AN ECONOMIC UNIT APPROACH TO EVALUATING THE PAYMENT OF UNDERGRADUATE EDUCATIONAL EXPENSES AS FRAUDULENT TRANSFERS

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INTRODUCTION 554
I. THE HISTORY AND PURPOSE OF FRAUDULENT TRANSFER LAW 562
A. The Origins of Fraudulent Transfer Law 562
B. Fraudulent Transfer Law in Bankruptcy 564
C. The Search for Purpose in Fraudulent Transfer Law 565
II. REFLECTING PURPOSE IN THE REASONABLY EQUIVALENT VALUE REQUIREMENT 569
A. Transactions that Do Not Result in a Cognizable Benefit to Creditors of the Debtor 571
B. Transactions Undertaken on Behalf of a Non-Debtor Third Party .. 574
C. Summary Observations 578
III. THE FUNCTION OF CONSUMER BANKRUPTCY 579
A. Introduction to Consumer Bankruptcy 579
B. Screening and Sorting—Eligibility for a Consumer Debtor Bankruptcy 581
C. What's the Point of It All Anyway?—The Goals of Bankruptcy 587
IV. THE INTERRELATED NATURE OF THE FAMILY AND PAYING FOR COLLEGE 590
A. The Economics of the Family Unit 590
B. Interconnected Nature of the Family Beyond Finances 592
C. The Benefits of College to Students and Their Parents 593
D. Societal Benefits of College 595
E. Paying for College—What is Ordinary Course? 596
V. UNDERGRADUATE EDUCATIONAL EXPENSES AND THE SEARCH FOR VALUE 598
VI. ASSESSMENT OF REASONABLY EQUIVALENT VALUE TO THE FAMILY ECONOMIC UNIT 604
A. The Proposed Test 606
B. Illustrating the Benefits of the Proposed Test 609
CONCLUSION 611

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INTRODUCTION

The fraudulent transfer is an early concept in the law regulating debtor-creditor relations. Under this body of jurisprudence, dating back to the 1500s, debtors are forbidden from transferring their assets for the purpose of moving those assets beyond the reach of their creditors.[1] This doctrine has expanded to include the concept of constructive fraud.[2] The doctrine of constructive fraud prohibits a debtor who is in a financially precarious position from engaging in a transfer, or incurring an obligation, for which the debtor does not receive "reasonably equivalent value" in exchange.[3]

Because intent to defraud is not a required element of constructive fraud, third parties who receive transfers from the debtor, even when the subject transactions involve no intent to frustrate creditor collection efforts, may find themselves the target of constructively fraudulent conveyance lawsuits.[4] Indeed, litigants have used fraudulent transfer law to challenge a variety of transactions.[5] Many of these transactions do not resemble the typical tale of the devious debtor who secretly transfers the debtor's assets away so creditors are unable to take them to satisfy debts.[6] Most recently, the doctrine of constructive fraud has been used to upend a type of transaction that is generally expected by many in U.S. society[7]—the payment by parents, at least in part, of their children's undergraduate educational expenses.

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1. *Infra* notes 53–56 and accompanying text.
2. *Infra* notes 65–67 and accompanying text.
3. 11 U.S.C. § 548(a)(1) (2018) ("The trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor . . . if the debtor voluntarily or involuntarily . . . received less than a reasonably equivalent value in exchange for such transfer or obligation . . . .").
4. *See* 11 U.S.C. § 548(a)(1)(A)–(B) (indicating that a debtor's intent to defraud while making a transfer is a sufficient, but not necessary, element of constructive fraud).
5. *Infra* note 6.
6. Some of the transactions challenged under fraudulent transfer law include leveraged buyouts, Weisfelner v. Hofmann (*In re* Lyondell Chem. Co.), 554 B.R. 635, 641–42 (S.D.N.Y. 2016), corporate spin-offs, VFB LLC v. Campbell Soup Co., 482 F.3d 624, 629–30 (3d. Cir. 2007), dividend recapitalizations, Buchwald Capital Advisors, LLC v. Papas (*In re* Greektown Holdings, LLC), Ch. 11 Case No. 08-53104, Adv. No. 10-05712, 2015 WL 8229658, at *2, *12 (Bankr. E.D. Mich. Nov. 24, 2015), *aff'd*, 584 B.R. 161 (E.D. Mich. 2018), *vacated*, 765 F. App'x 132 (6th Cir. 2019), real property foreclosures, BFP v. Resolution Trust Corp., 511 U.S. 531, 540 (1994), and intercorporate guaranty obligations, 3V Capital Master Fund Ltd. v. Official Comm. of Unsecured Creditors of TOUSA, Inc. (*In re* TOUSA, Inc.), 444 B.R. 613, 659 (S.D. Fla. 2011), *aff'd in part, rev'd in part*, 680 F.3d 1298 (11th Cir. 2012).
7. *Infra* notes 350–53 and accompanying text.

This issue came to the fore in the bankruptcy case of Lori and Steven Palladino.[8] When their multimillion-dollar Ponzi scheme began to crumble, the Palladinos filed for relief[9] under Chapter 7 of the Bankruptcy Code.[10] Shortly after their bankruptcy filing, both Palladinos pled guilty to charges of investment fraud for operating the Ponzi scheme.[11] The court in the criminal case sentenced Steven Palladino to ten years in state prison.[12] The court sentenced Lori Palladino to five years of probation.[13] As is the case with all bankruptcy proceedings under Chapter 7 of the Bankruptcy Code, a Chapter 7 trustee was appointed and charged with marshalling and liquidating nonexempt assets[14] of the debtors to satisfy, to the extent possible, debts owed to creditors.[15]

In addition to operating a Ponzi scheme in the years leading up to their bankruptcy filing, the Palladinos were also parents to a daughter who was attending college at Sacred Heart University (SHU).[16] In the four years prior to their bankruptcy filing, the Palladinos paid a total of approximately $65,000 to SHU to cover the cost of their daughter's college education.[17] The trustee for the Palladinos' bankruptcy estate sued SHU, seeking to set aside the $65,000 in payments as constructively fraudulent transfers and to recover those payments from SHU.[18] The trustee argued, among other things, that the payments were constructively fraudulent because the debtors had not

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8. DeGiacomo v. Sacred Heart Univ. (*In re* Palladino), 556 B.R. 10, 12 (Bankr. D. Mass. 2016), *rev'd*, 942 F.3d 55 (1st Cir. 2019).

9. *Id.* at 15.

10. *Id.* at 12–13 (citing 11 U.S.C. §§ 701–84 (2018)). Title 11 of the United States Code is commonly referred to as the "Bankruptcy Code."

11. *Id.* at 12.

12. *Id.*

13. *Id.*

14. The Bankruptcy Code permits consumer debtors to protect some of their assets from the claims of creditors because they are exempt under federal bankruptcy law or under the laws of the debtor's home state. 11 U.S.C. § 522(b) (2018). The Bankruptcy Code contains designated exemptions. 11 U.S.C. § 522. It also permits each state to adopt its own exemption law in place of the federal exemptions. 11 U.S.C. § 522(b)(3)(A). Some states give consumer debtors the option of choosing between a federal exemption law or the exemptions available under state law. 11 U.S.C. § 522(b)(2); *see also* Timothy R. Tarvin, *Bankruptcy, Relocation, and the Debtor's Dilemma: Preserving Your Homestead Exemption Versus Accepting the New Job Out of State*, 43 LOY. U. CHI. L.J. 141, 150 (2011) (explaining that debtors in states that have not opted out of the exemptions within the federal Bankruptcy Code may choose between state law exemptions and the federal law exemptions); *see, e.g.*, Heitkamp v. Dyke (*In re* Dyke), 943 F.2d 1435, 1438 (5th Cir. 1991) ("Under Texas law, . . . a debtor must elect between the 'federal' and the 'state' [bankruptcy] exemption scheme."). Thus, whether certain property is exempt and may be kept by the debtor is often a question of state law.

15. *In re Palladino*, 556 B.R. at 13.

16. *Id.* at 12.

17. *Id.*

18. *Id.* at 13.

received "reasonably equivalent value" in exchange for the payments.[19] Any value given, the trustee argued, was given by SHU (in the form of an education) to the Palladinos' daughter, and not to the Palladinos.[20]

The bankruptcy court rejected this contention, finding the trustee's "approach to valuing the Palladinos' payments to SHU overly rigid."[21] Holding that reasonably equivalent value had been given to the Palladinos, the court explained that, in making the payments to SHU, the debtors "believed that a financially self-sufficient daughter offered them an economic benefit and that a college degree would directly contribute to financial self-sufficiency" and the court found that such motivation was "concrete and quantifiable enough" to establish "reasonably equivalent value."[22]

Another trustee attacked the payment of undergraduate educational expenses by a debtor on behalf of the debtor's child as constructively fraudulent in connection with the bankruptcy case of Dr. Leslie Dunston—albeit with an outcome different from that in *Palladino*.[23] Dr. Dunston operated a medical practice for nearly two decades.[24] Dr. Dunston's practice began to suffer from severe cash-flow shortages when it experienced difficulties collecting reimbursements from medical insurance companies.[25] Finally, in October of 2014, Dr. Dunston filed for Chapter 7 bankruptcy relief.[26] As was the case with the Palladinos, Dr. Dunston also had a daughter in college during the years immediately preceding Dr. Dunston's bankruptcy filing.[27] In the two years prior to the bankruptcy filing, Dr. Dunston paid approximately $88,000 to Skidmore College (Skidmore) to cover Dr. Dunston's daughter's tuition and other costs of attendance.[28] The trustee for Dr. Dunston's bankruptcy estate sued Skidmore, seeking to avoid Dr. Dunston's payments to Skidmore as constructively fraudulent transfers and to recover those payments from Skidmore.[29] Just as the trustee in the Palladinos' case had argued, the trustee for Dr. Dunston's bankruptcy estate argued that Skidmore had not given Dr. Dunston reasonably equivalent value

19. *Id.*

20. *See id.* at 16 (summarizing the trustee's argument that the Palladinos' feeling of obligation to pay their daughter's tuition does not establish that the payments had value to the Palladinos).

21. *Id.* at 15.

22. *Id.* at 16.

23. Roach v. Skidmore Coll. (*In re* Dunston), 566 B.R. 624, 626 (Bankr. S.D. Ga. 2017).

24. *Id.* at 627.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 627–28.

29. *Id.* at 627.

in exchange for the payments.[30] In stark contrast to the decision reached by the bankruptcy court in *Palladino*, the bankruptcy court in *Dunston* agreed with the trustee, holding that Skidmore had failed to show that it gave Dr. Dunston reasonably equivalent value in exchange for tuition payments Dr. Dunston made on behalf of an adult daughter.[31] The *Dunston* court reached this conclusion because it determined that, while "the Debtor may have felt a moral obligation to pay for [the daughter's] college education and help her to achieve financial independence[,] . . . the satisfaction of such moral obligation does not provide an 'economic' benefit to the Debtor."[32]

The defendant educational institutions are, of course, the immediate losers in cases such as *Dunston*. In conjunction with finding that such tuition payments are fraudulent transfers, a court may order the defendant college or university to refund the subject tuition payments to the bankruptcy estate.[33] Tuition is an important component of revenues for colleges and universities.[34] As such, forced disgorgement of tuition payments could have a destabilizing effect on the target colleges and universities. In addition, as the direct beneficiary of such payments, the student who received the education at the center of the dispute may find themselves responsible for repaying the subject payments to the defendant college or university, or even directly to the trustee.[35] Alternatively, the trustee might sue these students themselves for the recovery of monies used to pay for their tuition or other

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30. *Id.* at 631.

31. *Id.* at 635–37.

32. *Id.* at 637.

33. 11 U.S.C. § 550 (2018).

34. *See* CHRONICLE OF HIGHER EDUC., VOL. 65 NO. 40, ALMANAC OF HIGHER EDUCATION 2019–20, at 72 (2019) (explaining that private and public institutions rely on tuition dollars for about 30% and 22% of their revenue respectively).

35. 11 U.S.C. § 550(a)(1) (providing that a trustee may recover the value of property transferred from "the entity for whose benefit such transfer was made"). The term "entity" includes the term "person," 11 U.S.C. § 101(15), which, in turn, includes an "individual," 11 U.S.C. § 101(41). *See also* Bonded Fin. Servs. v. European Am. Bank, 838 F.2d 890, 895 (7th Cir. 1988) (explaining that § 505(a)(1) allows recovery from "someone who receives the benefit but not the money"). An initial transferee of a fraudulent transfer is strictly liable for recovery of an avoidable transfer. 11 U.S.C. § 550(a); *see* Carroll v. Tese-Milner (*In re* Red Dot Scenic, Inc.), 351 F.3d 57, 58 (2d. Cir. 2003) (per curiam) (describing § 550(a) as imposing strict liability). Transferees that are not the initial transferee (i.e., transferees that are subsequent transferees), however, are afforded a "good faith" defense to the trustee's recovery under 11 U.S.C. § 550(b). Some colleges and universities have successfully argued that they are subsequent transferees of payments by debtor-parents (with the initial transferee of these transfers being the student). *See, e.g.*, Pergament v. Brooklyn Law Sch. (*In re* Adamo), 595 B.R. 6, 18 (E.D.N.Y. 2019) (agreeing with the bankruptcy court that the school was a subsequent transferee as to the subject payments). As such, they may be entitled to a good-faith defense against the recovery of these payments. *Id.* This Article focuses on the evaluation of the reasonably-equivalent-value requirement. It does not address the good-faith-transferee defense that subsequent transferees may assert after a given transfer has been deemed fraudulent.

educational expenses.[36] This fact is particularly problematic given the drastic rise in tuition costs over the last several years[37] and the increase in student loan debt many students now face.[38]

For many years, the payment of educational expenses as the subject of fraudulent transfer actions by bankruptcy trustees against colleges and universities was largely unheard of.[39] In recent years, however, several colleges and universities have been the target of these claims.[40] Instances of bankruptcy trustees seeking the return of educational payments made by debtors for their adult children have sparked interest and even outrage.[41]

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36. 11 U.S.C. § 550(a)(1).

