of conspiracy, bank fraud, wires fraud, and securities fraud. It is unknown why he made the transfer.
16	Bakst v. Univ. of Michigan (*In re* The Dental Specialty Group, PA), No. 11-02716 (Bankr. S.D. Fla.) Bakst v. Jules Schwartz Tr., No. 09-32987 (Bankr. S.D. Fla.)	10/21/11	$31,500	544	544/548	Within 2 years of filing	Yes	Settled Child = $12,000	Father, owner of the debtor corporation, transferred money into a series of accounts for the purpose of funding adult daughter's college education.

17	Gugino v. Nw. Lineman's Coll. (*In re* Larson), No. 12-06003 (Bankr. D. Idaho)	01/17/12	$10,025	No	548	> 18 months before filing	No	Settled $8,000	Trustee felt he had elements to prove claim but settled to save costs.
18	Kittay v. Univ. of R.I. (*In re* Ross Network, Inc.), No. 12-01178 (Bankr. S.D.N.Y.)	03/15/12	$50,674	544/548	544/548	18 months before filing	No	Settled $50,600	Corporate bankruptcy; went bankrupt due to its majority shareholders using corporate funds to settle personal debts. One of them paid for his son's outstanding tuition.
19	Birdsell v. Capella Univ. (*In re* Bryant), No. 12-01111 (Bankr. D. Ariz.)	06/08/12	$3,633	548	548	2 weeks before filing	No	Settled Debtor = $5,680	Debtor wife paid tuition for non-bankrupt husband two weeks before filing. Debtor wife paid the settlement.
20	Palmer v. Full Sail Univ. (*In re* Dawson), No. 12-05032 (Bankr. E.D. Ky.)	06/29/12	$16,172	No	544/548	Within weeks of filing	No	Settled $4,000	
21	Geltzer v. Colum. Grammar & Prep. Sch. (*In re* Rachlin), No. 12-01894 (Bankr. S.D.N.Y)	09/28/12	$80,000	No	544	Multiple within 6 years of filing	No	Dropped	This was tuition for a minor child. Amount of tuition was to be proved at trial, but this was the estimate before the case was dropped.
22	Yancey v. Univ. of Balt. (*In re* Kang), No. 12-01482 (Bankr. E.D. Va.)	10/18/12	$22,620	No	548	< 6 mos.= 1 > 1 year = 1	No	Settled $7,500	Debtor parents business was also in bankruptcy.
23	Sikirica v. Cohen (*In re* Cohen), 2012 WL 5360956 (Bankr. W.D. Pa.)	(10/31/12)	$102,573	544/548	544/548	N/A	No	For Defendants	Tuition payment provides reasonably equivalent value. Bankruptcy filed pending large judgement against debtor.
24	Rosenberg v. Santa Clara Univ. (*In re* Black), No. 12-01299 (Bankr. D. Nev.)	11/14/12	$30,000	544/548	544/548	2 weeks before filing	No	Settled $20,000	
25	Rund v. Ball State Univ. (*In re* EPD Investment Co., LLC), No. 12-02556 (Bankr. C.D. Ca.)	11/28/12	$79,876	544	544	4–6 years before filing	No	Dropped	Debtor father ran ponzi scheme through his sole proprietorship and used some of the funds to fund college tuition. University had defenses and trustee dropped case.
26	Kohut v. Wayne State Univ. & Karkoukli (*In re* Karkoukli), No. 13-04177 (Bankr. E.D. Mich.)	02/14/13	$12,306	No	544/548	< 6 mos. = 1 6-12 mos. = 3 > 12 mos. = 5	Yes	Dropped	Parents helped with daughter's tuition over 4-year span. Exact reasons for dropping case unknown.
27	Shapiro v. Univ. of Mich. (*In re* Feldman), No. 13-04262 (Bankr. E.D. Mich.)	03/06/13	$12,670	544/548	544 /58	< 6 mos. = 1 6-12 mos. = 2	No	Settled $6,000	

28	Shearer v. Oberdick (*In re* Oberdick), 490 B.R. 687 (Bankr. W.D. Pa)	(03/27/13)	$82,536	544	544	N/A	No	For Defendents	Court held that tuition payment provides reasonably equivalent value. Bankruptcy filed after debtor found liable for large judgment.
29	Sullivan v. N.D. State Univ. (*In re* Walters), No. 13-03071 (Bankr. D. Minn.)	04/04/13	$8,316	No	544/548	< 6 mos. = 1 6-12 mos. = 2 >12 mos. =12	No	Settled $5,000	Payments by parents ceased 5 1/2 months before filing.
30	Greenfeld v. Univ. of Vt. (*In re* Universe Tech. Inc.), No. 13-00194 (Bankr. D. Md.)	04/05/13	$4,974	No	544/548	< 6 mos. = 1	No	Dropped	Corporate Bankruptcy. No clear information as to why this action was dropped. Tuition was paid within 90 days of the company's petition for bankruptcy.
31	Greenfeld v. Mercyhurst Univ. (*In re* Universe Tech., Inc.), No. 13-00193 (Bankr. D. Md.)	04/05/13	$6,587	No	544/548	1 year before filing	No	Settled $3,300	Corporate bankruptcy.
32	McClarty v. Univ. Ligget Sch. (*In re* Karolak), No. 13-04394 (Bankr. E.D. Mich.)	04/08/13	$16,960	No	544/548	Within 3 years of filing	No	For Defendants	Tuition payments (by payroll deduction) for minor children. Transfers stopped 6 months before filing. Transfers consistent for 2–3 years. Court held for Defendants.
