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GENEROSITY IN BANKRUPTCY: THE NEW PLACE OF CHARITABLE CONTRIBUTIONS IN FRAUDULENT CONVEYANCE LAW

*Steven Walt**

Should generosity be allowed in bankruptcy when being generous comes at the expense of one's creditors? Congress apparently thinks so. As part of ongoing efforts to revise bankruptcy law, Congress recently amended the Bankruptcy Code (the "Code") with the Religious Liberty and Charitable Donation Protection Act¹ (the "Act"). The amendments are an attempt to ensure that bankruptcy does not interfere with a good deal of charitable giving. Pre-bankruptcy contributions to qualifying charities under prescribed conditions are insulated from attack as constructively fraudulent transfers.² Nor can the trustee avoid the transfer by recourse to state fraudulent conveyance law.³ The amendments also restrict the occasions on which a court can take into account the making of such gifts. For instance, a bankruptcy court cannot consider these gifts in deciding whether to dismiss a bankruptcy case filed under Chapter 7 for substantial abuse of the Chapter.⁴ Charitable gifts are excluded from the individual debtor's disposable income.⁵ A debt adjustment plan proposed in a Chapter 13 case therefore can be confirmed over the objection of unsecured creditors even when the plan does not promise to pay them amounts that would otherwise be contributed to charities.⁶ Therefore, in both Chapter 7 and Chapter 13 cases, more

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1. Pub. L. No. 105-183 (1998).

2. See 11 U.S.C. § 548(a)(2) (1998); *infra* text accompanying notes 9-10.

3. See 11 U.S.C. § 544(b)(2) (1998).

4. See *id.* § 707(b).

5. See *id.* § 1325(b)(2)(A).

6. See *id.* § 1325(b)(1)(B).

for qualifying charities means less for creditors of the contributing debtor. Consequently, the Act has a significant potential impact on creditors.

Central to the Act is its alteration of fraudulent conveyance law. The change was of principal importance to the Act's sponsors. Most of the Act's amendments to the Bankruptcy Code are designed to insulate pre-petition charitable contributions from the reach of fraudulent conveyance law.⁷ Although I believe that exempting charitable contributions from a large part of fraudulent conveyance law is a bad idea, this Article does not evaluate the wisdom of doing so. Rather, it very briefly describes some statutory difficulties created by the Act's amendment of the Code. Some statutory changes introduced by the Act, I shall argue, fail to protect effectively the transfers intended to be protected. Other changes create uncertainty in the application of amended provisions. Although both sorts of change might be considered merely technical difficulties, comparatively unimportant in a balanced evaluation of the Act, any informed evaluation, pro or con, must take them into account.⁸

I. SECTION 548'S AMENDMENT

The statutory changes made to § 548 are straightforward. The Act amends § 548 to insulate specified types of transfers from attack as constructively fraudulent conveyances.⁹ Under the unamended version of § 548(a)(2), a transfer by the debtor constitutes constructive fraud when the debtor does not receive reasonably equivalent value in return, and when one of three further conditions is satisfied.¹⁰ At the time of the transfer, the debtor must be either (1) insolvent, (2) left insufficiently capitalized, or (3) must have intended to incur debts she was unable to pay.¹¹ The Act alters § 548(a)(2) so

7. *See id.* §§ 544(b), 548(a)(2); HOUSE COMM. ON THE JUDICIARY, REPORT ON THE RELIGIOUS LIBERTY AND CHARITABLE DONATION PROTECTION ACT OF 1997, H.R. REP. NO. 105-556, at 1-2 (1997).

8. I provide a fuller evaluation in *Generosity In Bankruptcy: The Political Sources and Incentive Effects of the Charitable Donation Act* (unpublished manuscript, on file with the author).

9. *See* 11 U.S.C. § 548(a) (1998).

10. *See* 11 U.S.C. § 548(a)(2) (1994).