37. COLLEGE BD., TRENDS IN COLLEGE PRICING 2018, at 3 (2018) https://research.collegeboard.org/pdf/trends-college-pricing-2018-full-report.pdf.

> In the public two-year and private nonprofit four-year sectors, published prices are more than twice as high in 2018–19 as they were in 1988–89. The average in-state tuition and fee price in the public four-year sector is about three times as high in inflation-adjusted dollars as it was in 1988–89.

Id.; *see also* Grey Gordon & Aaron Hedlund, *Accounting for the Rise in College Tuition*, *in* EDUCATION, SKILLS, AND TECHNICAL CHANGE 357–94 (Charles Hulten & Valerie Ramey eds., 2019) (discussing the rise in tuition and potential contributing factors).

38. In November of 2018, outstanding U.S. student-loan debt reached a record $1.465 trillion—a more than two-fold increase since the end of the recession in June 2009. Alexandre Tanzi, *U.S. Student Loan Debt Sets Record, Doubling Since Recession*, BLOOMBERG (Dec. 17, 2018), https://www.bloomberg.com/news/articles/2018-12-17/u-s-student-loan-debt-sets-record-doubling-since-recession; *see also* FED. RESERVE BANK OF N.Y., STAFF REP. NO. 820, ECHOES OF RISING TUITION IN STUDENTS' BORROWING, EDUCATIONAL ATTAINMENT, AND HOMEOWNERSHIP IN POST-RECESSION AMERICA 27 (2017), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr820.pdf?la=en ("Our evidence is consistent with American students having accommodated such large positive shocks to the cost of college not by forgoing [sic] schooling, but instead by amassing substantially more student debt.").

39. Katy Stech, *What's Behind Bankruptcy Lawsuits over College Tuition?*, WALL ST. J. (May 6, 2015), https://blogs.wsj.com/bankruptcy/2015/05/06/whats-behind-bankruptcy-lawsuits-over-college-tuition/ [hereinafter Stech, *Bankruptcy Lawsuits*].

40. *See, e.g.*, Mangan v. Univ. of Conn. (*In re* Hamadi), 597 B.R. 67, 69 (Bankr. D. Conn. 2019) ("Avoidance actions involving debtors making tuition payments on behalf of their children are currently percolating all throughout the United States bankruptcy and district courts."); *see also* Stech, *Bankruptcy Lawsuits*, *supra* note 39 ("Tuition recovery lawsuits are a new phenomenon.").

41. *See, e.g.*, Katy Stech, *Bankruptcy Trustees Claw Back College Tuition Paid for Filers' Kids*, WALL ST. J. (May 5, 2015), https://www.wsj.com/articles/bankruptcy-trustees-claw-back-college-tuition-paid-for-filers-kids-1430869820 [hereinafter Stech, *Claw Back*] (reporting that a growing number of colleges find themselves fighting attempts by trustees to claw back tuition payments); *accord* Katy Stech, *Colleges Continue to Return Tuition Money in Bankruptcy Fights More than $276,000 in Tuition Payments Returned*, WALL ST. J. (Apr. 19, 2016), https://blogs.wsj.com/bankruptcy/2016/04/19/colleges-continue-to-return-tuition-money-in-bankruptcy-fights/ [hereinafter Stech, *Bankruptcy Fights*]. In response to these actions by trustees, a group of representatives in Congress introduced the Protecting All College Tuition (PACT) Act of 2015, H.R. 2267, 114th Cong. The PACT proposes to protect tuition payments by debtor-parents by excluding those payments from the reach of § 548 of the Bankruptcy Code, the provision of the Bankruptcy Code that provides a federal cause of action for fraudulent transfer. *Id.* sec. 2. Accordingly, the PACT provides that § 548 is to be "amended by adding at the end the following: '(f) A payment of tuition by a parent to an institution of higher education (as defined in either section 101

Given the skyrocketing costs of tuition,[42] it is reasonable to assume that trustees will bring these claims with greater frequency in the coming years. When tuition was relatively low, trustees likely considered the prospect of pursuing those payments, along with the associated costs and risks, was not worth the trouble. As tuition costs have risen, the dollar value of the pre-bankruptcy tuition payments made by parents has likely risen, too, undoubtedly making the recovery of those payments a more enticing opportunity to trustees.[43]

How should courts evaluate reasonably equivalent value for purposes of constructively fraudulent transfer law in the context of the payment of undergraduate educational expenses by debtor-parents for their adult children?[44] The *Dunston* and *Palladino* decisions illustrate that this issue is often central to resolving these claims. They also illustrate the lack of consistency in the courts' assessment of whether the debtor-parents received reasonably equivalent value, such that the defendant college or university will not have to disgorge these payments.

Although relatively few courts have analyzed reasonably equivalent value in the attempted clawback of tuition payments, numerous courts and

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or 102 of the Higher Education Act) for the education of that parent's child is not a transfer covered under paragraph (1)(B).'" *Id*. Progress on the potential passage of the PACT has stalled in the House of Representatives. *See* H.R. 2267—PACT (Protecting All College Tuition) Act of 2015, CONGRESS.GOV (last visited Apr. 13, 2020), https://www.congress.gov/bill/114th-congress/house-bill/2267/all-actions (showing the last action on the bill occurred in June 2015). Pursuant to § 544 of the Bankruptcy Code, however, trustees may also bring claims of fraudulent transfer under state law. 11 U.S.C. § 544(b)(2). Thus, even if Congress passed the PACT into law, it would not prevent trustees from acting under applicable state fraudulent conveyance law.

42. PEW RESEARCH CTR., THE RISING COST OF NOT GOING TO COLLEGE 37–38 (2014), http://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college/ [hereinafter RISING COST]; *see also* Gordon & Hedlund, *supra* note 37, at 357 (calculating a 92% rise in tuition and fees between 1987 and 2010).

43. Stech, *Bankruptcy Lawsuits*, *supra* note 39; *see also* Andrew Mackenzie, Note, *The Tuition "Claw Back" Phenomenon: Reasonably Equivalent Value and Parental Tuition Payments*, 2016 COLUM. BUS. L. REV. 924, 935–43 (collecting cases).

44. Notably, issues also arise with respect to the payment by debtor-parents of tuition to private schools for their children in grades K–12 and with respect to payments made by debtor-parents for the graduate school expenses of their adult children. *See, e.g.*, Gelzer v. Xaverian High Sch. (*In re* Akanmu), 502 B.R. 124, 132 (Bankr. E.D.N.Y. 2013) (involving a challenge to tuition payments the debtor-parents made to their minor children's parochial school); *see also* Sikirica v. Cohen (*In re* Cohen), Ch. 7 Case No. 05-38135, Adv. No. 07-02517, 2012 WL 5360956, at *9 (Bankr. W.D. Pa. Oct. 31, 2012) (involving a challenge to payments the debtor-parents made to support their daughter's graduate education), *rev'd in part on other grounds*, 487 B.R. 615 (W.D. Pa. 2013). Further, a trustee or other interested party may also scrutinize the payments made by debtor-parents to cover undergraduate educational expenses of their adult children under other provisions of the Bankruptcy Code. For example, they may scrutinize these payments in connection with considering whether a debtor's proposed plan of repayment in a Chapter 13 case should be confirmed, 11 U.S.C. § 1325(b) (2018), or whether the debtor's bankruptcy case should be dismissed as an abuse of the bankruptcy process, 11 U.S.C. § 707(b)(1). These issues, while important and certainly worthy of consideration, are beyond the scope of this Article.

commentators have struggled with the application of the reasonably-equivalent-value requirement in various other contexts.[45] The traditional paradigm of fraudulent transfer has proven inadequate to address a variety of transactions, including both consumer transactions[46] and commercial transactions.[47] The application of constructively fraudulent transfer law to intercorporate guarantees is one example that illustrates the inadequacy of

45. *See* discussion *infra* Part II.

46. In the 1990s, trustees waged a similar attack against churches and charitable organizations that had received donations from debtors in the months and even years leading up to the debtors' bankruptcy filing. *See* Boscarino v. Bd. of Trs. of Conn. State Univ. Sys. (*In re* Knight), Ch. 7 Case No. 15-21646, Adv. No. 15-02064, 2017 WL 4410455, at *5 (Bankr. D. Conn. Sept. 29, 2017) (noting the phenomenon and citing cases). In that context, trustees argued that donations to religious institutions and charitable organizations did not result in a cognizable value to the debtor for purposes of the requirement in fraudulent conveyance law that the debtor receive "reasonably equivalent value" in exchange for such transfers (i.e., the debtor's donations). *Id.* In response to these actions, Congress passed the Religious Liberty and Charitable Donation Protection Act of 1998 (Donation Protection Act), Pub. L. No. 105-183, 112 Stat. 517. The Donation Protection Act amended several provisions of the Bankruptcy Code, including §§ 544(b), 548(a)(2), 707(b), and 1325(b)(2)(A). *Id.* at 517–18. The legislature designed these revisions to protect the debtor's ability to donate to religious institutions and charitable organizations without the risk that such donations might compromise the debtor's ability to seek bankruptcy relief or subject the recipients of those donations to potential fraudulent conveyance litigation. *Boscarino*, 2017 WL 4410455, at *5. Specifically, with respect to fraudulent transfer actions, the Donation Protection Act modified the Bankruptcy Code to protect certain contributions to qualified religious or charitable organizations by debtors under Chapters 7, 11, 12, and 13. *Id.* More particularly, § 548(a)(2)(A) prevents the trustee from avoiding as a constructively fraudulent transfer a charitable contribution to a qualified religious or charitable organization if the amount of the contribution was not more than 15% of the debtor's gross annual income. 11 U.S.C. § 548(a)(2)(A). If a charitable contribution to a qualified religious or charitable organization exceeded 15% of the debtor's gross annual income, 11 U.S.C. § 548(a)(2)(B) prevents the trustee from avoiding that contribution "if the transfer was consistent with the practices of the debtor in making charitable contributions." 11 U.S.C. § 548(a)(2)(B). In addition, because § 544 of the Bankruptcy Code permits the trustee to bring these claims under state fraudulent transfer law, the Donation Protection Act adds an exception to § 544(b) to exclude from the reach of state fraudulent transfer law transfers to qualified religious or charitable organizations to the same extent those transfers are protected from attack under § 548. 11 U.S.C. § 544(b). As noted above, in addition to claims of fraudulent transfer, a trustee or other party in interest may raise issues related to Chapter 13 plan confirmation and dismissal of purportedly "abusive" Chapter 7 filings in the context of the payment of educational expenses by debtor-parents. *Supra* note 44. To address these issues in a comprehensive manner, an approach akin to the approach taken in the Donation Protection Act is likely necessary. This more comprehensive approach to protecting the payment of educational expenses by debtor-parents is likely warranted based, in part, on some of the same considerations underpinning the passage of the Donation Protection Act. A discussion of these analogies and their potential implications is beyond the scope of this Article. To be clear, however, there are significant, relevant distinctions between religious and charitable donations, on the one hand, and the payment of the tuition of an adult child, on the other. Both the varied and widespread economic benefits of obtaining a college degree and the interconnected nature of the economic lives of debtors and their children support that a finding of reasonable equivalent value in the context of the payment of educational expenses by debtor-parents may be warranted, even absent a comprehensive legislative approach to addressing the problem. *See infra* Part IV.A–D.

47. *See infra* Part II.B.

the traditional fraudulent transfer model.[48] In response to the inadequacy of the prototypical vision of fraudulent transfer law, courts have developed various doctrines designed to compensate for the shortcomings stemming from the traditional model.[49] The traditional fraudulent transfer model is similarly poorly equipped to address the question of whether a debtor-parent receives reasonably equivalent value in exchange for paying the undergraduate educational expenses of the debtor's adult child.

The purpose of this Article is to offer a new framework for analyzing reasonably equivalent value in constructively fraudulent transfer law as applied to undergraduate educational expenses paid by debtor-parents on behalf of their adult children. The proposed approach aims to create greater consistency and efficiency in the resolution of these claims, while also better promoting the "fresh-start" policy of bankruptcy and more faithfully reflecting the original purpose of fraudulent transfer law.

Part I of this Article frames the discussion by presenting the origins and purpose of fraudulent transfer law. Part II discusses the constructively fraudulent transfer, focusing on the doctrines courts have employed to assess whether the debtor-transferor received reasonably equivalent value. Part III provides an overview of individuals in bankruptcy, including presenting key underlying policies and goals of bankruptcy for individuals. Part IV provides context for considering the payment of educational expenses as constructively fraudulent transfers by examining the interconnected nature of the family generally, analyzing the relationship between parents and their adult children, and considering its economic ramifications. Part IV also discusses the perceived and actual benefits of a college education and how the culture of the United States generally views the responsibility for paying for such education. Part V examines the assessment of reasonably equivalent value in the context of the payment by debtor-parents of undergraduate educational expenses for their adult children. Part VI proposes a new approach to assessing the reasonably equivalent value requirement in the context of these payments based on an assessment of reasonable value to the debtor's economic unit. This test would assess the economic relationship between the debtor-parent and the adult child to determine whether the debtor-parent and adult child should be taken as a single economic unit for

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48. *See infra* Part II.B (examining the ways in which the reasonably equivalent value requirement creates false positives for constructively fraudulent transfers in the area of intercorporate guarantees); *see also generally* Jack Williams, *Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercorporate Guaranties: Fraudulent-Transfer Law as a Fuzzy System*, 15 CARDOZO L. REV. 1403 (1994) [hereinafter Williams, *Fallacies*] (providing a more detailed discussion of the problems in applying constructively fraudulent transfer law to intercorporate guarantees).