33	Mukamal v. Brown Univ. & Varela (*In re* Varela), No. 13-01329 (Bankr. S.D. Fla.)	04/24/13	$62,162	No	544/548	Between 2–4 years before filing	Yes	Settled Family = $62,162	Trustee brought action against university and daughter. University also cross-claimed against daughter for tuition expenses under unjust enrichment and contribution theories.
34	Straffi v. Univ. of Mass. Amherst (*In re* V & S Investments, LLC), No. 13-01630 (Bankr. D.N.J.)	06/19/13	$52,329	544/548	544/548	Between 1–2 years before filing	No	Settled $35,000	Parents paid for tuition out of their company.
35	Napolitano v. Sch. of Visual Arts, Inc. (*In re* Park), No. 13-05055 (Bankr. D. Conn.)	10/29/13	$47,748	No	544/548	< 6 mos. = 4 6-12 mos. = 5 >12 mos.= 10	No	Settled $10,500	
36	Geltzer v. Roman & Bronx Comm. Coll. (*In re* Roman), No. 13-01664 (Bankr. S.D.N.Y.)	10/31/13	$13,750	No	548	Within 1 year of filing	Yes	Dropped	New property opened up for the estate and trustee most likely voluntarily dismissed to pursue the larger available funds.
37	Geltzer v. Our Lady Of Mt. Carmel–St.Benedicta Sch. (*In re* Akanmu), 502 B.R. 124 (Bankr. E.D.N.Y.)	(12/04/13)	$24,746	No	544/548	During 6 years before filing	No	Dismissed	Tuition for minor child. Tuition payment represents reasonably equivalent value because parents and minor child are single economic unit.
38	Geltzer v. Xaverian High Sch. (*In re* Akanmu), 502 B.R. 124 (Bankr. E.D.N.Y.)	(12/04/13)	$21,816	No	544/548	During 5 years before filing	No	Dismissed	Tuition for minor child. Tuition payment represents reasonably equivalent value because parents and minor child are single economic unit.

39	Rowe, Jr. v. Saint Xavier High Sch., Inc. (*In re* Eifler), No. 13-03056 (Bankr. W.D. Ky.)	12/05/13	$12,000	548	No	Two weeks before filing	No	Settled $5,250	Minor child. The tuition paid for was for the following school year 9 months away. Debtor had never prepaid tuition before. Debtor faced potential large judgment.
40	O'Toole v. NYU School of Business & N.Y. Univ. (*In re* Innovest Holdings, LLC), No. 13-08366 (Bankr. S.D.N.Y)	12/18/13	$50,252	548	544/548	1.5 - 4 years before filing	No	Settled $50,252	Corporation being run as a ponzi scheme. Owner of the corporation, Roman Sledziejowski, used funds to pay tuition for his girlfriend, not child.
41	Moratzka v. Taylor & The Blake Sch. (*In re* Taylor), No. 13-04341 (Bankr. D. Minn.)	12/20/13	$11,914	No	544/548	<6 mos. = 3 6-12 mos. = 6 >1 year = 6	No	Settled $5,000	Tuition for minor child. The debtors were the grandparents of the minor child. Suit brought against school and child's parents. Debtors had paid tuition over 7-year span.
42	Katz v. Springfield Coll. (*In re* Buonaiuto), No. 14-03005 (Bankr. D. Conn.)	02/12/14	$45,627	No	544/548	<6 mos. = 7 6-12 mos. = 5 > 12 mos. = 9	No	Settled $6,000	
43	Katz v. Univ. of R.I. (*In re* Reynoso), No. 14-03008 (Bankr. D. Conn.)	03/26/14	$16,167	No	544/548	<6 mos. = 2 6-12 mos. = 4	No	Settled $12,000	
44	Leonard v. Boston Coll. (*In re* Wirth), No. 14-04064 (Bankr. D. Minn.)	04/09/14	$37,530	No	544/548	6-12 mos. = 1 >1 year = 2	No	Settled $17,500	
45	Roumeliotis v. Univ. of Bridgeport (*In re* Morales), No. 14-03015 (Bankr. D. Conn.)	05/20/14	$20,899	No	544/548	Between 1.5-2 years before filing	No	Settled $4,000	Loans were used to pay the tuition. Parents went into bankruptcy after they both lost their jobs.
46	Katz v. Univ. of Mass. (*In re* Roccapriore), No. 14-03016 (Bankr. D. Conn.)	05/21/14	$7,383	No	544/548	>12 mos. = 1 > 2 years = 1	No	Settled $6,000	
47	Katz v. Pace Univ. (*In re* Patel), No. 14-03025 (Bankr. D. Conn.)	07/09/14	$35,832	No	544/548	Almost 2 years before filing	No	Settled $23,291	
48	Official Comm. of Unsecured Creditors v. Canisius Coll. (*In re* DEMCO, Inc.), No. 14-01047 (Bankr. W.D.N.Y)	08/05/14	$109,365	No	544/548	6-12 mos. = 4 >1 year = 6	Yes	Settled Father = $6,522	Corporate bankruptcy. Owner ran a ponzi scheme, used some funds to pay for children's tuition. Settled this and 22 other cases in one settlement. Amount here is the average of settlement over all 23 settled.