11. *See id.*

that a debtor making a specified sort of transfer is deemed to have received reasonably equivalent value in exchange for it.¹² As altered, § 548(a)(2) reads:

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which—

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of that contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.¹³

Section 548(d)(3) defines a “charitable contribution” to be a transfer of cash or a financial instrument by a natural person to a “qualified religious or charitable entity or organization,” as both terms are defined by section 170(c) of the Internal Revenue Code.¹⁴

Although the statutory language is convoluted, the consequence of § 548(a)(2) and (d)(3) is clear: Protected transfers to qualifying charities cannot be avoided as constructively fraudulent conveyances.¹⁵ Section 548(a)(1)(B) defines a constructively fraudulent transfer.¹⁶ It includes (a)(1)(B)(i), which requires that the debtor receive less than reasonably equivalent value for the transfer.¹⁷ According to § 548(a)(2), a debtor making a charitable contribution to a tax-exempt charity, who satisfies either § 548(a)(2)(A) or (B), “shall not be considered” as having received less than reasonably equivalent value under § 548(a)(1)(B).¹⁸ This means that the debtor is

12. See 11 U.S.C. § 548(a)(2) (1998).

13. *Id.*

14. *Id.* § 548(d)(3)-(4).

15. See *id.* §§ 548(a)(2); 548(d)(3).

16. See *id.* § 548(a)(1)(B).

17. See *id.* § 548(a)(1)(B)(i).

18. *Id.* § 548(a)(2).

considered to have received at least reasonably equivalent value for the transfer. Since reasonably equivalent value was received, the transfer cannot be constructively fraudulent.

The amendment to § 544(b) assures the same result under state fraudulent conveyance law.¹⁹ Section 544(b)(1) subrogates the trustee to the position of an unsecured creditor under state law to avoid a transfer of property by the debtor.²⁰ This, of course, includes the right to avoid constructively fraudulent transfers under state fraudulent conveyance law. Section 544(b)(2) provides that § 544(b)(1) is inapplicable to transfers "not covered under section 548(a)(1)(B)."²¹ A debtor making a charitable contribution to qualifying charities or religious entities which satisfies either § 548(a)(2)(A) or (B) is deemed not to have received less than reasonably equivalent value under § 548(a)(1)(B).²² Thus, the transfer is "not covered" by the subsection, and § 544(b)(1) does not apply. The trustee therefore cannot use state fraudulent conveyance law to avoid such a transfer as constructively fraudulent. Section 544(b)(2) adds that, under these circumstances, unsecured creditors also are barred from doing so on their own behalf.²³

II. STATUTORY DEFECTS

The changes to §§ 548 and 544(b) are not models of statutory draftsmanship. They exhibit both important and somewhat less important but still troublesome defects in drafting. Some of the defects reflect a failure to insulate successfully the sort of transfers Congress presumably wanted to protect from fraudulent conveyance attack. Others are instances of simple lack of clarity. All of the defects no doubt will occasion some litigation. Five problems in the changes to §§ 548 and 544(b) are described below.

(1) The Act's purpose is to prevent pre-petition transfers of assets by debtors to religious or charitable organizations from being treated in bankruptcy as fraudulent conveyances. The amendments

19. *See id.* § 544(b)(2).

20. *See id.* § 544(b)(1).

21. *Id.* § 544(b)(2).

22. *See id.* § 548(a)(1)(B).

23. *See id.* § 544(b)(2).

to § 548 do not achieve that purpose. They insulate a qualifying transfer from attack as constructively fraudulent. On the same facts, however, the transfer still can be avoided as an instance of actual fraud—a transfer made by the debtor with the intent to delay, hinder, or defraud creditors. This is because § 548(a)(2) only exempts qualifying transfers from the scope of § 548(a)(1)(B), which defines constructive fraud. It does not exempt the same transfer from the reach of § 548(a)(1)(A), which defines actual fraud. Thus, with respect to § 548(a)(1)(A), the same facts can be used to find that a transfer involves actual fraud by the debtor.

For example, suppose Ms. Jones donates ten percent of her gross annual income to Church, a qualifying religious entity, a month before she files a bankruptcy petition and while insolvent. She receives nothing in return and is under no obligation to make the donation. Since her contribution falls within the terms of § 548(a)(2)(A), Jones is deemed not to have received less than reasonably equivalent value from Church under § 548(a)(1)(B). Jones's transfer therefore is not constructively fraudulent. However, Jones made a donation of ten percent of her annual gross income while insolvent. She received nothing in return from Church. Taken together, the facts justify an inference that Jones intended to hinder, delay, or defraud her creditors.²⁴ Nothing in § 548(a)(2) or § 548(a)(1)(A) prevents the inference. If so, the transfer to Church is avoidable as an instance of actual fraud. Jones could even lose her discharge under § 727(a)(2). Since the same inference is always possible with transfers described by § 548(a)(2), the Act's attempt to insulate qualifying charitable contributions from fraudulent conveyance attack is seriously compromised.