49. *See infra* notes 173–86 and accompanying text (discussing the indirect-benefits and identity-of-interests doctrines).

purposes of constructively fraudulent transfer law.[50] The test would also ask whether the transferee educational institution gave value, in the form of an education, to the debtor's adult child in exchange for the subject payments.[51] Finally, it would consider whether the expenses paid were necessary for the adult child to receive the education provided.[52] The Article concludes that such a test for reasonably equivalent value in this context will result in a more standardized and efficient approach to the courts' consideration of such claims and, moreover, that the proposed test would more accurately reflect the economic realities of the family. As such, the proposed test will more faithfully advance the overarching purposes of both bankruptcy and fraudulent transfer law.

I. THE HISTORY AND PURPOSE OF FRAUDULENT TRANSFER LAW

A. The Origins of Fraudulent Transfer Law

The law originally developed fraudulent transfer law to remedy actions taken by a debtor to impede the creditor's ability to collect on the debtor's debt.[53] The Statute of 13 Elizabeth first codified the prohibition against such transfers.[54] This statute invalidated transfers that the debtor designed, "to delay, hinder or defraud creditors and others."[55] A deliberate attempt by the debtor to move assets beyond the reach of the debtor's creditors has come to be known as *actual fraud*.[56]

Determining whether a given transfer was in fact, "a device to 'hinder, delay or defraud' creditors while reserving some benefit for the debtor" is

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50. *Infra* note 424.

51. *Infra* note 419.

52. *Infra* note 421.

53. *See* Bonded Fin. Servs. v. European Am. Bank., 838 F.2d 890, 892 (7th Cir. 1988) (noting that fraudulent transfer law was originally designed to address "debtors who transferred property to their relatives, while the debtors themselves sought sanctuary from creditors" allowing the debtor's family to enjoy "the value of the assets, which the debtor might reclaim if the creditors stopped pursuing him"). For a detailed discussion of the history of fraudulent transfer law, see Kenneth C. Kettering, *The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act*, 70 BUS. LAW. 777, 778–79 (2015). For a history of fraudulent transfer and its interaction with bankruptcy, see Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1587–88 (2016).

54. Fraudulent Conveyances Act 1571, 13 Eliz. c. 5. (Eng.).

55. BFP v. Resolution Trust Corp., 511 U.S. 531, 540 (1994) (quoting the Fraudulent Conveyances Act 1571, 13 Eliz. c. 5 (Eng.)); Eberhard v. Marcu, 530 F.3d 122, 130 (2d Cir. 2008) (quoting the Fraudulent Conveyances Act 1571, 13 Eliz. c. 5, § 1 (Eng.)); *see also* Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 829–30 (1985) (describing the origin of the Statute of 13 Elizabeth).

56. For a detailed discussion of fraudulent transfers that are *actually* fraudulent, see generally Jack F. Williams, *Revisiting the Proper Limits of Fraudulent Transfer Laws*, 8 BANKR. DEV. J. 55 (1991) [hereinafter Williams, *Limits*].

often difficult.[57] In response to this challenge, English courts developed the doctrine of *badges of fraud*.[58] Under this doctrine, the courts could consider circumstantial evidence in determining whether a transferor intended a subject transfer to impede collection efforts.[59] This doctrine required "proof by a creditor of certain objective facts (for example, a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or grossly inadequate consideration)."[60] The existence of sufficient badges of fraud "would raise a rebuttable presumption of actual fraudulent intent."[61] Fraudulent transfer law based on the badges-of-fraud doctrine, however, has been plagued with "considerable uncertainty regarding the precise combination of badges of fraud that constituted fraudulent intent."[62]

The objective of undoing transfers made by the debtor with the intent to delay, hinder, or defraud creditors was incorporated into both the federal Bankruptcy Code and the various state laws that are modeled on the Uniform Fraudulent Conveyance Act (UFCA) and its successor, the Uniform Fraudulent Transfer Act (UFTA),[63] recently amended to be called the Uniform Voidable Transactions Act (UVTA).[64] In addition, various state

57. Bos. Trading Grps., Inc. v. Burnazos, 835 F.2d 1504, 1509 (1st Cir. 1987).

58. *Id.*

59. *Id.*; *BFP*, 511 U.S. at 541.

60. *BFP*, 511 U.S. at 541 (citing Twyne's Case (1601) 76 Eng. Rep. 809; 3 Co. Rep. 80 b (Eng.)); *see also* Kenneth C. Kettering, *Securitization and its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553, 1585–86 (2008) (discussing the history of fraudulent transfer law).

61. *BFP*, 511 U.S. at 541.

62. Michael Simkovic & Benjamin S. Kaminetzky, *Leveraged Buyout Bankruptcies, the Problem of Hindsight Bias, and the Credit Default Swap Solution*, 2011 COLUM. BUS. L. REV. 118, 137 (2011) (footnote omitted).

63. *See* 11 U.S.C. § 548(a)(1)(A) (2018) (permitting trustee to avoid any transfer made "with actual intent to hinder, delay, or defraud"); UNIF. FRAUDULENT TRANSFER ACT § 4(a)(1) (UNIF. LAW COMM'N 1984) (declaring transfers made or obligations incurred to be fraudulent if made "with actual intent . . . to hinder, delay, or defraud"); UNIF. FRAUDULENT CONVEYANCE ACT § 7 (UNIF. LAW COMM'N 1918) (footnote omitted) ("Every conveyance made . . . with actual intent . . . to hinder, delay, or defraud either present or future creditors . . . is fraudulent as to both present and future creditors."). The Bankruptcy Act of 1898 "specifically adopted the language of the Statute of 13 Elizabeth" and "[e]very American bankruptcy law has incorporated a fraudulent transfer provision." *BFP*, 511 U.S. at 541; *see also* Simkovic & Kaminetzky, *supra* note 62, at 135 (discussing the development of fraudulent transfer law).

64. The UVTA was adopted by the Uniform Law Commission in 2014 as the successor to the UFTA. UNIF. VOIDABLE TRANSACTIONS ACT (UNIF. LAW COMM'N 2014). The UVTA amendments to the UFTA have since been adopted by 21 states. *Voidable Transactions Act Amendments—Formerly Fraudulent Transfer Act*, UNIF. LAW COMM'N (last visited Apr. 13, 2020), https://www.uniformlaws.org/committees/community-home?communitykey=64ee1ccc-a3ae-4a5e-a18f-a5ba8206bf49&tab=groupdetails. The UVTA was not a substantial rewrite of the UFTA. Rather, the UVTA resolved several "narrowly-defined issues" that had created challenges under the UFTA. UNIF. VOIDABLE TRANSACTIONS ACT 5. For example, the UVTA includes a codified choice-of-law rule, eliminates the separate insolvency definition for partnerships, provides clarity as to which party carries the burden of proof, and provides a defined

fraudulent transfer laws and the Bankruptcy Code have codified some of the commonly accepted badges of fraud, creating a separate cause of action based on *constructive fraud*.[65] Constructive fraud permits courts to void certain transfers that deplete the debtor's estate to the detriment of its creditors, even when it is not shown that a transferee designed a transfer to delay, hinder, or defraud creditors.[66] This type of transfer occurs when a financially unstable debtor transfers an asset or incurs an obligation without receiving reasonably equivalent value in return.[67]

B. Fraudulent Transfer Law in Bankruptcy

In bankruptcy, fraudulent transfer law is a powerful tool because it permits the trustee to void certain payments or other transfers the debtor made prior to the debtor's bankruptcy filing.[68] Under § 548 of the Bankruptcy Code, the trustee may make a claim of actual fraud[69] or constructive fraud.[70] Section 548 permits a trustee to avoid fraudulent transfers made by a debtor within the two years prior to the debtor's bankruptcy filing date (known as the "petition date").[71] This two-year period is colloquially referred to as the *look-back* period because the trustee "looks back" to examine payments made or obligations incurred during the applicable time period.

Under § 544(b) of the Bankruptcy Code, the trustee also has the authority to avoid any transfers by the debtor that an unsecured creditor with an allowable claim[72] could avoid under applicable state fraudulent-transfer law.[73] As noted, most state laws are fashioned after either the UFCA or the

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evidentiary standard for seeking a remedy under the act. The most immediately obvious change introduced by the UVTA is the substitution of the word "voidable" in place of the word "fraudulent," both in the title and body of the act. The drafters of the UVTA explain that "[n]o change in meaning is intended" by this change in terminology. *Id.* at 6. Rather, this change in terminology is aimed at addressing some of the confusion that has arisen as a result of what the drafters see as an overemphasis on the concept of *fraud* in the context of fraudulent conveyance law. *Id.* at 25, § 4 cmt. 8.

65. Bos. Trading Grps., Inc. v. Burnazos, 835 F.2d 1504, 1509 (1st Cir. 1987); *see also* Barry L. Zaretsky, *Fraudulent Transfer Law as the Arbiter of Unreasonable Risk*, 46 S.C. L. REV. 1165, 1166 (1995) (observing that, because courts recognized "the difficulty of proving a transferor's specific intent, [they] developed principles of constructive fraud under which a transaction might be avoidable as fraudulent even in the absence of a showing of actual intent to hinder, delay, or defraud").

66. *See* Zaretsky, *supra* note 65, at 1166.

67. *Id.*

68. *See generally* 11 U.S.C. § 548 (2018) (providing for the recovery of fraudulent transfers).

69. *See* 11 U.S.C. § 548(a)(1)(A) (providing that the trustee may avoid transfer of an interest if the debtor made such a transfer with "actual intent" to defraud).

70. *See* 11 U.S.C. § 548(a)(1)(B)(i) (providing that the trustee may avoid transfer of an interest if the debtor received "less than a reasonably equivalent value in exchange for [the] transfer").

71. 11 U.S.C. § 548(a)(1).

72. *See* 11 U.S.C. § 502 (addressing allowance of claims).

73. 11 U.S.C. § 544(b).

UFTA.[74] These acts both generally provide that a transfer is avoidable if it is either: (a) actually fraudulent, or (b) constructively fraudulent—the same causes of action that are recognized by § 548 of the Bankruptcy Code.[75] Importantly, however, state fraudulent-transfer statutory schemes typically provide for a look-back period ranging from three to six years, potentially giving the trustee the authority to question payments made by the debtor as much as six years prior to the debtor's bankruptcy filing.[76]

Litigants have used fraudulent transfer law to challenge transfers made and obligations incurred in a variety of scenarios—including transactions involving leveraged buyouts,[77] corporate spin-offs,[78] dividend recapitalizations,[79] real-property foreclosures,[80] and intercorporate guaranties.[81] Because an intent to hinder, delay, or defraud creditors is not a required element for constructive fraud, third parties who receive transfers from the debtor or who are the beneficiaries of obligations assumed by the debtor—even when the subject transactions involve no intent to impede the collection efforts of creditors—are often the target of constructive fraud claims.[82]

C. The Search for Purpose in Fraudulent Transfer Law

Following a borrower's default, an unsecured creditor generally has the authority to seek a judgment against the borrower.[83] Upon obtaining a judgment, the unsecured creditor may, subject to applicable exceptions,[84]

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74. *See supra* notes 63–64 and accompanying text (introducing the UFCA and UFTA); *see also* Simkovic & Kaminetzky, *supra* note 62, at 135–36 (identifying the UFCA and UFTA as the primary source of fraudulent transfer law at the state level).

75. Simkovic & Kaminetzky, *supra* note 62, at 135–37.

76. *Id.* at 200. These look-back periods are codified by state statutes of limitations. For example, New York generally recognizes a six-year look-back period, codified by the statute of limitations set forth in section 213(1) of the New York Civil Practice Law and Rules. N.Y. C.P.L.R. 213(1) (McKinney 2019).

77. *See, e.g.*, Weisfelner v. Hofmann (*In re* Lyondell Chem. Co.), 554 B.R. 635, 654 (S.D.N.Y. 2016).

78. *See, e.g.*, VFB LLC v. Campbell Soup Co., 482 F.3d 624, 629–30 (3d Cir. 2007).

79. *See, e.g.*, Reynolds v. Behrman Capital IV L.P., No. 2:18-cv-00514, 2019 WL 527364, at *1 (N.D. Ala. Feb. 11, 2019).

80. *See, e.g.*, BFP v. Resolution Trust Corp., 511 U.S. 531, 540 (1994).

81. *See, e.g.*, 3V Capital Master Fund Ltd. v. Official Comm. of Unsecured Creditors of TOUSA, Inc. (*In re* TOUSA, Inc.), 444 B.R. 613, 659 (S.D. Fla. 2011), *aff'd in part, rev'd in part*, 680 F.3d 1298 (11th Cir. 2012).

82. *See* 11 U.S.C. § 548(a)(1)(B) (providing a remedy for constructively fraudulent transfers).

83. THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 4 (1986).

84. An exempt asset is protected from collection actions by creditors. Each state has a set of exemptions that apply in bankruptcy. WILLIAM HOUSTON BROWN ET AL., BANKRUPTCY EXEMPTION MANUAL § 4:1, Westlaw (database updated June 2019). Most states allow a resident-debtor to use only the exemptions offered by the state. Tarvin, *supra* note 14, at 149. Nineteen states allow debtors to choose

pursue the assets of the borrower to satisfy its judgment.[85] The archetypal tale of a fraudulent transfer consists of a borrower intentionally moving property beyond the reach of its creditors by engaging in clandestine transactions that result in "last-minute diminutions of the pool of assets."[86] "Most of us envision a debtor bogusly selling property to a friend or relative for much less than its worth."[87] With this backdrop, the fraudulent transfer can be understood as a contravention of the creditor's right to recover from the available assets of the creditor's debtor.[88] Fraudulent transfer law protects the rights of the unsecured creditor by prohibiting the debtor from transferring the debtor's assets with the intent—either actual or implied (through the doctrine of constructive fraud)—of diminishing the assets available to the debtor's creditors.[89]

Many authorities assert that the *purpose* of fraudulent transfer law is the preservation of the debtor's assets for the benefit of the debtor's unsecured creditors.[90] With this understanding of the purpose of fraudulent transfer law, courts are compelled to determine what constitutes a reasonably equivalent value—and thus whether a transfer is constructively fraudulent—from the standpoint of a debtor's creditors.[91] From the standpoint of the creditors of a

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between the state exemption system and the set of exemptions contained in the Bankruptcy Code. BROWN ET AL., *supra*, apps. B1–B53 (cataloging the availability of federal exemptions in each state); 11 U.S.C. § 522(d) (2018) (listing federal exemptions).