49	Christians v. N.Y. Univ. (*In re* Renewable Energy Solutions SD, LLC), No. 14-04159 (Bankr. D. Minn.)	08/19/14	$27,152	No	544	2-3 years before filing	Yes	Settled $15,000	Non-profit corporation bankruptcy. Owned by debtors. Transferred many corporate funds to son and paid his tuition. Suit against son brought in separate action and eventually dropped for all transfers.

50	Gordon v. N.C. A&T State Univ. (*In re* Shaw), No. 14-05278 (Bankr. N.D. Ga.)	09/03/14	$8,365	548	548	Less than 2 mos. before filing	No	Dropped	
51	Stalford v. Rochester Inst. of Tech. (*In re* Lammertse), No. 14-01760 (Bankr. D.N.J.)	09/03/14	$110,000	544	544/548	Unspecified	No	Settled $32,500	Debtor parent provided affidavit regarding the transfers. Paid tuition for three different adult children over a span of ten years totalling approximately $600,000.
52	Stalford v. Am. Univ. (*In re* Lammertse), No. 14-01759 (Bankr. D.N.J.)	09/03/14	$23,300	544	544/548	Unspecified	No	Settled $7,000	Debtor parent provided affidavit regarding the transfers. Paid tuition for three different adult children over a span of ten years totalling approximately $600,000.
53	Stalford v. Johns Hopkins Univ. (*In re* Lammertse), No. 14-01757 (Bankr. D.N.J.)	09/03/14	$7,560	544	544/548	Unspecified	No	Settled $2,000	Debtor parent provided affidavit regarding the transfers. Paid tuition for three different adult children over a span of ten years totalling approximately $600,000.
54	Leonard v. N.Y. Univ. (*In re* Dooling), No. 14-04201 (Bankr. D. Minn.)	10/15/14	$165,519	No	544/548	Within 3 years of filing	Yes	Settled $91,000	Related to Christians v. New York University #48. Parents made many transfers to son out of own and company's pocket. Were insolvent the whole time.
55	Coan v. Univ. of Md. (*In re* Jabick), No. 14-05069 (Bankr. D. Conn.)	12/10/14	$61,595	No	544/548	6-12 mos. = 1 > 12 mos. = 7	No	Settled $9,999	
56	Boscarino v. Fisher Coll. (*In re* Reilly), No. 14-02055 (Bankr. D. Conn.)	12/23/14	$24,500	No	544	More than 2 years before filing	No	Settled $11,900	Involved a loan.
57	Shapiro v. Univ. of Ariz. (*In re* Feldman), No. 11-58312 (Bankr. E.D. Mich.)	07/01/11	$17,166	No	544/548	Within 1 year before filing	No	Settled $8,500	Trustee and university settled before a lawsuit was filed. Settlement even though debtor said he would voluntarily pay for children's college education in divorce decree.
58	Roumeliotis v. Univ. of Hartford (*In re* Santiago), No. 15-03006 (Bankr. D. Conn.)	03/11/15	$23,950	No	544/548	6-12 mos. = 1 > 12 mos. = 1	No	Settled $11,975	
59	Baxter v. Drexel Univ. (*In re* Money Ctrs. of Am., Inc.), No. 15-50246 (Bankr. D. Del.)	03/20/15	$44,788	544	544	Within 1 year of filing	No	Dismissed	Corporate bankruptcy. Corporate funds had been used by an insider to pay for his child's tuition.
60	Taunt v. Michigan State Univ. (*In re* Merrow), No. 15-04281 (Bankr. E.D. Mich.)	03/24/15	$6,195	No	548	Within 2 years before filing	No	Settled $4,000	
61	Boscarino v. Univ. of S. Fla. Bd. of Trs. (*In re* Endres), No. 15-02019 (Bankr. D. Conn.)	03/31/15	$22,372	No	544/548	6-12 mos. = 3 > 12 mos. = 9	No	Dropped	Trustee concluded it wasn't worth the cost.

62	Roumeliotis v. Johnson & Wales Univ. (*In re* DeMauro), No. 15-03011 (Bankr. D. Conn.)	04/08/15	$46,909	No	544/548	>1 year = 1 >2 years = 7	No	For Defendants	The parents used federal loans to pay for the tuition. Court granted summary judgment in favor of debtors because the loans were not part of the debtors' estate.
63	Napolitano v. Hofstra Univ. (*In re* Buchta), No. 15-05022 (Bankr. D. Conn.)	04/13/15	$23,800	No	544/548	6-12 mos. = 1 >12 mos. = 1	No	Settled $11,900	
64	Boscarino v. Bd. of Trs. of Conn. State Univ. (S. Conn. St.) (*In re* Rosenberg), No. 15-02021 (Bankr. D. Conn.)	04/13/15	$15,892	No	544	More than 2 years before filing	No	Settled $5,800	
65	Roumeliotis v. Quinnipiac Univ. (*In re* Catania), No. 15-03017 (Bankr. D. Conn.)	04/15/15	$39,980	No	544/548	<6 mos. = 1 6-12 mos. = 2 >12 mos. = 1	No	Settled $17,000	
66	Nesse v. St. Maria Goretti High Sch., Inc. (*In re* Bye), No. 15-00233 (Bankr. D. Md.)	05/08/15	$6,450	No	548	<6 mos. = 1	No	Settled $500	Tuition for minor child. Tuition was prepaid for following year.