As a drafting technique, the limited change in § 548(a)(2) is an understandable response to prominent case law. Some noteworthy cases applying fraudulent conveyance law to contributions to religious organizations deemed the contributions to be constructively fraudulent. They did so by finding either that no exchange had occurred or that the debtor received no value or less than reasonably

24. Section 548(a)(1)(A) does not require insolvency as a predicate for actual fraud. Insolvency, however, can be used as evidence of fraudulent intent described by the subsection.

equivalent value in the exchange.²⁵ An economical way of precluding the finding is to amend § 548 to insulate the offending transfers from attack only as constructively fraudulent, leaving actual fraud unaddressed. The legislative history of the Act expresses a hope that transfers insulated from attack as constructively fraudulent also will not be found to involve actual fraud.²⁶ Courts are unlikely to vindicate this hope. They are more likely to pay attention to the language of § 548 and facts surrounding a contribution. Although wavering on occasion, the Supreme Court has shown a settled and marked preference for the literal language of Bankruptcy Code provisions.²⁷ Amended § 548(a)(2) only works to exempt qualifying charitable contributions from avoidance as constructively fraudulent. Its terms are limited to that sort of fraud "under paragraph (1)(B)."²⁸ As interpreted, amended § 548(a) is unlikely to prevent a judicial finding that qualifying charitable contributions are instances of actual fraud. The question facing a court will continue to be whether a transfer to a charity while the debtor is insolvent constitutes fraud.

25. See *Christians v. Crystal Evangelical Free Church (In re Young)*, 89 F.3d 494, 495 (8th Cir. 1996); *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge)*, 200 B.R. 884, 907 (Bankr. D. Idaho 1996).

26. See 144 CONG. REC. H3999, H4000 (daily ed. June 3, 1998) (statement of Rep. Gekas); cf. 144 CONG. REC. S4769 (daily ed. May 13, 1998) (statement of Sen. Grassley) (stating that these types of transfers still will be determined to involve actual fraud); HOUSE COMM. ON THE JUDICIARY, REPORT ON THE RELIGIOUS LIBERTY AND CHARITABLE DONATION PROTECTION ACT OF 1997, H.R. REP. NO. 105-556, at 5 (1997) (claiming that the right of certain debtors to make charitable contributions after filing for bankruptcy relief will be protected).

27. See Carlos J. Cuevas, *The Rehnquist Court, Strict Statutory Construction and the Bankruptcy Code*, 42 CLEV. ST. L. REV. 435 (1994) (discussing the Court's literal interpretations of the Bankruptcy Code's provisions); Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993) (studying the use of textualism in the Court's analysis of bankruptcy cases); ANTONIN SCALIA, A MATTER OF INTERPRETATION 23-25, 29-37 (1997) (discussing the virtues of textualism and rejecting over-emphasis on legislative history); see, e.g., *Associates Commercial Corp. v. Rash*, 117 S. Ct. 1879, 1884 (1997); *Patterson v. Shumate*, 504 U.S. 753, 757 (1992); *Union Bank v. Wolas*, 502 U.S. 151, 154-56 (1991); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

28. 11 U.S.C. § 548(a)(2) (1998).