85. JACKSON, *supra* note 83, at 4.

86. *See* Pioneer Liquidating Corp. v. San Diego Trust & Sav. Bank (*In re* Consol. Pioneer Mortg. Entities), 211 B.R. 704, 717 (S.D. Cal. 1997) (discussing the purpose of fraudulent transfer law), *aff'd in part, rev'd in part*, 166 F.3d 342 (9th Cir. 1999).

87. Williams, *Fallacies*, *supra* note 48, at 1414.

88. *See* Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 777 (1984) (describing fraudulent transfer law as protecting the creditor's rights from the debtor); *accord* Williams, *Fallacies*, *supra* note 48, at 1421.

89. Michael L. Cook, *Fraudulent Transfer Liability Under the Bankruptcy Code*, 17 HOUS. L. REV. 263, 266 (1980).

90. *See, e.g.*, DeGiacomo v. Sacred Heart Univ. (*In re* Palladino), 942 F.3d 55, 59 (1st Cir. 2019) (citing Riley v. Countrywide Home Loans, Inc. (*In re* Duplication Mgmt.), 501 B.R. 462, 483 (Bankr. D. Mass. 2013)) ("Because fraudulent transfer law's purpose is to preserve the debtor's estate for the benefit of unsecured creditors, courts evaluate transfers from the creditors' perspective."); *accord* Nordberg v. Sanchez (*In re* Chase & Sanborn Corp.), 813 F.2d 1177, 1181 (11th Cir. 1987); Rubin v. Mfrs. Hanover Trust Co., 661 F.2d 979, 992 (2d Cir. 1981); Martin v. Phillips (*In re* Butcher), 58 B.R. 128, 130 (Bankr. E.D. Tenn. 1996); *see also* Williams, *Fallacies*, *supra* note 48, at 1413 ("[P]reservation of the estate for the benefit of one's creditors is a core element of fraudulent transfer jurisprudence. But just as there is more to the apple than its core, so too there is more to fraudulent transfer jurisprudence than the preservation of the estate for one's unsecured creditors.").

91. *See, e.g.*, *In re Palladino*, 942 F.3d at 59 (focusing the fraudulent transfer inquiry on whether the transfer furnished value to the debtor's creditors); *see also* Mellon Bank, N.A. v. Official Comm. of Unsecured Creditors of R.M.L., Inc. (*In re* R.M.L., Inc.), 92 F.3d 139, 150 (3d Cir. 1996) (quoting Mellon Bank, N.A. v. Metro Commc'ns, Inc., 945 F.2d 635, 646 (3d Cir. 1991)) ("[W]hether the debtor received reasonable value must be determined from the standpoint of the creditors." (emphasis omitted)).

debtor, a transfer that does not benefit the creditors of the debtor does not provide value. Professor Jack Williams has observed that this view of the purpose of fraudulent transfer law is the "confounding of purpose [with] effect" and that it has "lead [sic] many a court astray in assessing fraudulent transfer liability."[92] A benefits-to-the-creditors requirement for a finding of value in constructively-fraudulent-conveyance law has implicated many transactions that "[do] not seem at all like the Elizabethan deadbeat who sells his sheep to his brother for a pittance."[93]

A view of fraudulent transfer law that would declare any transfer that results in a net loss to the debtor's estate to be constructively fraudulent ultimately turns on itself. From a practical perspective (setting aside any challenges that may be faced in its implementation),[94] a retrospective, balance-sheet test of "value" would likely have a negative economic impact at the macro level. Such a narrow understanding of value would permit—and perhaps even incentivize—creditors of the debtor to simply sit back and wait to see whether financial decisions made by the debtor are ultimately economically beneficial, challenging only those decisions that do not ultimately pay off with a net-positive gain to the debtor (and the debtor's creditors).[95] Similarly, the debtor may be hesitant to take risks that creditors might otherwise want the debtor to take, fearing that these transactions may later be subject to attack.[96] Moreover, the third party to the fraudulent-transfer triangle—the would-be counter-party to a proposed transaction with the debtor—may also adjust the third party's behavior to account for the perceived risk that the transaction at issue may later be undone by an unhappy creditor.[97] It is, after all, the transferee who will likely be left holding the bag if a transfer is successfully challenged as a voidable transfer.[98] Ultimately, the increased risk associated with transactions should lead to increased transaction costs and may result in missed financial opportunities.

Although preservation of the debtor's estate for the benefit of unsecured creditors may be the effect of undoing a transaction as fraudulent; the fact that a subject transaction may not have resulted in a net financial benefit to

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92. Williams, *Fallacies*, *supra* note 48, at 1421.

93. Baird & Jackson, *supra* note 55, at 852.

94. *See, e.g.*, Simkovic & Kaminetzky, *supra* note 62, *passim* (discussing challenges inherent in the process of valuation, particularly as done in hindsight to a given transaction).

95. Baird & Jackson, *supra* note 55, at 839.

96. *Id.* at 834, 839.

97. *Cf.* David Gray Carlson, *Is Fraudulent Transfer Law Efficient?*, 9 CARDOZO L. REV. 643, 675–79 (1987) (criticizing Baird & Jackson and other scholars' failure to explain why third-party transferees accept the risk of fraudulent conveyance).

98. *Id.* at 652; *see, e.g.*, Stech, *Bankruptcy Fights*, *supra* note 41 (reporting on universities which agreed to pay thousands of dollars to settle fraudulent transfer suits brought by bankruptcy trustees).

the debtor's estate has not proven sufficient, standing alone, to warrant its undoing. In fact, when courts have faced factual scenarios that do not neatly fit the paradigmatic fraudulent transfer, they develop doctrines and shift their frame of reference away from the benefits-to-creditors requirement, adjusting the lens to see a different picture. With an altered perspective, the courts scrutinizing these transactions often find that they are not fraudulent transfers and permit them to stand.[99] Thus, the unifying purpose of fraudulent transfer law generally, and constructively-fraudulent-transfer law specifically, must be something more than the preservation of the debtor's estate for the debtor's unsecured creditors.[100]

In the article *Is Fraudulent Conveyance Law Efficient?*, Professor David Carlson describes the purpose of fraudulent transfer law as the redistribution of power.[101] According to Professor Carlson, "fraudulent conveyance law redistributes power from positionally strong debtors to positionally weak creditors on the principle that repayment of debt is privileged over the debtor's freedom to alienate his property."[102] When a debtor is on shaky financial footing, the debtor is, in some ways, at an advantage over the debtor's creditors.[103] First, the debtor knows the circumstances of the debtor's finances. The debtor's creditors often lag on this knowledge. Second, when a debtor is overleveraged, the debtor's unencumbered assets essentially belong to the debtor's unsecured creditors, to the extent an exemption does not protect them. As such, any financial risks the debtor may take are risks the debtor is imposing on the debtor's creditors.[104] Professor Carlson observes that fraudulent transfer law intercedes, *ex post*, to balance the power between insolvent debtors and their unsecured creditors.[105]

Professor Williams accepts Professor Carlson's description of fraudulent transfer law as the *ex post* redistribution of power from positionally strong debtors to positionally weak creditors.[106] In addition,

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99. *See infra* Part II (discussing the doctrines courts have employed to assess whether a debtor received reasonably equivalent value in exchange for a transfer of property); *see also* Williams, *Fallacies*, *supra* note 48, at 1422–26 (exploring three factual scenarios which force courts to take a different view: transfers of property in payment for services, charitable donations, and payment of time-barred debt).

100. *Cf.* Williams, *Fallacies*, *supra* note 48, at 1424 (emphasis in original) (suggesting that the true purpose of fraudulent transfer law is not simply to preserve the debtor's estate against diminution, but to preserve the debtor's estate against "*unjust* diminution").

101. Carlson, *supra* note 97, at 644.

102. *Id.*

103. *Cf. id.* at 653 (describing a series of six contingencies necessary for the creditor to gain advantage from fraudulent conveyance law).

104. *Cf. id.* at 652 (noting that a creditor's attempt to recover a fraudulent conveyance may be thwarted if the transferee is a bona fide purchaser or if competing creditors obtain a lien on transferred property first).

105. *Id.* at 644.

106. Williams, *Fallacies, supra* note 48, at 1415.

Professor Williams observes that fraudulent transfer law is "also designed to remedy the risk inherent in time itself."[107] A creditor enters a legal relationship with a debtor at a specific point in time and under the circumstances that exist at that time.[108] Upon entering that legal relationship, however, the debtor does not slip into a Rip Van Winkle-like state of suspended animation. Rather, both debtors and creditors "continue with their respective affairs long after the events that gave significance to their legal relationship have passed."[109] Fraudulent transfer law accounts for the fact that "creditors expect their debtors to continue conducting their affairs in a manner consistent with their past practices."[110] Thus, the doctrine of fraudulent transfer, whether actual or constructive, "provides a creditor's remedy . . . when debtors veer from the ordinary course of their affairs at the expense of their unsecured creditors."[111] Stated differently, fraudulent transfer law imposes an "ordinary course of affairs requirement on virtually all transfers and obligations where the debtor is insolvent."[112] As such, fraudulent transfer law gives the creditor power retroactively by permitting the creditor to challenge transactions that the creditor had no reason to expect might occur.

II. REFLECTING PURPOSE IN THE REASONABLY EQUIVALENT VALUE REQUIREMENT

To avoid a transfer based on a theory of constructive fraud, the trustee must establish that the debtor "received less than a reasonably equivalent value in exchange for such transfer."[113] The Bankruptcy Code defines

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107. *Id.* at 1416.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 1414.
113. 11 U.S.C. § 548(a)(1)(B)(i) (2018). The trustee must also show that the transfer was made while the debtor was either: (1) insolvent or on the brink of insolvency; (2) engaged in a business with unreasonably small capital; or (3) incurring debts that the debtor did not believe it could pay. 11 U.S.C. § 548(a)(1)(B). Similar provisions are contained in both the UFTA and the UFCA. Section 4(a)(2) of the UFTA provides for constructive fraud

> if the debtor made the transfer or incurred the obligation . . . without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (ii) intended to incur, or believed or reasonably should have believed that [the debtor] would incur debts beyond [the debtor's] ability to pay as they became due.

UNIF. FRAUDULENT TRANSFER ACT § 4(a)(2) (UNIF. LAW COMM'N 1984). Sections 4–6 of the UFCA state that a conveyance or an obligation may be voidable if it is made without fair consideration and:

"value" as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor."[114] The Bankruptcy Code, however, does not provide a definition of "reasonably equivalent value." As such, courts have employed a case-by-case assessment of whether the debtor has received reasonably equivalent value in the transaction that is being challenged as constructively fraudulent.[115]

Whether reasonably equivalent value has been given in exchange for a payment is "largely a question of fact."[116] Courts have considerable discretion in making this assessment.[117] Courts do not employ a fixed mathematical formula for making this determination. Rather, the determination depends on "all the facts of each case."[118] Further, the concept of reasonably equivalent value does not demand a precise dollar-for-dollar exchange.[119] Courts generally find that the debtor received reasonably equivalent value when the value given is not "so far short of the real value of the property as to startle a correct mind, or shock the moral sense."[120] "As long as the unsecured creditors are no worse off because the debtor, and consequently the estate, has received an amount reasonably equivalent to what it paid, no fraudulent transfer has occurred."[121] Ultimately, courts generally recognize the determination of reasonably equivalent value as "fundamentally one of common sense, measured against market reality."[122]

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(1) "by a person who is . . . thereby rendered insolvent . . . without regard to [such person's] actual intent"; (2) "when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in [the person's] hands after the conveyance is an unreasonably small capital . . . without regard to [the person's] actual intent"; and (3) "when the person making the conveyance or entering into the obligation intends or believes that [the person] will incur debts beyond [the person's] ability to pay as they mature." UNIF. FRAUDULENT CONVEYANCE ACT §§ 4–6 (UNIF. LAW COMM'N 1918).

114. 11 U.S.C. § 548(d)(2).

115. *See, e.g.*, Abramoff v. Life Ins. Co. of Ga. (*In re* Abramoff), 92 B.R. 698, 703 (Bankr. W.D. Tex. 1988) (recognizing the case-by-case approach).

116. Nordberg v. Arab Banking Corp. (*In re* Chase & Sanborn Corp.), 904 F.2d 588, 593 (11th Cir. 1990) (quoting Mayo v. Pioneer Bank & Trust Co., 270 F.2d 823, 829–30 (5th Cir. 1959)).

117. *Id.*

118. Barber v. Golden Seed Co., 129 F.3d 382, 387 (7th Cir. 1997); *see also* Peltz v. Hatten, 279 B.R. 710, 736 (D. Del. 2002) (looking at the totality of circumstances), *aff'd*, 60 F. App'x 401 (3d Cir. 2003).

119. Williams, *Fallacies*, *supra* note 48, at 1422. Butler Aviation Int'l, Inc. v. Whyte (*In re* Fairchild Aircraft Corp.), 6 F.3d 1119, 1125–26 (5th Cir. 1993); Brandt v. Charter Airlines, LLC (*In re* Equip. Acquisition Res., Inc.), 511 B.R. 527, 534 (Bankr. N.D. Ill. 2014) (quoting *Barber*, 129 F.3d at 387), *objection sustained by*, No. 14-C-5102, 2015 WL 4764145 (N.D. Ill. Aug. 12, 2015).

120. Mancuso v. Champion (*In re* Dondi Fin. Corp.), 119 B.R. 106, 109 (Bankr. N.D. Tex. 1990).

121. Suhar v. Bruno (*In re* Neal), 541 F. App'x 609, 612 (6th Cir. 2013) (quoting Congrove v. McDonald's Corp. (*In re* Congrove), 222 F. App'x 450, 454 (6th Cir. 2007)).

122. Sullivan v. Schultz (*In re* Schultz), 368 B.R. 832, 836 (Bankr. D. Minn. 2007) (quoting Lindell v. JNG Corp. (*In re* Lindell), 334 B.R. 249, 256 (Bankr. D. Minn. 2005)).