67	Sklar v. Univ. of Vt. (*In re* Miller), No. 15-01929 (Bankr. D.N.J.)	05/13/15	$19,642	548	544/548	>12 mos. = 2	No	Settled $7,250	
68	Richards v. Univ. of S. Cal. (*In re* Ankrim), No. 15-02107 (Bankr. E.D. Cal.)	05/29/15	$178,986	No	544/548	<6 mos. = 7 6-12 mos. = 8 >12 mos.= 37 >2 years = 64	No	Settled $75,000	University threatened to sue child if a claw back occurred, but it waived all claims as part of settlement.
69	Napolitano v. N.Y. Inst. of Tech. (*In re* Guilfoile), No. 15-05034 (Bankr. D. Conn)	06/03/15	$16,487	No	544/548	>12 mos. = 1	No	Settled $8,000	
70	Corcoran v. Univ. of Michigan-Flint (*In re* Stewart), No. 15-03105 (Bankr. E.D. Mich.)	07/09/15	$5,400	No	548	Within 2 months of filing	No	Dropped	
71	Marshack v. St. Margaret's Episcopal Sch. (*In re* Osseous Techs. of Am., Inc.), No. 15-01310 (Bankr. C.D. Cal.)	07/22/15	$64,540	544/548	544/548	<6 mos. = 1 >2 years = 1	No	Settled $70,000	Tuition for minor child. Corporate bankruptcy. Owner of the debtor was being prosecuted for wire fraud, used allegedly misappropriated funds to pay for tuition.
72	Rescia v. E. Conn. State Univ. (*In re* Harnett), No. 15-03025 (Bankr. D. Conn.)	08/12/15	$22,505	No	544/548	All more than 1 year	No	Dismissed	Dismissed because judged recognized that debtor had divorce decree that required paying portion of college tuition.

73	Chorches v. Pa. State Univ. (*In re* Barfuss), No. 15-05045 (Bankr. D. Conn.)	08/21/15	$105,000	No	544/548	<6 mos. = 3 6-12 mos.=1 >12 mos. = 12 > 2 years = 5	No	Settled $21,000	
74	Lim v. Regis Univ. (*In re* Lentz), No. 15-04843 (Bankr. E.D. Mich.)	09/02/15	$27,000	No	548	Within 2 years of filing	No	Settled $6,000	
75	Boscarino v. Univ. of Saint Joseph (*In re* Germano), No. 15-02057 (Bankr. D. Conn.)	11/02/15	$28,000	No	544/548	<6 mos. = 4 6-12 mos. = 4 >12 mos. = 11	No	Settled $14,000	Debtor had been paying consistently for more than two years.
76	O'Neil Jr. v. Am. Musical and Dramatic Acad. (*In re* Stavola), No. 15-02061 (Bankr. D. Conn.)	11/18/15	$19,000	No	544	More than 2 years before filing	No	Settled $10,000	
77	Covey v. Nat'l Collection Sys., Inc. (Roosevelt Univ.) (*In re* Heing), No. 15-08072 (Bankr. C.D. Ill.)	12/09/15	$6,200	No	548	Less than 1 year	No	For Trustee Debt Collector Paid $6,200	Trustee came after the holder of the loan once debor paid back tuition loan. For trustee by default judgment.
78	Chorches v. St. Vincent's Coll., Inc. (*In re* Villegas), No. 15-05067 (Bankr. D. Conn.)	12/09/15	$11,000	No	544/548	6-12 mos. = 2 > 12 mos. = 6 >2 years = 13	No	Settled $5,270	
79	Boscarino v. Bd. of Trustees of Conn. State Univ. (Central Conn. State) (*In re* Knight), No. 15-02064 (Bankr. D. Conn.)	12/15/15	$23,000	No	544/548	6-12 mos. = 1 >12 mos. = 7 >2 years = 16	No	Settled $5,050	On Sept. 29, 2017, judge denied defendant's motion for summary judgment by holding that parental tuition payments do not provide reasonably equivalent value.
80	Roumeliotis v. Villanova Univ. (*In re* Mack), No. 16-03001 (Bankr. D. Conn.)	01/05/16	$13,000	No	544/548	<6 mos. = 2 6-12 mos. = 4	No	Settled $10,000	One transfer made a month before filing for bankruptcy.
81	Boscarino v. Ithaca Coll. (*In re* Ladipo), No. 16-02002 (Bankr. D. Conn.)	01/13/16	$96,000	No	544/548	6-12 mos. = 1 >12 mos. = 3 >2 years = 4	No	For Defendants	Funds used were from federal loans. Judgment was in favor of defendants.
82	Boscarino v. Lincoln Tech. Inst., Inc. (*In re* Dorner), No. 16-02003 (Bankr. D. Conn.)	01/25/16	$12,000	No	544	More than 2 years before filing	No	Settled $4,750	
83	Wells v. Tulane & Loyola Univs. (*In re* Guzzardo), No. 16-04218 (Bankr. E.D. Mich.)	02/24/16	$148,992	No	544/548	<6 mos. = 2 6-12 mos. = 4 1-2 years = 6 > 2 years = 2	Yes	Settled Family = $25,000	Debtors were found liable in civil suit 1 year before bankruptcy. Admitted some transfers made because their accounts were being garnished. Interesting twist of paying for one child through transfer to another.

84	Rescia v. E. Conn. State Univ. (*In re* Johnson), No. 16-03014 (Bankr. D. Conn.)	02/26/16	$21,000	No	544/548	< 6 mos. = 1 6-12 mos. = 1 >12 mos. = 1	No	Dismissed	Funds were part of ParentPlus Loan.