(2) Amended § 548 is limited in effect in another way: Arguably it does not prevent avoidance of charitable contributions occurring more than a year before the filing of a bankruptcy petition as constructively fraudulent under state fraudulent conveyance law. Federal fraudulent conveyance law under § 548(a) allows avoidance of fraudulent transfers occurring within a year of the filing. According to the amendment to § 544(b)(2), the trustee is prevented from using state fraudulent conveyance law to reach “a transfer of a charitable contribution . . . that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2).”²⁹ By its own terms, § 548(a)(1)(B) only describes transfers made within a year of the filing of a bankruptcy petition: “(a)(1) The trustee may avoid any transfer . . . that was made . . . on or within one year before the date of the filing of the petition, if the debtor . . . (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation”³⁰ Thus, § 544(b)(2) does not prevent the trustee from using state fraudulent conveyance law to reach transfers made more than a year before that date. As far as the section goes, the trustee can use state law to avoid these pre-petition charitable contributions as constructively fraudulent transfers. The possibility is significant because state fraudulent conveyance laws typically have longer reach-back periods than federal law.³¹ The arguably limited protection given to transferees by § 544(b)(2) presumably is the result of the modest drafting aim of the Act. It does not achieve the Act’s purpose of protecting the range of charitable transfers from attack as constructively fraudulent.

A stock response is that the interpretation of § 544(b)(2) just discussed, while literally correct, leads to an absurd result, inconsistent with Congress’s intent. If Congress wanted to protect qualifying charitable contributions made within a year of a bankruptcy filing, it clearly would want to protect pre-petition transfers made before that time as well. Therefore, it is arguable that not protecting these transfers also may produce an absurd result. The result is not absurd,

29. *Id.* § 544(b)(2).

30. *Id.* § 548(a)(1)(B)(i).

31. *See, e.g.,* California Uniform Fraudulent Transfer Act, CAL. CIV. CODE § 3439.09 (West 1996) (four year reach-back period).

however, when examined more carefully. Limiting § 544(b)(2) to transfers reachable under federal fraudulent conveyance law may be inconvenient or unwise. It may leave less recent charitable contributions more exposed under state law than more recent ones are. But this is not an absurd consequence. Congress's presumed purpose is not apparent. However, it could have been moved by federalism concerns—a reluctance to entirely displace state law on constructive fraud. Or, § 544(a)(2) could reflect a division of labor between federal and state law as to avoidance. The case law involves attacks on charitable contributions made within a year of the filing, so there might be little cost in not preempting state law as to transfers made outside this period. More likely, the sparse relevant legislative history suggests that Congress did not think about the matter at all. What Congress would have intended if it had concentrated on the matter, even if relevant, simply is indeterminate. The language of § 544(b)(2) clearly does not preclude the application of state law to transfers made more than a year prior to the filing of a bankruptcy petition. Therefore, at the very least, the above interpretation is respectable.³² My point is that the drafting of amended § 544(b)(2) allows the argument.

(3) The amendment to § 544(b) also combines with § 548(a)(2) to insulate some patently fraudulent transfers from avoidance under state law. Section 548(a)(2)(A) protects a contribution to qualifying entities when it is less than fifteen percent of the debtor's annual gross income.³³ No restriction is placed on the circumstances under which the contribution is made, such as its consistency with the debtor's practice of giving. A contribution therefore can fall under § 548(a)(2)(A) even if the debtor never contributed to a qualifying entity before. Section 548(a)(2) prevents the transfer from being constructively fraudulent under § 548(a)(1)(B). An unprecedented gift to a qualifying entity still can constitute actual fraud.

32. Cf. *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (citing *Blum v. Steuson*, 465 U.S. 886, 896 (1984)) (stating that clear statutory language controls when unambiguous and in the absence of a clearly expressed legislative intent contrary to plain meaning of the statutory language).

33. See 11 U.S.C. § 548(a)(2)(A) (1998).

The trouble is that amended § 544(b) can prevent the trustee from avoiding the transfer as actual fraud using state fraudulent conveyance law. Under § 544(b)(2), the trustee is not subrogated to the rights of an unsecured creditor under state fraudulent conveyance law if the "transfer of a charitable contribution (as that term is defined in section 548(d)(3)) . . . is not covered under section 548(a)(1)(B), by reason of section 548(a)(2)."³⁴ If a qualifying transfer fits under § 548(a)(2)'s terms, it is not a constructively fraudulent transfer "covered" under § 548(a)(1)(B). According to § 544(b)(2), the trustee therefore cannot avoid the transfer under state law. This includes avoidance as actual fraud under state fraudulent conveyance law as well. To be sure, the result almost always will not matter. The trustee still can use federal fraudulent conveyance law under § 548(a)(1)(A) to find actual fraud. However, some state law contains standards of proof and evidentiary bases, such as badges of fraud, making a showing of actual fraud easier.³⁵ As applied, these devices might make actual fraud easier to establish. By depriving the trustee of the use of state law, the statute allows some clear cases of actual fraud to remain unregulated. This is the result of defects in drafting.