Commentators and the courts have struggled to define the proper limits of the doctrine of constructive fraud.[123] In assessing the limits of the doctrine, "[i]t is the reasonably equivalent value requirement that presents hard problems of proof and challenges our understanding of the underlying norms of fraudulent transfer law."[124] Linking reasonably equivalent value to benefit from a creditor's perspective is consistent with the classic model of a fraudulent transfer—the malicious transfer of assets by the debtor in exchange for little or no value.[125] Scholars have criticized the benefits-to-the-creditor requirement, however, for failing to adequately address many situations that do not fit the traditional paradigm.[126]

A. Transactions that Do Not Result in a Cognizable Benefit to Creditors of the Debtor

Transactions constituting property-for-services exchanges have been highlighted as a type of exchange that the benefits-to-the-creditor requirement cannot address.[127] For example, if an insolvent debtor hires a company to provide lawn-care services, should the law undo payments the debtor makes to this company for lawn care as constructively fraudulent? This service does not obviously benefit the creditors of the debtor: the payments deplete the debtor's assets without a clear financial benefit in exchange. Under the traditional benefits-to-the-creditor requirement, these payments should be labeled fraudulent transfers.[128] Often, however, the law finds that payment-for-services exchanges are not constructively fraudulent

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123. *See, e.g.,* Baird & Jackson, *supra* note 55, *passim* (grappling with the interpretation and the purpose of fraudulent conveyance law); Frank R. Kennedy, *The Uniform Fraudulent Transfer Act*, 18 UCC L.J. 195 (1986); Jonathan C. Lipson, *First Principles and Fair Consideration: The Developing Clash Between the First Amendment and the Constructive Fraudulent Conveyance Laws*, 52 U. MIAMI L. REV. 247, *passim* (1997) (describing dissonance between the intent of constructively fraudulent conveyance law and its practical application); Emily Sherwin, *Creditors' Rights Against Participants in a Leveraged Buyout*, 72 MINN. L. REV. 449 (1988); Paul M. Shupack, *Confusion and Policy and Language in the Uniform Fraudulent Transfer Act*, 9 CARDOZO L. REV. 811, 815–16 (1987) (observing that the statute of limitations in bankruptcy is complicated by the law of fraudulent conveyance); Mary Jo Newborn Wiggins, *A Statute of Disbelief?: Clashing Ethical Imperatives in Fraudulent Transfer Law*, 48 S.C. L. REV. 771, 771–72 (1997); Williams, *Limits*, *supra* note 56, at 127–30 (lamenting the state of fraudulent transfer law).

124. Williams, *Fallacies*, *supra* note 48, at 1420.

125. *Id.* at 1424.

126. *Id. passim*; *see* Lipson, *supra* note 123, at 260–65 (identifying charitable donations and gifts as transfers that the benefits-to-the-creditor model fails to address).

127. *See* Shupack, *supra* note 123, at 832–33 (criticizing the issue in the context of the UFTA). *But see* Frank R. Kennedy, *Reception of the Uniform Fraudulent Transfer Act*, 43 S.C. L. REV. 655, 661 (1992) (casting fraudulent transfer law as flexible enough to permit the judge to account for property-for-services exchanges).

128. Williams, *Fallacies*, *supra* note 48, at 1426.

conveyances.[129] This is so, because, in property-for-services cases, the courts generally shift the value inquiry away from looking at value from the creditor's perspective to focus on an analysis of the value of the services provided to the debtor and to the price paid by the debtor for those services.[130]

A second scenario that has presented challenges for the benefits-to-the-creditor test for evaluating the reasonably equivalent value requirement is the situation involving a transaction that is unwise from the perspective of utility, whether at the outset or in retrospect.[131] If the debtor makes a foolish investment of the debtor's assets, or otherwise makes a bad financial decision, should that transfer be deemed fraudulent because it does not result in value from the creditor's perspective? If value is viewed solely from the perspective of net benefit to the creditor, every unwise transaction that ultimately fails would be deemed a fraudulent transfer. Very often though, even in the case of a risky investment, fraudulent transfer law does not construe these transactions as fraudulent transfers.[132] In the case of an unwise transaction, the inquiry again shifts away from the net value of the transaction to creditors. In those cases, the court generally focuses the value inquiry on the circumstances surrounding the transaction at issue,[133] including, in the case of a failed investment, the *potential* for a positive return on the investment.[134] The analysis tends to center on ferreting out *indicia* of bad faith or collusion,[135] although intent is ostensibly not relevant to the question of whether a transfer was constructively fraudulent.[136]

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129. *Id.* at 1423. *See, e.g.*, Brandt v. Charter Airlines, LLC (*In re* Equip. Acquisition Res., Inc.), 511 B.R. 527 (Bankr. N.D. Ill. 2014) (finding that the transferee had provided chartered flights at market value), *objection sustained by*, No. 14-C-5102, 2015 WL 4764145 (N.D. Ill. Aug. 12, 2015); Lawrence v. Bonadio, Insero & Co. (*In re* Interco Sys., Inc.), 202 B.R. 188, 196 (Bankr. W.D.N.Y. 1996) (finding that most of the debtor's payments of attorney's fees were not fraudulent conveyances).

130. Williams, *Fallacies*, *supra* note 48, at 1423.

131. *Id.* at 1423.

132. *See infra* notes 133–34 (citing examples of cases where the court declined to construe these types of transactions as fraudulent transfers).

133. *See, e.g.*, Allard v. Hilton (*In re* Chomakos), 170 B.R. 585 (Bankr. E.D. Mich. 1993) (finding the debtors received reasonably equivalent value for bets placed at a casino).

134. *See In re* Morris Commc'ns NC, Inc., 914 F.2d 458 (4th Cir. 1990) (finding the debtor received reasonably equivalent value for sale of stock, even though the stock's value later rose substantially).

135. *Id.* at 467 (quoting Bundles v. Baker (*In re* Bundles), 856 F.2d 815, 824 (7th Cir. 1988)) (stating that, in determining whether the debtor has received reasonably equivalent value, the "[f]actors to be considered include the good faith of the transferee, the relati[ve] differences in the amount paid compared to the fair market value, and [what] percentage . . . the amount paid is of the fair market value . . . [and] whether the sale was 'an arm's length transaction between a willing buyer and a willing seller'").

136. *See* 11 U.S.C. § 548(a)(1)(B) (2018) (defining the elements of a constructively fraudulent transfer without requiring intent to defraud).

The case of *In re Chomakos* is illustrative.[137] The trustee brought an action against the Flamingo casino to recover the losses the debtors suffered at the slot machines over a period of several months while the debtors were insolvent.[138] Although the debtors had won on occasion, the debtors' overall losses exceeded their winnings.[139] In considering whether the debtors had received reasonably equivalent value in exchange for the money the debtors had lost, the court rejected the contentions that it must view "value" from the perspective of the creditor and that the subject transfer must result in a net benefit.[140] Rather, the *Chomakos* court applied a totality-of-the-circumstances test to determine whether the debtors had received reasonably equivalent value.[141]

The court first considered whether the parties had conducted the transactions at arm's-length.[142] The court found that the transactions at issue—the bets placed by the debtors—did appear to be arm's-length, noting that no evidence had been offered to suggest that they were made under compulsion or duress.[143] The court next considered whether the debtors had received value.[144] It found that the debtors had received value because the debtors had the chance to win more money than they wagered.[145] There was value in that opportunity.[146] In addition, the court found that the debtors "also received whatever psychic and other intangible values are attendant to being at Flamingo's establishment and gambling,"[147] making it clear that, in the court's view, "value" for purposes of reasonably equivalent value does not mean the debtor must have received something tangible and leviable in exchange.[148] Finally, the court considered whether good faith existed in the

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137. *In re Chomakos*, 170 B.R. at 585.

138. *Id.* at 587.

139. *Id.* at 589–90.

140. *Id.* at 592–93.

141. Some courts have held that the totality-of-the-circumstances test is the test for value that courts should apply in all circumstances involving the purchase by consumers of services or intangible or consumable goods. *See, e.g.*, *In re* Grigonis, 208 B.R. 950, 955–56 (Bankr. D. Mont. 1997) (citation omitted) (stating that consideration that is immediately and completely consumed, such as a service, has "a liquidation or 'second-hand' value of zero" and "by definition, always results in asset depletion," but it is "nonsense" to conclude that such transfers are fraudulent merely because "transfers of funds to secure such enjoyments can by definition be of no value" from the viewpoint of creditors).

142. *In re Chomakos*, 170 B.R. at 593.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 593–94; *see also* DAVID G. EPSTEIN ET AL., BANKRUPTCY 375 (1993) ("[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.").

subject transactions.[149] In considering this factor, the court examined whether the transferee, the casino, had acted in good faith in receiving the transfers.[150] The court concluded that the casino had acted in good faith, observing that there was no proof that the casino had knowledge of the debtors' precarious financial situation.[151] The court also observed that the transfers the casino received "w[ere] not measurably beyond the consequences of [the] [d]ebtors' natural relationship with Flamingo nor did Flamingo receive or obtain some greater advantage for itself, above and beyond that which naturally results from that relationship."[152] With respect to its interaction with the debtors, the Flamingo was simply "acting in its customary way consistent with the business it was in."[153] The court suggested that, under certain circumstances, a casino might be said to be acting in bad faith in taking bets, observing that, in the case before the court "[t]here [wa]s insufficient evidence that the [d]ebtors['] gambling activities involved such amounts or were engaged in with such frequency as would support a conclusion that Flamingo was acting in bad faith."[154]

B. Transactions Undertaken on Behalf of a Non-Debtor Third Party

Transactions in which a debtor transfers an asset to another, or incurs an obligation in favor of another, in exchange for a benefit that is received by a third party is yet another type of transaction that has faced considerable challenges under the traditional paradigm of fraudulent transfer law. These transactions are susceptible to a constructive fraud challenge because the debtor often receives no direct benefit from the transaction—thus the debtor, arguably, does not receive reasonably equivalent value.[155] A common example of such a transaction is the intercorporate guaranty.[156]

A guaranty is an agreement by a party to repay the debt of another.[157] There are three common structures for intercorporate guaranties.[158] These

149. *In re Chomakos*, 170 B.R. at 593–94.

150. *Id.*

151. *Id.*

152. *Id.* at 595.

153. *Id.*

154. *Id.*

155. 39 CAUSES OF ACTION 2D 1 *Cause of Action in Bankruptcy Case for Avoidance of Prepetition Fraudulent Transfer or Obligation Under 11 U.S.C.A. § 548(a)(1)(B)* § 8, Westlaw (database updated Nov. 2019).

156. For a detailed discussion of the problem of the application of constructively fraudulent transfer law to intercorporate guarantees, see Williams, *Fallacies*, *supra* note 48, at 1417.

157. *Id.*

158. *Id.* at 1419.

structures include the downstream guaranty, the upstream guaranty, and the cross-stream guaranty.[159]

In a downstream guaranty, a parent entity guarantees an obligation of its subsidiary.[160] A downstream guaranty does not generally raise fraudulent transfer concerns.[161] Because the parent company that acts as the guarantor owns some or all of the stock of the subsidiary-borrower, the benefits of the transaction that the borrower receives should flow to the parent-guarantor through its stock ownership in the borrower.[162] A loan to the subsidiary should strengthen the subsidiary's operations and increase the value of the stock in the subsidiary.[163] As a result, the debtor-guarantor receives value in a downstream guaranty sufficient to satisfy the benefits-to-the-creditor requirement.[164]

Both the upstream guaranty and the cross-stream guaranty, however, have faced challenges under traditional fraudulent transfer jurisprudence. In an upstream guaranty, a subsidiary guarantees the debt of its parent company.[165] In a cross-stream guaranty, one subsidiary guarantees an obligation owed by another subsidiary.[166] Parties often use a cross-stream guaranty when a common parent entity owns the two subsidiaries.[167] In addition, the business operations of the two subsidiaries are often intertwined.[168]

In transactions involving either upstream or cross-stream guaranty transactions, the guarantor generally does not receive any of the loan proceeds from the lender.[169] Rather, the borrower entity receives those

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159. *Id.*

160. *Id.*

161. *Id.*

162. *See* Brown Publ'g Co. Liquidating Trust v. Hudson Printing Co. (*In re* Brown Publ'g Co.), Ch. 11 Case No. 8-10-73295, Adv. No. 8-12-08173, 2014 WL 1338102, at *6 (Bankr. E.D.N.Y. Apr. 3, 2014) ("[M]ost transfers made by parents to or on behalf of subsidiaries result in at least some benefit to the parent . . . ."); Lawrence Paperboard Corp. v. Arlington Trust Co. (*In re* Lawrence Paperboard Corp.), 76 B.R. 866, 871 (Bankr. D. Mass. 1987) (finding that the parent received reasonably equivalent value for downstream guaranties through its ownership of stock in the subsidiary); *accord* Kenneth J. Carl, *Fraudulent Transfer Attacks on Guaranties in Bankruptcy*, 60 AM. BANKR. L.J. 109, 115 (1986).

163. Williams, *Fallacies*, *supra* note 48, at 1419.

164. *See id.* (implying that the parent's improved financial condition satisfies the benefits-to-the-creditor requirement).

165. 3V Capital Master Fund Ltd. v. Official Comm. of Unsecured Creditors of TOUSA, Inc. (*In re* TOUSA, Inc.), 444 B.R. 613, 659 (S.D. Fla. 2011), *aff'd in part, rev'd in part*, 680 F.3d 1298 (11th Cir. 2012).