85	Novak v. Univ. of Conn. (*In re* Agron), No. 16-02022 (Bankr. D. Conn.)	03/10/16	$14,000	No	544/548	< 6 mos. = 1 >12 mos. = 1	No	Settled $3,928	
86	Roumeliotis v. Bd. of Trs. of Conn. State Univ. (W. Conn. State Univ.) (*In re* Kovacs), No. 16-03024 (Bankr. D. Conn.)	04/05/16	$12,000	No	544/548	< 6 mos. = 2	No	Dropped	Loan involved. Stayed awaiting the *In re Demauro* decision. Likely dropped in response to that holding.
87	Hedback v. Univ. of Minn. (*In re* Drasek), No. 16-03043 (Bankr. D. Minn.)	04/20/16	$6,000	No	548	Right before filing	No	Dismissed	
88	Novak v. Univ. of Conn. (*In re* Possardt), No. 16-02025 (Bankr. D. Conn.)	04/26/16	$30,000	No	544/548	< 6 mos. = 1 6-12 mos. = 2 >12 mos. = 2 >2 years = 6	No	Dropped	Loan involved for some of the payments.
89	Roumeliotis v. Marist Coll. (*In re* Kovacs), No. 16-03025 (Bankr. D. Conn.)	05/26/16	$84,000	No	544/548	< 6 mos. = 2 >12 mos. = 2 >2 years = 2	No	Dropped	
90	Novak v. Wellesley Coll. (*In re* Corcoran), No. 16-02046 (Bankr. D. Conn.)	06/03/16	$17,000	No	544	More than 2 years before filing	No	Settled $8,663	
91	Novak v. Bd. of Trs. of Conn. State Univ. (*In re* Possardt), No. 16-02045 (Bankr. D. Conn.)	06/03/16	$17,749	No	544	All more than 2 years	No	Dropped	Loan involved.
92	Boscarino v. Manhattan Coll. (*In re* McPhail), No. 16-02048 (Bankr. D. Conn.)	06/09/16	$31,192	No	544/548	< 6 mos. = 1 6-12 mos. = 1 1-2 years = 1	No	Settled $12,477	
93	Novak v. Bd. of Trs. of Conn. State Univ. (*In re* Clarke), No. 16-02052 (Bankr. D. Conn.)	06/17/16	$16,620	No	544/548	< 6 mos. = 4 6-12 mos. = 5 1-2 years = 6	No	Settled $2,500	
94	Napolitano v. Boston Coll. (*In re* McLaughlin), No. 16-05034 (Bankr. D. Conn.)	06/21/16	$25,491	No	544/548	1-2 years = 2 >2 years = 4	No	Settled $10,000	

95	Chorches v. Savannah Coll. of Art & Design (*In re* Franzese), No. 16-05036 (Bankr. D. Conn.)	06/23/16	$12,466	No	548	<6 mos. = 3 6-12 mos. = 2	No	Settled $6,233	
96	Chorches v. Catholic Univ. of Am. (*In re* Franzese), No. 16-05035 (Bankr. D. Conn.)	06/23/16	$64,845	No	544/548	All over 1 year before filing	No	Pending	Parent debtors had consistently paid for tuition over 3-year span. Complaint was dismissed but with leave to replead. The trustee had not alleged sufficient facts of financial insolvency to meet *Iqbal* pleading standards.
97	DeGiacomo v. Sacred Heart Univ., Inc., (*In re* Palladino), 556 B.R. 10 (Bankr. D. Mass.)	(08/10/16)	$64,696	544/548	544/548	All 1-4 years before filing	No	Pending	Bankruptcy Judge held that parental tuition payments provide reasonably equivalent value. Parent debtors were running a large Ponzi scheme and used funds to pay tuition. Now pending at the First Circuit.
98	Pergament v. Hofstra Univ. (*In re* Adamo), No. 16-08122 (Bankr. E.D.N.Y.)	08/17/16	$257,962	No	544/548	Starting 4 years before and up until month of filing	No	Pending	Tuition payments were made despite civil judgment against debtor. Bankruptcy court originally held that university was protected because money was put into son's university account. This decision was reversed because it depends on the timing of the payment for this defense to apply.
99	Eisenberg v. Pa. State Univ. (*In re* Lewis), No. 16-00282 (Bankr. E.D. Pa.)	08/31/16	$102,045	544/548	544/548	All between 1 and 5 years before filing.	No	Dismissed	Involved a loan balance of $102,045.
100	Eisenberg v. N.Y. Univ. (*In re* Lewis), No. 4:16-00283 (Bankr. E.D. Pa.)	08/31/16	$168,836	544/548	544/548	All between 1 and 5 years before filing.	No	Dismissed	Involved a loan. Likely dismissed due to Eisenberg v. Pa. St. Univ.
101	Payne v. Regents of Univ. of Cal. (*In re* PI Advert., Inc.), No. 16-04091 (Bankr. E.D. Tex.)	09/20/16	$34,304	548	548	<6 mos. = 3 6-12 mos. = 1 >12 mos. = 5	No	Dismissed	Corporate bankruptcy.
102	Payne v. Legacy Christian Acad. (*In re* PI Advert., Inc.), No. 14-42005 (Bankr. E.D. Tex.)	09/20/16	$16,600	548	548	All transfers made < 2 years before filing.	No	Settled $9,000	Corporate bankruptcy. Tuition for minor child.