(4) Another drafting defect is that amended § 548(a)(2) permits dividing transfers to avoid a finding of constructive fraud. The statutory description of the transfers protected by § 548(a)(2) allows the possibility. This is because neither § 548(a)(2)(A) nor (B) requires aggregation of charitable contributions to tax-exempt entities.³⁶ Section 548(a)(2) refers to "[a] transfer of a charitable contribution,"³⁷ § 548(a)(2)(A) refers to "the amount of that contribution,"³⁸ and (a)(2)(B) refers to "the contribution."³⁹ Each of the references is in the singular and therefore connotes a single transfer.

34. *Id.* § 544(b)(2).

35. *See, e.g.*, UNIF. FRAUD. TRANS. ACT § 4(b), 7A U.L.A. § 4(b) (1985); CAL. CIV. CODE § 3439.04(b) (West 1997).

36. Tax treatment of charitable contribution requires aggregation. *Cf.* 26 U.S.C. § 170(b)(1)(B) (1997) (stating that a charitable contribution deduction for an individual taxpayer is allowed to the extent that the aggregate of such contributions does not exceed fifty percent of the taxpayer's contribution base for the taxable year).

37. 11 U.S.C. § 548(a)(2) (1998).

38. *Id.* § 548(a)(2)(A).

39. *Id.* § 548(a)(2)(B).

Thus, each of a set of transfers which individually satisfy § 548(a)(2)(A) fall within § 548(a)(2)'s protection even though in the aggregate they do not. In testing for constructive fraud, § 548(a)(2), however, does not aggregate individual contributions. This allows for planning to evade avoidance of transfers as constructively fraudulent. For instance, assume that Ms. Jones has never before contributed to qualifying entities. Should she want to safely give all of her annual gross income to a church within the reach-back period, she need only divide her contributions into individual gifts of less than fifteen percent of her gross income. Her aggregate contribution would not be considered constructively fraudulent under § 548(a).

Two possible responses can reduce, but not eliminate, the problem. First, dividing contributions would allow a finding of actual fraud under § 548(a)(1)(A). However, evidence of actual fraud can be difficult to discover. This is because a series of discrete contributions can occur innocently, with no plan to evade creditors. Second, courts could prevent the dividing of contributions by collapsing the discrete contributions in order to find a single contribution. This technique has been used in the regulation of leveraged buyouts by fraudulent conveyance law. Utilizing the technique would be problematic, however, because the statutory reference to "a charitable contribution" contemplates a discrete transaction. The language of § 548(a)(2) therefore is a barrier to a statutorily justified collapsing of contributions.

There are also significant differences between the status of the transferees in leveraged buyouts and qualifying entities defined under § 548(d)(3). The difference is principally in the two groups' sophistication and in their degree of involvement in the transaction. The difference may ground a policy in favor of collapsing transactions in leveraged buyouts while keeping charitable contributions discrete. If so, § 548(a)(1)(A) allows for the division of contributions.

(5) A final defect of § 548(a)(2) is that it does not provide for cases in which a transfer exceeds the amount protected by either § 548(a)(2)(A) or (B). The section therefore does not direct how contributions in excess of the statutorily protected amounts should be handled. For instance, suppose Ms. Jones contributed twenty percent

of her gross annual income to church, and has never given to a qualifying charity before. Or suppose she contributed twenty percent of her gross annual income, when in the past she always gave only fifteen percent. In the first case, her contribution is not a contribution described in part (a)(2)(A) because it exceeds the fifteen percent limit. In the second case, her contribution is not described in part (a)(2)(B), because it is inconsistent with Ms. Jones's practices. Could the entire twenty percent contribution be left unprotected in both cases? Or is each contribution protected under (a)(2)(A) and (B), respectively, to the extent that it falls within either subsection's terms? The amendment is simply silent on the matter. The presence of "to the extent" language elsewhere within § 548 and the Bankruptcy Code supports an inference that its omission in § 548(a)(2) is intended.⁴⁰ This suggests that excess contributions are unprotected in their entirety. On the other hand, the omission of "to the extent" language might be accidental, as are other familiar misidentifications of subsections sometimes present in the Code. Some legislative history supports the inference of inadvertent oversight.⁴¹ However, a court committed to drawing inferences from § 548's language and structure, not from legislative history, would justifiably not be persuaded.