166. Williams, *Fallacies*, *supra* note 48, at 1420.

167. *Id.*

168. *Id.*

169. Carl, *supra* note 162, at 115.

proceeds.[170] Further, because the guarantor does not own the stock in the borrower entity, the guarantor does not clearly benefit from the transaction in the way that the parent-guarantor in a downstream guaranty transaction benefits from a loan made to its subsidiary.[171] As such, both the upstream guaranty and the cross-stream guaranty transactions would fail the value requirement when viewed through the traditional benefits-to-the-creditor lens.[172] Rather than finding all such obligations to be void as constructively fraudulent, however, some courts have developed doctrines such as the *indirect-benefits* and *identity-of-interests* doctrines to analyze the value in these transactions and uphold the guaranty obligation.[173]

Under the indirect-benefits doctrine, a court may find that the debtor received reasonably equivalent value in exchange for a transfer even when the value the debtor receives does not come directly from the third party to which the debtor made the transfer.[174] Though the indirect-benefits doctrine provides significant flexibility as compared to the traditional test, which requires an immediate benefit to the debtor from the transferee, it is not without its limitations. Generally, for a court to recognize an indirect benefit the debtor receives, it must be "fairly concrete."[175] Further, courts have applied the doctrine inconsistently, resulting in no clear understanding of exactly the type of indirect benefits a court might perceive as providing

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170. *Cf.* Williams, *Fallacies*, *supra* note 48, at 1419 (noting that, because it owns stock in its subsidiary, a parent company making a guaranty on behalf of its subsidiary benefits from the proceeds of the subsidiary's loan).

171. *Cf. id.* at 1419–20 (explaining that a downstream guarantor (i.e., a corporate parent) receives a direct benefit through enhanced stock value, whereas upstream and cross-stream guarantors (i.e., subsidiaries and affiliates) receive only the diffuse and indirect benefit of improved creditworthiness in the corporate family).

172. *See* 3V Capital Master Fund Ltd. v. Official Comm. of Unsecured Creditors of TOUSA, Inc. (*In re* TOUSA, Inc.), 444 B.R. 613, 655–56 (S.D. Fla. 2011) (reasoning that the benefit-to-the-creditor requirement is inconsistent with financing options like the cross-stream guaranty), *aff'd in part, rev'd in part*, 680 F.3d 1298 (11th Cir. 2012); *see, e.g.*, Meeks v. Don Howard Charitable Remainder Trust (*In re* S. Health Care of Ark., Inc.), 309 B.R. 314, 320 (B.A.P. 8th Cir. 2004) (finding no reasonably equivalent benefit to debtor for paying non-debtor's mortgage expenses); Braunstein v. Walsh (*In re* Rowanoak Corp.), 344 F.3d 126, 132–33 (1st Cir. 2003) (finding no reasonably equivalent benefit for a corporate debtor who paid off purported loans from its principal's mother); Leonard v. Mountainwest Fin. Corp. (*In re* Whaley), 229 B.R. 767, 775 (Bankr. D. Minn. 1999) (finding no reasonably equivalent benefit for paying live-in-companion's credit-card expenses).

173. Williams, *Fallacies*, *supra* note 48, at 1426.

174. *See* Leibowitz v. Parkway Bank & Trust Co. (*In re* Image Worldwide, Ltd.), 139 F.3d 574, 578 (7th Cir. 1998) (discussing the origin and application of the indirect-benefits doctrine).

175. *Id.* (quoting Heritage Bank Tinley Park v. Steinberg (*In re* Grabill Corp.), 121 B.R. 983, 995 (Bankr. N.D. Ill. 1990). Once the plaintiff demonstrates that the purported benefit received by the debtor passed through a third party, many courts place the burden on the defendant to demonstrate that the benefit to the debtor was concrete and reasonably identifiable. *See, e.g.*, *In re Image Worldwide*, 139 F.3d at 579–80 (faulting the defendant for failing to demonstrate reasonably equivalent value).

sufficient "value."[176] In some instances, courts have found an asserted indirect benefit to be insufficient because it was not, according to the court, sufficiently quantified.[177] In other instances, however, courts have recognized less tangible indirect benefits, such as enhanced ability to obtain credit,[178] "strengthen[ing] the viability of the corporate group,"[179] and corporate goodwill.[180] Because the courts have not clearly delineated the appropriate limits of the indirect-benefits doctrine, it does not provide a viable approach for efficiently and reliably addressing instances in which debtor-parents pay educational expenses on behalf of their adult children.

Under the identity-of-interests doctrine, a court might find that the debtor has received reasonably equivalent value "where the debtor and the third party [the party who directly received the benefit of the subject transaction] are so related or situated that they share an identity of interests because what benefits one will, in such case, benefit the other to some degree."[181] In determining whether this doctrine should apply to a given situation, some courts consider whether a corporate group has purposely availed itself of the benefits of operating as an enterprise such that the court should treat it as one borrowing unit, even though each member of the enterprise is a separate legal entity under applicable state law.[182] Similarly, the creditors of the corporate group often benefited from the group

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176. For a discussion of the inconsistency and confusion surrounding the implementation of the indirect-benefits doctrine, see Williams, *Fallacies*, *supra* note 48.

177. *See, e.g.*, Leibowitz v. Parkway Bank & Trust Co., 210 B.R. 298, 302 (Bankr. N.D. Ill. 1997) (finding the fact "that Debtor was permitted to 'continue in business'" insufficient, because "such consideration does not constitute 'reasonably equivalent value' for purposes of fraudulent transfer law").

178. Creditors' Comm. of Jumer's, Castle Lodge, Inc. v. Jumer (*In re* Jumer's Castle Lodge, Inc.), 338 B.R. 344, 354 (Bankr. C.D. Ill. 2006), *aff'd*, 472 F.3d 943 (7th Cir. 2007).

179. *See, e.g.*, *In re Image Worldwide*, 139 F.3d at 581; *see also* Mellon Bank, N.A. v. Metro Commc'ns, Inc., 945 F.2d 635, 647 (3d Cir. 1991) (finding value in the strength gained by a business that associated with a complementary business).

180. *See, e.g.*, Consove v. Cohen (*In re* Roco Corp.), 701 F.2d 978, 983–84 (1st Cir. 1983) (working from the idea that goodwill can have value in the fraudulent transfer analysis); Colfax, Inc. v. D'Agostino (*In re* J.K. Chems., Inc.), 7 B.R. 897, 898 (Bankr. D.R.I. 1981) (asserting that the debtor may have received value in the form of goodwill); *see also In re Jumer's Castle Lodge*, 338 B.R. at 354 (citing *In re Image Worldwide*, 139 F.3d at 578–79) ("'[I]ndirect benefits' constitute 'value' and can include a wide range of intangibles such as: a corporation's goodwill or increased ability to borrow working capital; the general relationship between affiliates or 'synergy' within a corporate group as a whole; and a corporation's ability to retain an important source of supply or an important customer.").

181. Reinbold v. Morton Cmty. Bank (*In re* Mid-Illini Hardwoods, LLC), 576 B.R. 598, 607 (Bankr. C.D. Ill. 2017) (citing *In re* Pembroke Dev. Corp., 124 B.R. 398, 400 (Bankr. S.D. Fla. 1991)).

182. *See, e.g.*, Tryit Enters. v. Gen. Elec. Capital Corp. (*In re* Tryit Enters.), 121 B.R. 217, 222 (Bankr. S.D. Tex. 1990) (considering the issue of whether to treat a corporate group as a single borrowing unit); *In re* Augie/Restivo Baking Co., 87 B.R. 242, 247 (Bankr. E.D.N.Y. 1988) (treating two corporations as a single borrowing unit).

functioning as a single enterprise.[183] Some courts have determined that, under the identity-of-interests doctrine, where the debtor receives an indirect benefit because it is part of a common enterprise, that type of economic benefit can be reasonably equivalent value based on the theory that the guaranty strengthens the corporate group.[184] Thus, in the commercial context, some courts have recognized that the courts may treat some entities as a single corporate enterprise under fraudulent transfer law, even when they are separate legal entities under applicable state law.[185]

The identity-of-interests approach to analyzing the reasonably equivalent value requirement provides further flexibility as compared to the indirect-benefits doctrine because it permits the recognition of value that accrues to the corporate group as a whole. Significantly, given the interconnected nature of the entities being subjected to scrutiny, the fact that the subject transactions occurred would probably not come as a surprise to the creditors.[186] Still, as with the indirect-benefits doctrine, this approach is plagued with inconsistency in application, leaving no clear understanding of the type of value the doctrine will recognize as sufficient to defend against claims of constructive fraud.

C. Summary Observations

Courts often shift the focus of the value inquiry away from the benefits-to-the-creditor test when a given situation does not fit the traditional paradigm of a fraudulent transfer.[187] This change in focus demonstrates that the *purpose* of the reasonably-equivalent-value requirement is not the

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183. *See, e.g.*, *Mellon Bank*, 945 F.2d at 647 (finding that the companies gained strength and profits by associating with one another).

184. *See, e.g.*, Nordberg v. Arab Banking Corp. (*In re* Chase & Sanborn Corp.), 904 F.2d 588, 594 (11th Cir. 1990) (holding that the Chapter 11 debtor received reasonably equivalent value for its guaranty of owner's loan which was totally secured and co-guaranteed by other entities); *In re* Xonics Photochemical, Inc., 841 F.2d 198, 201 (7th Cir. 1988) (holding that, where affiliates operate as a common enterprise and have intertwined financial affairs, a guaranty of one affiliate's debts by the other provides benefit and is for reasonably equivalent value); Sarachek v. Wahls (*In re* Agriprocessors, Inc.,) 490 B.R. 374, 382 (Bankr. N.D. Iowa 2013) (holding that the debtor's issuance of checks as remuneration for labor that benefited the affiliate entity constituted reasonably equivalent value); Memory v. Alfa Mut. Fire Ins. Co. (*In re* Martin), 205 B.R. 646, 648 (Bankr. M.D. Ala. 1993) (holding that the debtor received reasonably equivalent value from its payment to the creditor on a note executed by a corporation of which the debtor was the sole shareholder and, thus, the payment was not fraudulent conveyance, where the debtor guaranteed the corporation's loan), *aff'd*, 184 B.R. 985 (M.D. Ala. 1995), *aff'd*, 101 F.3d 708 (11th Cir. 1996).

185. *In re Tryit Enters*., 121 B.R. at 223–24.

186. *See supra* text accompanying notes 107–12 (explaining that creditors expect debtors to carry on with business as usual and that fraudulent transfer law protects this expectation).

187. *See supra* note 99 and accompanying text.

preservation of value for the debtor's unsecured creditors, although it may be the *effect* when a given transfer is voided as constructively fraudulent. As illustrated, the diminution of the debtor's estate under certain scenarios is acceptable.[188] Instead, the unifying purpose of the value requirement is to protect creditors from the *unjust* diminution of the debtor's estate.[189] With this understanding, the question then becomes: what makes the diminution of a debtor's estate "unjust" for purposes of fraudulent transfer law? Considering the historical roots of fraudulent transfer law and the doctrines that have developed to refocus and narrow the scope of constructive fraud, unjust diminution to the debtor's estate "means that the diminution, that is, the damage to creditors, arises from a transaction or event outside the ordinary course of affairs of a debtor—an unexpected harm."[190] This ordinary course reading of reasonably equivalent value strives to protect the expectations of the creditors as they existed when the creditors chose to enter into a legal relationship with the debtor.[191] It also strives to protect innocent third-party transferees that may have no reason to suspect that the debtor (the transferor from the perspective of the third party) is in a financially precarious position.[192] This understanding of the value requirement lends stability to market transactions, leaving third parties freer to engage in ordinary course transactions with potential debtors.

III. THE FUNCTION OF CONSUMER BANKRUPTCY

A. Introduction to Consumer Bankruptcy

To fully appreciate the challenge of certain payments made by the debtor as constructively fraudulent, it is critical to understand the basic mechanics and functions of consumer bankruptcy. Each year, hundreds of thousands of individuals seek bankruptcy protection in the United States.[193] Subject to certain restrictions, individuals may seek bankruptcy relief under various chapters of the Bankruptcy Code.[194] Individuals generally file for bankruptcy under either Chapter 13,[195] known as individual reorganization or debt

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188. *See supra* Part II.A–B (offering property-for-services transactions, failed investments, and intercorporate guaranties as examples).

189. Williams, *Fallacies*, *supra* note 48, at 1424–38.

190. *Id.* at 1424.

191. *Id.* at 1416.

192. *Id.* at 1417 n.52.

193. For example, in the 12 months prior to June 30, 2018, there were 753,333 nonbusiness bankruptcy filings in the United States. ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, tbl.F-2 (2018), https://www.uscourts.gov/sites/default/files/bf_f2_0630.2018.pdf.

194. *See* 11 U.S.C. § 109(b), (d), (e) (2018).

195. 11 U.S.C. §§ 1301–30.

adjustment bankruptcy, or under Chapter 7,[196] known as liquidation bankruptcy.[197] Bankruptcy under Chapter 7 is the most common type of bankruptcy protection sought.[198]

In a Chapter 13 bankruptcy case, the debtor is obligated to commit a portion of the debtor's future income to paying some or all the debtor's debts over a period of time.[199] That period of time is typically three to five years in length.[200] In exchange, the debtor is permitted to keep assets that the debtor might otherwise lose to creditors in bankruptcy under Chapter 7, such as a home or other valuable assets.[201] In contrast, a Chapter 7 bankruptcy case does not require the debtor to commit future income to the payment of debts.[202] Instead, a Chapter 7 trustee is appointed.[203] The trustee is charged with marshalling the debtor's assets, to the extent those assets are not protected from liquidation by an exemption.[204] The trustee liquidates these nonexempt assets.[205] The trustee then uses the proceeds from the sale of such assets to pay the debtor's debts, to the extent possible, in accordance with the priority provisions of the Bankruptcy Code.[206] General unsecured creditors, the creditors on the lowest rung of the priority ladder, often receive nothing or pennies on the dollar in Chapter 7 cases.[207] Aside from a few narrowly defined exceptions,[208] debts that the trustee is unable to pay with proceeds from the liquidation of the debtor's non-exempt assets are discharged and the debtor is no longer liable for them.[209]

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196. 11 U.S.C. §§ 701–84.

197. Of the 753,333 nonbusiness bankruptcy filings in the 12 months prior to June 30, 2018, Chapter 7 and Chapter 13 accounted for 99.9% of all such filings. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 193, tbl.F-2.