103	Rosen v. Temple Univ. (*In re* Agbro), No. 16-00441 (Bankr. D. Md.)	09/23/16	$18,187	No	548	1-2 years = 3	No	Dropped	
104	Novak v. Bd. of Trs. of Conn. State Univ. (*In re* Dobrowolski), No. 16-02068 (Bankr. D. Conn.)	10/03/16	$8,363	No	544/548	6-12 mos. = 1 >1 year = 4 >2 years = 9	No	Dropped	Loan involved. Case voluntarily dismissed after conclusion that there would be no other distribution from the estate.

105	Shapiro v. Gideon (*In re* Gideon), No. 16-04939 (Bankr. E.D. Mich.)	10/04/16	$88,041	No	544	1-2 years = 2 >2 years = 8	Yes	Dismissed	Loans involved.
106	Corcoran v. Mott Cmty. Coll. (*In re* Coley), No. 16-03142 (Bankr. E.D. Mich.)	10/05/16	$6,000	No	548	All payments < 6 mos.	No	Dropped	
107	Novak v. Univ. of Saint Joseph (*In re* Rodriguez), No. 16-02069 (Bankr. D. Conn.)	10/20/16	$10,284	No	544/548	< 6 mos. = 5 1-2 years = 2	No	Settled $4,114	Last payment made in the month prior to filing and was significantly larger than all prior payments.
108	Lim v. Wayne State Univ. (*In re* Lentz), No. 16-04991 (Bankr. E.D. Mich.)	10/25/16	$38,407	No	548	Made within 2 years before filing	No	Settled $8,500	
109	Napolitano v. Univ. of Conn. (*In re* Quintana), No. 16-05063 (Bankr. D. Conn.)	11/04/16	$16,208	No	544/548	< 6 mos. = 1 >12 mos. = 2	No	Settled $10,535	
110	Novak v. LIM Coll. (*In re* Brunelle), No. 16-02074 (Bankr. D. Conn.)	12/22/16	$62,923	No	544/548	>1 year = 1 >2 years = 5	No	Settled $27,000	
111	Chorches v. Rensselaer Polytechnic Inst. (*In re* Mitchell), No. 17-05003 (Bankr. D. Conn.)	01/04/17	$58,428	No	544/548	< 6 mos. = 2 >2 years = 6	No	Dropped	Most likely dropped because trustee discovered that debtor and ex-husband had divorce agreement to provide undergraduate education. Some loans involved as well.
112	Enrizon Worldwide Inc.v. Roberts, Howard Univ. & Univ. of Md. (*In re* Enrizon Wordwide, Inc.), No. 17-00035 (Bankr. D. Md.)	01/19/17	$58,455	544/548	544/548	< 6 mos. = 8 6-12 mos. = 4 1-2 years = 3	Yes	Settled $21,858	Univ. of Maryland was voluntary dismissed as a defendant but Howard Univ. settled with the company.
113	Napolitano v. Bd. of Trs. of Conn. State Univ. Sys. (*In re* Saraceni), No. 17-05004 (Bankr. D. Conn.)	01/24/17	$46,970	No	544/548	< 6 mos. = 5 6-12 mos. = 8 >12 mos. =12 >2 years = 1	No	Dropped	Trustee voluntarily dismissed because estate was closing, without any distribution, and thus there was no point in continuing the delayed action against the university.
114	Roach v. Skidmore Coll. (*In re* Dunston), 566 B.R. 624 (Bankr. S.D. Ga.)	(02/07/17)	$87,807	No	548	< 6 mos. = 1 6-12 mos. = 1 >12 mos. = 1	No	Settled $5,000	Judge held that parental tuition payments did not provide reasonably equivalent value. This case involved difficult questions regarding what was property of the estate.
115	Boscarino v. Univ. of Findlay (*In re* Mullinar), No. 17-02009 (Bankr. D. Conn.	02/20/17	$18,200	No	544	> 2 years = 2	No	Dropped	

116	Richardson v. Midwest Tech. Inst., Inc. (*In re* Lucas), No. 17-07004 (Bankr. C.D. Ill.)	03/03/17	$6,300	No	548	2 months before filing	No	Settled $5,000	
117	Novak v. Bd. of Trs. of the Univ. Sys. of N.H. & Keene State (*In re* Bellano), No. 17-02022 (Bankr. D. Conn.)	03/21/17	$25,320	No	544/548	<6 mos. = 1 6-12 mos. = 3 >12 mos. = 2 >2 years = 2	No	Settled $10,000	
118	Eisenberg v. Penn State Univ. (*In re* Lewis), 2017 WL 1344622 (Bankr. E.D. Pa.)	(04/07/17)	$102,045	No	544/548	More than 3 years before filing	No	Dismissed	Judge dismissed holding that Parent Plus loans are not part of the debtors' estate and thus no claw back. Also argued in dicta that debtors received reasonably equivalent value.
119	Boscarino v. Johnson & Wales Univ. (*In re* Sagarino), No. 17-02026 (Bankr. D. Conn.)	05/02/17	$27,028	No	544/548	<6 mos. = 4 6-12 mos. = 5 >12 mos. = 9 >2 years = 12	No	Settled $16,500	Initial complaint dismissed for insufficient pleadings under *Iqbal*. Case settled after amended complaint filed.