The importance of the above statutory defects depends in part on the frequency with which charitable contributions can be attacked as fraudulent conveyances. Attack by the trustee in a number of cases is potentially significant, although the point needs to be put carefully. To date, trustees very seldom have attacked charitable contributions as fraudulent transfers—on the order of less than one percent of bankruptcy cases.⁴² Clearly, inferences regarding the frequency of

40. See, e.g., §§ 547(c), 548(c), 553(a) (each including the "to the extent" language); cf. 26 U.S.C. § 170(c) (excluding the "to the extent" language).

41. See 144 CONG. REC. H3999-4001 (daily ed. June 3, 1998) (statement of Rep. Gekas); cf. *Bankruptcy Issues in Review: The Bankruptcy Code's Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships: Hearing Before the Senate Subcomm. on Admin. Oversight and the Courts*, 105th Cong. 42 (1997) (statement of Donald S. Bernstein).

42. See *Congressional Budget Office Cost Estimate: S.1244 Religious Liberty and Charitable Donation Protection Act of 1998* (visited Mar. 1, 1999) <<http://www.cbo.gov/showdoc.cfm?index=366&sequence=0&from=5>>.

attack, drawn from sparse and newsworthy case law, overstate the salience of the phenomenon. A complete assessment, however, must make two other estimates. The first is the frequency with which transfers are attacked as fraudulent conveyances by creditors, indirectly, rather than by the trustee. Creditors quite often attack a debtor's right to a discharge in a Chapter 7 case, alleging that the debtor engaged in actual fraud in making a pre-petition transfer.⁴³ Since the same facts bear on the allegation as bear on recovery of a pre-petition transfer as a fraudulent conveyance, a creditor's motion to deny a discharge under § 727(a)(2) indirectly attacks a transfer as fraudulent. Accordingly, denial of discharge under § 727(a)(2) is a good proxy for a finding of a fraudulent conveyance in a bankruptcy case. Thus, the number of fraudulent conveyance attacks is not accurately gauged by the number of cases in which a discharge is denied under § 727(a)(2). Frequency must be considered as well. When this additional estimate is considered, the number of transfers that may be attacked increases.

An estimate of the likely rate of attack after passage of the Act also needs to be made, taking into account the Act's effect on debtor's behavior. The previously measured rate of trustee attack occurred against a background of sparse and conflicting case law focusing on the reach of fraudulent conveyance law. Even more important, the frequency of attack occurred prior to passage of the Act. A debtor's pattern of contributions, however, cannot be considered an exogenous (fixed) variable. It is plausible that debtors could respond to the Act by altering their charitable giving because the Act has reduced the "price" of doing so. If debtors respond by increasing their charitable giving, or by altering circumstances under which they give, trustees now could find attack worthwhile. The question to ask, then, is necessarily counterfactual: How many transfers would be attacked given the passage of the Act and the likely change in debtor patterns of giving?

There is reason to believe that avoidance actions could become more frequent after passage of the Act. The frequency with which

43. See 11 U.S.C. § 727(a)(2)(A) (1998); *Hiberia Nat'l Bank v. Perez* (*In re Perez*), 954 F.2d 1026 (5th Cir. 1992); *Pavy v. Chastant* (*In re Chastant*), 873 F.2d 89 (5th Cir. 1989).