198. Of the 753,333 nonbusiness bankruptcy filings in the 12 months prior to June 30, 2018, 61.8% of those cases were filed under Chapter 7. *Id.*

199. 11 U.S.C. § 1322(a)(1).

200. 11 U.S.C. § 1322(a)(1)(d).

201. 11 U.S.C. § 1322(b).

202. Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 140 (2005).

203. 11 U.S.C. § 701.

204. 11 U.S.C. § 704. The Bankruptcy Code allows a debtor to protect from the collection efforts of creditors some or all of the debtor's equity in certain property. 11 U.S.C. § 522(b)(1). The amount the debtor is allowed to protect varies, depending on the state in which the debtor resides. 11 U.S.C. § 522.

205. *In re* Farmer, 295 B.R. 322, 323 (Bankr. W.D. Wis. 2003) (outlining the role of the Chapter 7 bankruptcy trustee).

206. 11 U.S.C. § 704.

207. James B. McLaughlin, Jr. & Robert W. Nelms, *Classification of Unsecured Claims in Chapter 13 of the Bankruptcy Reform Act of 1978: What is Fair?*, 7 CAMPBELL L. REV 329, 344 (1985).

208. 11 U.S.C. § 523 (identifying exceptions to discharge).

209. 11 U.S.C. § 727(b).

B. Screening and Sorting—Eligibility for a Consumer Debtor Bankruptcy

The Bankruptcy Code contains various requirements and restrictions that serve to either sort a debtor into a particular Chapter of the Bankruptcy Code or screen a potential debtor out of obtaining bankruptcy relief altogether. As noted, most individuals file petitions for relief under either Chapter 7 or Chapter 13.[210] Whether an individual seeks protection under Chapter 7 or Chapter 13, the individual must face an analysis bankruptcy professionals refer to as the *means test*.[211]

The means test provides a method of analyzing the debtor's financial circumstances and determining the debtor's ability to repay debt.[212] If the means test calculation determines that the debtor has the ability to repay a portion of the debtor's debts, the debtor will be unable to obtain relief under Chapter 7.[213] In order to obtain a discharge of some of the debtor's debts in bankruptcy, this debtor would likely file bankruptcy under Chapter 13.[214] Under Chapter 13, the debtor would be required to repay that portion of the debtor's debt that it is determined the debtor is financially able to pay.[215] As one Senator explained when the legislature enacted the means test:

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210. *See supra* notes 195–97 and accompanying text. Generally, an individual may be eligible for bankruptcy relief under Chapter 7, 11, 12, or 13 of the Bankruptcy Code. As an initial matter, § 109 of the Bankruptcy Code—entitled "Who may be a debtor"—specifies who qualifies to be a debtor under each of the various Chapters of the Bankruptcy Code. 11 U.S.C. § 109. Chapter 12 is limited to debtors who qualify as family farmers or family fisherman, resulting in few petitions each year being filed under Chapter 12 of the Code. In 2017, only 501 bankruptcy petitions were filed under Chapter 12 of the Bankruptcy Code. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 193, tbl.F-5A, https://www.uscourts.gov/sites/default/files/data_tables/bf_f5a_1231.2017.pdf. The 472,190 nonbusiness cases that were filed under Chapter 7 in 2017 dwarfs this number. *Id.* Similarly, comparatively speaking, few individuals seek bankruptcy protection under Chapter 11 of the Bankruptcy Code, perhaps because, as compared to Chapter 13, the Chapter 11 process is costlier and may be more difficult to navigate. *See* Craig A. Gargotta, *Death, Taxes and the Bankruptcy Reform Act of 1994,* 13 AM. BANKR. INST. J. 10, 10 (1995) (explaining that Chapter 11 cases generally involve larger filing and attorneys' fees and more extensive disclosure than Chapter 13 cases). In 2017, 7,442 petitions were filed under Chapter 11. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 193, tbl.F-5A. It is likely that individuals only filed a small percentage of these cases. Richard M. Hynes, Anne Lawton & Margaret Howard, *National Study of Individual Chapter 11 Bankruptcies*, 25 AM. BANKR. INST. L. REV. 61 *passim* (2017).

211. The means test is perhaps the most widely discussed of the numerous changes to the Bankruptcy Code that were brought about by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, 33 (codified as amended in scattered sections of 11 U.S.C.).

212. 151 CONG. REC. 3037 (2015) (statement of Sen. Grassley).

213. *Id.*

214. *Id.*

215. *See* Matthew Showel, *Calculating Projected Disposable Income of an Above-Median Chapter 13 Debtor*, 21 LOY. CONSUMER L. REV. 407, 409 (2009) (explaining that Congress intended that Chapter 13 bankruptcy would force debtors to commit to repaying their debts with whatever disposable income they had available).

> If repayment is possible, then he or she will be channeled into chapter 13 of the Bankruptcy Code which requires people to repay a portion of their debt as a precondition for limited debt cancellation. . . .
>
> This bill does this by providing for a means-tested way of steering people . . . who can repay a portion of their debts, away from chapter 7 bankruptcy.[216]

A central component to evaluating the financial wherewithal of the individual debtor is the concept of the debtor's *household*.[217] A threshold determination in an individual's bankruptcy case is whether the debtor is categorized as an above-median-income debtor or a below-median-income debtor.[218] To determine whether a debtor is an above-median-income debtor or a below-median-income debtor, one compares the debtor's annualized "current monthly income"[219] to the "median family income"[220] in the debtor's state of residence for a family of the same size as the debtor's household. The answer to this critical question impacts several key issues for the individual debtor.[221]

The income of the debtor under the means test calculation includes, among other amounts, amounts paid by a third party "on a regular basis" for the household expenses of the debtor or the debtor's dependents.[222] The amounts include "payments from roommate, partner, parent, or relative, regardless of whether living with [the] debtor"[223] and "payments made directly to creditors on behalf of [the] debtor, e.g., rent, car, or insurance."[224]

When a debtor has income that is below the median family income when compared to other households of comparable size in the debtor's state, the

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216. 151 CONG. REC. 3037 (2015) (statement of Sen. Grassley). Whether and to what extent the means test accomplishes its stated purpose is the subject of much discussion. Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 231 (2006).

217. An analysis of the debtor's financial circumstances as a member of a household is central to both Chapter 7 and Chapter 13 bankruptcy. With respect to Chapter 7 bankruptcy, see 11 U.S.C. § 707(b) (2018). With respect to Chapter 13 bankruptcy, see 11 U.S.C. § 1325(b).

218. *See infra* text accompanying notes 225–35 (explaining that debtors with below-median income can more easily access Chapter 7 bankruptcy than debtors with above-median income).

219. 11 U.S.C. § 101(10A) (defining "current monthly income").

220. The "median family income" is determined by using Census Bureau data, adjusted annually to reflect the change in the Consumer Price Index. 11 U.S.C. § 101(39A).

221. *See, e.g.*, *infra* text accompanying notes 229–35, 244–46 (explaining that a debtor's income factors in determining whether and for how long the debtor must commit future earnings to paying back creditors).

222. 11 U.S.C. § 101(10A)(B).

223. U.S. DEP'T. OF JUSTICE TRUSTEE PROGRAM, STATEMENT OF THE U.S. TRUSTEE PROGRAM'S POSITION ON LEGAL ISSUES ARISING UNDER THE CHAPTER 7 MEANS TEST 2 (2010), https://www.justice.gov/sites/default/files/ust/legacy/2015/03/03/ch7_line_by_line.pdf.

224. *Id.*

analysis under the means test stops.[225] In such circumstances, the debtor is deemed to have satisfied the means test.[226] Satisfaction of the means test means that a presumption that the debtor's Chapter 7 filing is abusive does not arise and the debtor will not be barred from obtaining relief under Chapter 7 on this basis.[227] In addition, in such a debtor's bankruptcy case, only judges, U.S. trustees, and bankruptcy administrators will have standing to challenge the debtor's Chapter 7 filing as abusive on other grounds—individual creditors of the debtor will not have standing.[228]

In contrast, if a debtor is determined to have income that is above the median family income when compared to other households of comparable size in the debtor's state, the debtor will be required to complete the entirety of the means test calculations.[229] These calculations require an analysis of detailed and extensive income and expense information.[230] This calculation determines whether and to what extent the debtor has *disposable income*.[231]

Upon completion of this analysis, if the debtor's calculated disposable income is above the specified permissible threshold, then the debtor's Chapter 7 bankruptcy filing is presumptively deemed to be abusive.[232] This presumption of abuse can be "rebutted," but only by showing the requisite "special circumstances."[233] In most instances, a debtor with disposable income that is above the permissible amount for a household the size of the debtor's household will be unable to obtain bankruptcy relief under Chapter 7.[234] When a debtor is unable to seek relief under Chapter 7, the debtor is generally faced with a choice: either make do without obtaining relief in bankruptcy or seek relief under Chapter 13, thus making it necessary for the

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225. 11 U.S.C. § 707(b)(2).

226. 11 U.S.C. § 707(b)(2).

227. *See* 11 U.S.C. § 707(b)(7)(A) (specifying that no one may file a motion to dismiss the bankruptcy case if the debtor's monthly income is below the median).

228. 11 U.S.C. § 707(b)(6). Even in circumstances in which a debtor passes the means test because that debtor is determined to have income below the median income in the debtor's state, the debtor's Chapter 7 filing might nonetheless be attacked as abusive under § 707(b)(3) as a bad faith filing, or as abusive under the "totality of the circumstances." 11 U.S.C. § 707(b)(3)(B). Under § 707(b)(3), courts have broad discretion to find that debtor's filing to be abusive. 11 U.S.C. § 707(b)(3).

229. 11 U.S.C. § 707(b)(2).

230. *See, e.g.*, 11 U.S.C. § 707(b)(2)(A)(ii)(I)–(V) (providing detailed parameters for calculating the debtor's expenses).

231. 11 U.S.C. § 707(b)(2)(A)(i). *See* Chelsey W. Tulis, *Get Real: Reframing the Debate over How to Calculate Projected Disposable Income in § 1325(b)*, 83 AM. BANKR. L.J. 345, 353 n.57 (2009) (explaining that § 707(b)(2)(A)(i) is designed to calculate the amount of disposable income the debtor would have over the course of five years—five years being the amount of time an above-median-income debtor must make payments on their debt under Chapter 13).

232. *See* 11 U.S.C. § 707(b)(2)(A)(i) (setting up the presumption of abuse).

233. 11 U.S.C. § 707(b)(2)(B)(i).

234. *See* 11 U.S.C. § 707(b)(1) (authorizing the court to dismiss a Chapter 7 bankruptcy case which the court finds to be abusive of the Chapter 7 process).

debtor to commit certain future earnings toward paying back the debtor's creditors, to the extent required under the Bankruptcy Code.[235]

The size of the debtor's household and its impact on the means test calculations also plays a critical role in a debtor's case under Chapter 13. If a debtor files under Chapter 13, the debtor's Chapter 13 plan must provide that all the debtor's "projected disposable income" that will be received by the debtor "in the applicable commitment period" will be used to make payments to the debtor's unsecured creditors.[236] "Disposable income" is defined as "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor."[237] The means by which the "[a]mounts reasonably necessary to be expended" are calculated differ significantly, depending on whether a debtor is determined to have income that is below or above the median family income when compared to other households of comparable size in the debtor's state.[238] For a debtor with income that is below the median family income, the calculation uses the debtor's actual expenses.[239] For a debtor with income that is above the applicable median family income, the debtor is required to use Internal Revenue Service (IRS) standardized expenses in deducting most of the

235. Feibelman, *supra* note 202, at 140.

236. 11 U.S.C. § 1325(b)(1)(B).

237. 11 U.S.C. § 1325(b)(2). The Bankruptcy Code does not define the term "dependent."

238. 11 U.S.C. § 1325(b)(3).

239. 11 U.S.C. § 1325(b)(3). Both before and after the enactment of the BAPCPA, courts have struggled with the question of whether debtors in bankruptcy should be permitted to pay the college tuition and expenses of their children who are 18 or older, rather than directing those funds to the payment of creditors. *See In re* Goins, 372 B.R. 824, 826 (Bankr. D.S.C. 2007) (discussing this issue as it existed both before and after the BAPCPA); *see also* Dominick Capotosto, *Educational Expense Deductions from the Chapter 13 Plan: Creating a "Reasonably Necessary" Standard*, 29 EMORY BANKR. DEV. J. 195 (2012). Following the enactment of the BAPCPA, some courts have held that the question of whether debtor parents in bankruptcy may pay the educational expenses of their adult-age children to be settled in the negative. The *Goins* court provides a clear discussion of this view. *In re Goins*, 372 B.R. at 827. It looked to § 707(b)(2)(A)(ii)(IV), which specifically allows a means test deduction of the reasonable and necessary "actual expenses for each dependent child less than 18 years of age, not to exceed $1,500 per year per child, to attend a private or public elementary or secondary school." *Id.* at 826 (quoting 11 U.S.C. § 707(b)(2)(A)(ii)(IV)). The *Goins* court reasoned that by expressly including a deduction for pre-college students under the age of 18, Congress specifically excluded educational expenses for students over the age of 18 from being a "reasonable and necessary" expense the debtor parent would be permitted to deduct from the income that would be paid to creditors. *In re Goins*, 372 B.R. at 826–27. The resolution of this question is beyond the scope of this Article. It bears noting, however, that the question of whether a debtor-parent should be permitted to expressly choose, through the debtor's bankruptcy repayment plan, to pay the educational expenses of the debtor's adult child while, at the same time, seeking a discharge of debts in bankruptcy, and also likely retaining non-exempt assets, is distinct from the question of whether such payments made prior to the debtor's bankruptcy filing in exchange for an education already provided to the debtor's child should be subject to clawback by the trustee.

debtor's expenses.[240] The amount of these standardized IRS expenses depend on the size of the debtor's family.[241] These standardized expenses may or may not adequately account for the actual expenses of the debtor.[242] The above-median income debtor may also deduct from the debtor's income "the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service . . . for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent."[243]

Whether the Chapter 13 debtor is a debtor with above median income also impacts the length of time during which the debtor must commit the debtor's future income to repaying the debtor's creditors. The "applicable commitment period," addressed in § 1325(b)(4) of the Bankruptcy Code, is the period of time the debtor is required to commit future income to the debtor's repayment plan.[244] For a debtor with income below the applicable median income level, the applicable commitment period is three years.[245] For a debtor with income equal to or greater than the median income of comparably sized households in the debtor's state, the applicable commitment period must be five years.[246]

Even though the size of the debtor's household is a critical component to analyzing the debtor's financial wherewithal in bankruptcy and determining how much, if anything, the debtor will be required to pay to the debtor's unsecured creditors, the term "household" is not defined in the Code.[247] In response, courts have developed various approaches to determine a debtor's household size.[248] Most courts to consider the issue have adopted a variation of an approach known as the *economic-unit approach*.[249]

Under the economic unit approach, the court considers "the financial interdependence of individuals to determine whether someone is an economic part of the debtor's household"[250] and includes in the debtor's "household" individuals who "directly impact the debtor's financial

240. 11 U.S.C. § 1325(b)(3) (referring to subparagraphs (A) and (B) of § 707(b)(2)).