120	Slobodian v. Pa. State Univ. (*In re* Fisher), No. 17-00084 (Bankr. M.D. Pa.)	5/25/17	$5,827	No	548	Unspecified	No	Pending	Court denied a motion to dismiss, holding that the trustee's complaint was adequate under *Iqbal*.
121	Novak v. Univ. of Miami (*In re* Demitrus), No. 17-02036 (Bankr. D. Conn.)	07/19/17	$66,616	No	544/548	More than 1-2 years before filing	No	Dropped	
122	Novak v. Univ. of S.C. (*In re* Demitrus), No. 17-02066 (Bankr. D. Conn.)	09/06/17	$9,752	No	544/548	Within 6 months of filing	No	Dropped	
123	Novak v. Univ. of Conn. (*In re* Regan), No. 17-02067 (Bankr. D. Conn.)	09/08/17	$9,554	No	544/548	<6 mos. = 1 6-12 mos. = 1	No	Dropped	Last payment was only 2 months before filing. First payment was made after debtors' business was already in bankruptcy proceedings.
124	Geltzer v. Trey Whitfield Sch. (*In re* Michel), 573 B.R. 46 (Bankr. E.D.N.Y)	(09/18/17)	$45,880	544/548	544/548	<6 mos. = 12 6-12 mos.=12 >12 mos. =24 >2 years =66	No	Dismissed	Consistent tuition payments for minor children. Dismissed for failure to state a claim; debtor received reasonably equivalent value paying tuition for minor children.
125	Geltzer v. Lawrence Woodmere Acad. (*In re* Michel), 572 B.R. 46 (Bankr. E.D.N.Y)	(09/18/17)	$69,240	544	544	All 3-6 years before filing	No	Dismissed	Consistent tuition payments for minor children. Dismissed for failure to state a claim; debtor received reasonably equivalent value when paying tuition for minor children.
126	Chorches v. Univ. of Conn. (*In re* Sohon), No. 17-05028 (Bankr. D. Conn.)	09/19/17	$27,000	No	544/548	More than 1 year before filing	No	Dropped	Payment was made with Parent Plus Loan

127	Mangan v. Univ. of Hartford (*In re* Gagnon), No. 17-02070 (Bankr. D. Conn.)	09/26/17	$25,275	No	544/548	More than 1-2 years before filing	No	Settled $7,000	
128	Mangan v. Montclair State Univ. (*In re* Bartolucci), No. 17-02071 (Bankr. D. Conn.)	09/29/17	$26,622	No	544/548	6-12 mos. = 1 >12 mos. = 2 >2 years = 2	No	Dropped	
129	Caron v. Ga. S. Univ. (*In re* Todd), No. 17-02070 (Bankr. S.D. Ga.)	11/03/17	$18,598	No	544/548	< 6 mos. = 1 6-12 mos. = 2 1-2 years = 3 > 2 years = 2	No	Settled $5,400	
130	Connolly v. Okla. Baptist Univ. (*In re* Iley), No. 17-01526 (Bankr. D. Colo.)	11/8/17	$144,092	544/548	544/548	< 6 mos. = 5 1-2 years = 5 > 2 years = 7	No	Settled $85,000	Father was using business to run an illegal payroll scheme. He pled guilty to wire fraud. He had used payroll funds to pay for children's tuition.
131	Boscarino v. Champlain Coll. (*In re* Scallion), No. 17-02087 (Bankr. D. Conn.)	11/16/17	$18,910	No	544/548	6-12 mos. = 1 1-2 years = 1 > 2 years = 1	No	Settled Father = $5,000	Case against the university was dropped when the father-debtor settled the case.
132	Rainsdon v. Purdue Univ. (*In re* Willich), No. 08-08076 (Bankr. D. Idaho)	11/20/17	$15,120	No	548	1-2 years = 2 > 2 years = 2	No	Defualt Judgment $15,120	This had a special twist. The defendants did not pay for a child, but they paid to have a scholarship in their names for a student's use. Purdue never responded and the court entered default judgment.
133	Manty v. UC Riverside, Bd. of Regents (*In re* Dykes), No. 17-04140 (Bankr. D. Minn.)	11/27/17	$68,110	No	548	< 6 mos. = 6 6-12 mos. = 6	No	Settled $15,000	
134	Mangan v. Univ. of Conn. (*In re* Hamadi), No. 17-02090 (Bankr. D. Conn.)	12/04/17	$23,655	No	548	< 6 mos. = 2 1-2 years = 2	No	Settled $3,030	Questions in court of whether university was the initial transferee when payments were transferred through son's university account.
135	Chorches v. Univ. of Conn. (*In re* Sohon), No. 17-05041 (Bankr. D. Conn.)	12/19/17	$20,000	No	544/548	Within 1 year of filing	No	Dropped	Payment was made with Parent Plus Loan.
136	Chorches v. St. John's Univ. (*In re* Sohon), No. 17-05040 (Bankr. D. Conn.)	12/19/17	$25,686	No	544/548	6-12 mos. = 1 1-2 years = 3	No	Dropped	Payments were made with Parent Plus Loan.
137	Bailey v. Brunswick Sch., Inc. (*In re* Crow), No. 18-02004 (Bankr. D. Wyo.)	02/05/18	$45,661	548	548	< 6 mos. = 2 6-12 mos. = 2	No	Settled $22,500	Tuition for a minor child. Debtor was the grandfather of student, and he allowed funds from one of his bank accounts to pay for tuition even though the debtor had recently received a judgment against him.