charitable donations are attacked as fraudulent depends on whether trustees find it worthwhile to pursue them. At least three variables are involved in the trustee's decision: the trustee's compensation for attacking a transfer, the frequency with which attackable charitable donations are made, and the doctrinal or statutory bases allowing for successful attack. Although the variables probably interact and their estimation is speculative, some guesses can be made. A trustee's willingness to pursue transfers depends on her schedule of compensation. At present, the trustee's compensation is based on the value of the trustee's "services."⁴⁴ "Services" contemplates an ex ante assessment of the expected value of the trustee's activity.⁴⁵ An increase in the expected value of attacking a transfer increases the trustee's incentive to bring an avoidance action. The Act reduces the "price" of debtors' charitable giving, and, other things being equal, increases the rate and amounts of charitable donations. Although the Act reduces the likelihood of successful attack by protecting an expanded set of donations, its statutory defects leave exposed a range of charitable contributions that might well be subject to avoidance. The net effect of an increase in charitable giving by debtors and some continued exposure to avoidance could increase the number of donations potentially subject to attack. The estate could be expected to benefit from the trustee's attempt to recover a range of donations. In these circumstances, trustees' incentives to attack donations therefore might be enhanced. Consequently, the increased rates and amounts of charitable giving could increase significantly the number of avoidance actions brought. This consequence demonstrates the extreme significance of the Act's statutory defects.

III. CONCLUSION

The success of a statutory amendment can be judged in two ways: by whether it achieves its purpose and by whether it creates

44. See 11 U.S.C. §§ 326(a), 330(a) (1998).

45. See *id.* § 330(a)(1)(A) ("reasonable compensation for actual, necessary services rendered . . ."). A proposal in the ongoing bankruptcy reforms would compensate the trustee by "commission" calculated by "result"—success in avoiding a transfer. The proposal's measure of compensation therefore is ex post value, the equivalent of a contingent fee.

uncertainty in applicable law. Applying these standards to § 548, the amendment receives mixed marks. As amended, § 548, contrary to its purpose, under-protects the transfers intended to be protected. This is because § 548(a)(2) prevents avoidance of a qualifying charitable contribution as constructively fraudulent. However, under the same facts, actual fraud still can be determined. Before the Act, transfers could be avoided as actually or constructively fraudulent—or both. After the Act, a qualifying charitable contribution still can be found to involve actual fraud under § 548(a)(1). The debtors may be in the practice of charitable giving, but the circumstances may have changed. For example, perhaps the debtor gave while insolvent. The question thus arises: Did the debtor intend to hinder, delay or defraud creditors in these changed circumstances? Courts continue to face this question, as they did prior to the amendment of § 548(a)(2). Although the litigation strategies will change, one does not have to be a legal realist to believe that the amendment will not change the outcomes of many cases. If the Act's purpose is to insulate qualifying charitable contributions from attack, the amendment is only partially successful. The mere change will only affect the way in which such transfers are regulated.

At the same time, amended §§ 548 and 544 also create significant legal uncertainty. They allow respectable arguments for different results, with no statutorily prescribed means of resolution. Arguably, § 544(b) continues to allow, under state fraudulent conveyance law, avoidance of charitable contributions made more than a year before the filing of a bankruptcy petition. These transfers remain avoidable as constructively fraudulent under state law. Arguably, under § 548(a)(2)(A), debtors also can "distribute" charitable contributions under § 548(a)(2)(A) to remain within the fifteen percent ceiling set by the subsection. In addition, amended § 548 does not address the treatment of amounts contributed in excess of those protected by § 548(a)(2). Again, my point is not that the amendment underwrites these arguments. It is only that they are reasonable arguments allowed by the language of the amendment. The Code does not help the debate between contested interpretations of the amended provisions.

Bankruptcy courts are notoriously diverse in their understanding of important Bankruptcy Code provisions. This makes the prospect of different interpretations of §§ 548 and 544's amendments very real. The Supreme Court's approach is more settled. It shows an inclination to give effect to the plain meaning of clear statutory language and statutory structure, and a distaste for reliance on legislative history and bankruptcy policy. Here, however, this preference might not introduce significant legal certainty into fraudulent conveyance law. There can be disagreement over the "clarity" of a statutory provision,⁴⁶ the structural relation among provisions, and the inferences drawn from them. The Act can be criticized for making this disagreement possible.

46. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) (discussing whether "reasonably equivalent value" in pre-amendment 11 U.S.C. § 548(a)(2)(A) is ambiguous); *Dewsnup v. Timm*, 502 U.S. 410 (1992) (showing that majority and dissent disagree as to whether 11 U.S.C. § 506(d) is ambiguous); *United States v. Locke*, 471 U.S. 84 (1985) (majority and dissent disagree as to whether statutory language is clear).