138	Geltzer v. Oberlin Coll. (*In re* Sterman), No. 18-01015 (Bankr. S.D.N.Y.)	02/15/18	$14,322	No	544	All more than 3 years before filing	Yes	Settled $8,000	Court held that tuition payments by insolvent parents for adult children did not provide reasonably equivalent value. Court also held that tuition payments made for child at university before the age of majority were not subject to being clawed back.
139	Boscarino v. Quinnipiac Univ. (*In re* Fritzson), No. 16-20291 (Bankr. D. Conn.)	02/15/18	$118,999	No	544/548	< 6 mos. = 2 1-2 years = 1 > 2 years = 6	No	Dropped	Payments were made with Parent Plus Loan. Received and paid for tuition with these loans as near as one month before filing for bankruptcy. Debtor had over $800,000 in civil judgments pending against her.
140	Boscarino v. Univ. of Conn. (*In re* Rivosa), No. 18-02015 (Bankr. D. Conn.)	04/24/18	$40,323	No	544/548	6-12 mos = 2 1-2 years = 11 > 2 years = 12	No	Pending	Payments were made with Parent Plus Loan. Debtor obtained over $68,000 in loans despite being in default on her mortgage for most of that time.
141	Perkins v. Denison Univ. (*In re* Horizon Products, LLC), No. 18-01212 (Bankr. D.N.J.)	04/30/18	$13,274	544	544	6-12 mos. = 1	No	Settled $10,000	Parent was sole shareholder of debtor corporation and used corporate funds as bankruptcy approached to pay for son's tuition.
142	Perkins v. Carrion (*In re* Carrion), No. 18-01221 (Bankr. D.N.J.)	05/04/18	$68,732	544	544	1 month before filing	No	Pending	One month before bankruptcy, the debtor-father prepaid tuition for his two daughters through a state program. Father was sued as well.
143	Hoskins v. Univ. of S. Cal. (*In re* The Document Co., Inc.), No. 18-03043 (Bankr. N.D. Cal.)	07/25/18	$62,523	No	544	< 1 year = 1 1-2 years = 1	No	Dropped	Corporate bankruptcy. Sole shareholder paid tuition for his son with corporate funds. Casedropped when the executor of the shareholder's estate settled for over $1 million. University didn't have to pay.
144	Taunt v. Belmont Univ. (*In re* Croce), No. 18-04347 (Bankr. E.D. Mich.)	07/30/18	$99,973	No	544	Around 1 year or more	No	Pending	Portion of tuition payments, around $35,000, was paid with Parent Plus loans, while the rest was from personal funds.
145	Haley v. Maricopa Cty. Cmty. Coll. Dist. (*In re* Valiente), No. 18-00421 (Bankr. D. Ariz.)	10/03/18	$7,800	No	548	Within 3 weeks of filing	Yes	Pending	
146	Gordon v. Shebanjo (*In re* Taylor) No. 18-05280 (Bankr. N.D. Ga.)	11/01/18	$75,401	No	548	6-12 mos. = 1 1-2 years = 3 > 2 years = 6	Yes	Pending	University (Harvard University) was not sued, only children. Default judgment was initially entered, but later reversed. Payments were made with Parental PLUS loans. This action was brought in debtor's fourth bankruptcy within three years.
147	Wilkins v. Stetson Univ., Inc. (*In re* McCallan), No. 18-03094 (Bankr. M.D. Ala.)	11/18/18	$12,509	No	544/548	Within 3 months of filing	No	Pending	

148	Anderson v. Point Loma Nazarene Univ. (*In re* Universal Surveillance Systems LLC), No. 19-01006 (Bankr. C.D. Cal.)	01/09/19	$21,977	544/548	544/548	18 mos. before filing	No	Pending	Owner of corporate debtor used millions to cover child's costs and educational expenses.
149	Anderson v. Gonzaga Univ. (*In re* Universal Surveillance Systems LLC), No. 19-01007 (Bankr. C.D. Cal.)	01/09/19	$19,167	544/548	544/548	18 mos. before filing	No	Pending	Owner of corporate debtor used millions to cover child's costs and educational expenses.
150	Ostrander v. Tufts Univ. (*In re* Umezuruike), No. 19-03004 (Bankr. D. Mass.)	02/20/19	$13,401	No	544/548	Unspecified	No	Pending	Debtor made tuition payments for two sons sometime within four years before bankruptcy.
151	Ostrander v. Quinnipiac Univ. (*In re* Behnava), No. 19-03011 (Bankr. D. Mass.)	03/14/19	$41,000	No	544/548	Unspecified	No	Pending	Debtor made tuition payments sometime within four years before bankruptcy.
152	Scott v. Univ. of S.C., (*In re* Dandridge) No. 19-06013 (Bankr. W.D. Va.)	03/20/19	$33,511	544/548	544/548	6-12 mos. = 8 1-2 years = 14 > 2 years = 3	No	Pending	Debtor operated an embezzlement scheme to provide lavish lifestyle for himself and family. Was sentenced to seven years in prison. Trustee referred to badges of fraud to provide inference of actual fraudulent intent.
	Totals		$6,169,582 (Avg. = $40,589)	Yes = 41 (27%)	Yes = 150 (99%)		Yes = 21 (14%)	$1,464,473 (Univ. = $1,184,102) (Family or Debtor = $255,371) (Child = $25,000) (Pending = 15)	