241. 11 U.S.C. § 1325(b)(3)(A)–(C) (specifying different expense formulas for one-person households, two-to-four-person households, and households of more than four people).

242. *See* 11 U.S.C. § 707(b)(2)(A)(ii)(I) (limiting each category of expenses to an amount which is objectively necessary).

243. 11 U.S.C. § 707(b)(2)(A)(ii)(I).

244. Capotosto, *supra* note 239, at 205 n.62.

245. 11 U.S.C. § 1325(b)(4)(A)(i).

246. 11 U.S.C. § 1325(b)(4)(A)(ii).

247. Johnson v. Zimmer, 686 F.3d 224, 226 (4th Cir. 2012).

248. *Id.* (identifying three such approaches).

249. *In re* Thomas, No. 17-03558, 2018 Bankr. LEXIS 2380, at *12 (Bankr. S.D. Miss. Mar. 22, 2018) (citing *Johnson*, 686 F.3d at 224).

250. *Johnson*, 686 F.3d at 237.

situation."[251] Under this approach, a household includes "individuals who are financially dependent on a debtor, individuals who financially support a debtor, and individuals whose income or expenses are intermingled or interdependent with a debtor."[252] Thus, the economic unit approach attempts to "measure[] the size of the debtor's household by the number of individuals in the home who act as a single economic unit."[253] In adopting this approach, one court explained, "the entire purpose of identifying a debtor's household size is to use that number to determine [the debtor's] financial obligations and ability to pay. A definition of 'household' that is also tailored to reflect a debtor's financial situation focuses directly upon the ultimate purpose of the Code."[254]

Another approach utilized by some courts to determine the number of individuals in the debtor's household is the *heads-on-beds* approach.[255] This approach utilizes the United States Census Bureau definition of "all of the people, related and unrelated, who occupy a housing unit."[256] A third approach to defining the debtor's household that fewer courts have adopted is known as the IRS dependents approach.[257] This approach relies on the "Internal Revenue Manual ('IRM') which states that the number of household members allowed for purposes of determining the applicable National Standards should generally be the same as those allowed as dependents on the taxpayer's tax returns."[258]

Regardless of the approach utilized by the courts to define "household" for purposes of determining the number of individuals in the debtor's household, one point remains clear—central to the relief provided to consumers under the Bankruptcy Code is the understanding that the debtor's economic life does not exist in isolation, void of any connectedness to others.[259] Rather, as the Code recognizes, the debtor's financial wherewithal

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251. *Id.*

252. Fraleigh v. Fraleigh (*In re* Fraleigh), 474 B.R. 96, 101 (Bankr. S.D.N.Y. 2012) (quoting *In re* Morrison, 443 B.R. 378, 396 (Bankr. M.D.N.C. 2011)).

253. *In re* Robinson, 449 B.R. 473, 479 (Bankr. E.D. Va. 2011).

254. *Johnson*, 686 F.3d at 237; *see also In re* Skiles, 504 B.R. 871, 879 (Bankr. N.D. Ohio 2014) (citing *Johnson*, 686 F.3d at 237) ("Courts adopting the 'economic unit' definition do so because they believe it most closely aligns with the purpose of the Code, while also comporting with the statutory text.").

255. *See, e.g.*, *In re* Ellringer, 370 B.R. 905, 910–11 (Bankr. D. Minn. 2007) (explaining the heads-on-beds approach to defining a "household").

256. *Id.* at 911.

257. *See In re Robinson*, 449 B.R. at 479 (citing opinions applying the IRS dependents approach).

258. *In re* Jewell, 365 B.R. 796, 800 (Bankr. S.D. Ohio 2007); *see also In re Robinson*, 449 B.R. at 480 (discussing shortcomings of the IRS dependents approach).

259. *See In re Skiles*, 504 B.R. at 879–81 (Bankr. N.D. Ohio 2014) (quoting *Johnson*, 686 F.3d at 237) ("[T]he entire purpose of identifying a debtor's household size is to use that number to determine his or her financial obligations and ability to pay . . . . A definition of 'household' that is . . . tailored to reflect

should be scrutinized by acknowledging and considering the debtor's economic interconnectedness with others in the debtor's household.[260]

C. What's the Point of It All Anyway?—The Goals of Bankruptcy

Bankruptcy law exists in response to our credit economy.[261] At the center of the body of laws that regulate debtor-creditor relations is the tension that exists between the interests of debtors and the interests of creditors.[262] The Bankruptcy Code seeks to navigate and manage these conflicting interests, guided by two overarching goals: providing a fresh financial start[263] to overburdened debtors, on the one hand, and treating creditors in a fair and evenhanded manner, on the other.[264]

The Bankruptcy Code embodies the goal of fair and evenhanded treatment of creditors by offering a comprehensive system, designed to bring together and address, in a collective manner, the interests of all creditors of a debtor.[265] This system is comprised of various provisions regarding the stay of collection actions,[266] priorities of claims,[267] exceptions to the reduction or elimination of debtor's debts,[268] and various controls on debtor actions, among other provisions.[269]

Similarly, bankruptcy accomplishes its "fresh start" function through myriad rules and provisions that allow debtors to "reorder their affairs" and "make peace with their creditors."[270] A key component to the bankruptcy fresh start is the shedding of certain debts owed by the debtor.[271] The

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a debtor's financial situation focuses directly upon the ultimate purpose of the Code." (second omission in original)).

260. *Id.*

261. JACKSON, *supra* note 83, at 7.

262. Baird & Jackson, *supra* note 55, at 833–34.

263. *See* Wenmore v. Markoe, 196 U.S. 68, 77 (1904) (asserting the bankruptcy system is designed to give honest debtors a fresh start and relief from crippling debt). One of the primary purposes of bankruptcy law is to give "the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of [pre-existing] debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (emphasis omitted) (citations omitted).

264. *See* Grogan v. Garner, 498 U.S. 279, 286–87 (1991) (discussing the fair treatment of creditors).

265. Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d 1198, 1203 (9th Cir. 2005).

266. 11 U.S.C. § 362 (2018).

267. 11 U.S.C. § 507.

268. 11 U.S.C. § 523. In bankruptcy parlance, the reduction or elimination of debts of the debtor is referred to as the "discharge" of debts. *Id.*

269. *See, e.g.*, 11 U.S.C. § 727(d) (allowing creditors to move the court to revoke a debtor's discharge if the debtor behaved fraudulently).

270. Grogan v. Garner, 498 U.S. 279, 286 (1991).

271. 11 U.S.C. § 524.

discharge granted in bankruptcy operates as an injunction.[272] It protects the debtor from creditor efforts to collect on discharged debts.[273] This protection, in turn, allows the debtor to "start afresh" with "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of [pre-existing] debt."[274] The Supreme Court has described the fresh-start function of bankruptcy law as having been "again and again emphasized by the courts as being of public as well as private interest."[275] It explained that, "[t]he various provisions of the bankruptcy act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act."[276]

Although scholars disagree as to the proper scope and effect of bankruptcy relief,[277] they generally agree that bankruptcy serves an important social function—serving the public interest—as the Supreme Court has recognized.[278] Commentators suggest that bankruptcy benefits society by influencing debtor-creditor behavior outside of bankruptcy.[279] Bankruptcy is often understood as having a moderating effect on the economy.[280] The specter of bankruptcy is believed to encourage lenders to make more prudent decisions regarding extending credit.[281] If a creditor fears the risk of bankruptcy, the creditor should more carefully scrutinize potential borrowers and adjust the cost of borrowing to more accurately reflect the risk associated with the loan to a particular debtor.[282] Borrowers who are at a greater risk for default pay more for credit, primarily through increased interest rates.[283] A

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272. 11 U.S.C. § 524(a)(2).

273. Robert P. Wasson, Jr., *Remedying Violations of the Discharge Injunction Under Bankruptcy Code § 524, Federal Non-Bankruptcy Law, and State Law Comports with Congressional Intent, Federalism, and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 BANKR. DEV. J. 77, 81 (2003).

274. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (citations omitted).

275. *Id.*

276. *Id.* at 245.

277. *See generally, e.g.*, Karen Gross, *Taking Community Interests into Account in Bankruptcy: An Essay*, 72 WASH. U. L.Q. 1031, (1994) (asserting that community interests are important and must be considered in the bankruptcy process).

278. *Hunt*, 292 U.S. at 244.

279. Robert J. Landry, III & Amy K. Yarbrough, *Global Lessons from Consumer Bankruptcy and Healthcare Reforms in the United States: A Struggling Social Safety Net*, 16 MICH. ST. J. INT'L L. 343, 369 (2007); *see generally* Baird & Jackson, *supra* note 55 (analyzing numerous ways in which the interpretation of fraudulent conveyance law might affect the actions of debtors and creditors).

280. 1 HENRY J. SOMMER, CONSUMER BANKRUPTCY LAW AND PRACTICE 17–18 (John Rao ed., 12th ed. 2020).

281. Baird & Jackson, *supra* note 55, at 834, 836.

282. *Id.*

283. *What Is Risk-Based Pricing?*, CONSUMER FIN. PROTECTION BUREAU (last updated Aug. 5, 2016), https://www.consumerfinance.gov/ask-cfpb/what-is-risk-based-pricing-en-767/.

potential borrower who is too risky may be priced out of borrowing. If a potential borrower is essentially destined to default, forgoing the loan in the first instance may be the best result for both the potential borrower and the would-be creditor.[284]

Some authorities believe that the existence of the bankruptcy option may also impact debtor behavior by permitting them to take financial risks that might ultimately prove economically beneficial, thereby benefitting not only themselves, but also the creditors of the debtor and the economy generally.[285] In their insightful article, *Global Lessons from Consumer Bankruptcy and Healthcare Reforms in the United States: A Struggling Social Safety Net*, Professors Landry and Yarbrough explained succinctly that:

> The importance of an effective bankruptcy system is vital to any country, the United States or otherwise, in which the economic structure embraces risk-taking by its citizens in consumer or business financial transactions. Bankruptcy provides an organized mechanism to deal with financial problems. In so doing, the bankruptcy system adds a component of stability to the economic structure of a country. Bankruptcy is a necessary component of our economic system, a fact that the drafters of the Constitution were apparently aware of as they had the foresight to include the "bankruptcy clause" in the Constitution.[286]

In addition to benefits that exist even absent a bankruptcy filing, benefits also flow from the relief granted by the bankruptcy process. Bankruptcy of course benefits the debtor by allowing the debtor to obtain relief from some or all of the debtor's debts.[287] The fresh start of bankruptcy, however, also benefits society by allowing the debtor to "begin anew as a productive member of society."[288] Bankruptcy relief can be understood as serving a rehabilitative function that benefits the public good by allowing "a debtor to retain the basic necessities of life" and to participate in the economy by earning, consuming, and borrowing.[289] The debtor's ability to be free from the burden of unmanageable debt "is a matter of great public concern" because, from a debtor's perspective, "there is little difference between not

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284. Baird & Jackson, *supra* note 55, at 838.

285. *Id.*

286. Landry & Yarbrough, *supra* note 279, at 348–49 (footnotes omitted).

287. *See* Feibelman, *supra* note 202, at 130 (describing the bankruptcy's discharge of debts as a form of "social insurance").

288. Karen Gross, *Preserving A Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 60 (1986).

289. Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 516–17 (1991).

earning at all and earning wholly for a creditor."[290] Both may prevent the debtor from covering the debtor's own expenses and from providing for the debtor's dependents, and poverty "may be the necessary result of either."[291]

For individuals overwhelmed by debt, bankruptcy can act as a form of social insurance similar to unemployment insurance, Medicare, disability insurance, or workers' compensation.[292] Bankruptcy protection may serve as "a potential substitute" for any of these social insurance programs.[293] Some experts describe bankruptcy "as an insurer of last resort" that acts to plug the holes in "a social safety net filled with 'gaps.'"[294] Given the important role that bankruptcy plays in our society, actors engaged in the bankruptcy process should be particularly careful to avoid promoting policies that ultimately serve to undermine its purposes.

IV. THE INTERRELATED NATURE OF THE FAMILY AND PAYING FOR COLLEGE

A. The Economics of the Family Unit

Before examining how bankruptcy courts have dealt with the treatment of undergraduate educational expenses paid by debtors on behalf of their adult children in the context of constructively-fraudulent-transfer litigation, it is important to understand the cultural and social context in which parents make such payments. Raising a child in the United States is a significant financial undertaking. The U.S. Department of Agriculture estimates that the cost of raising a child through age 17 is $233,610.[295] This amount is primarily attributable to housing, food, clothing, and childcare.[296] Having a child is one of the best predictors of bankruptcy.[297]

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290. Local Loan Co. v. Hunt, 292 U.S. 234, 245 (1934).

291. *Id.*

292. Feibelman, *supra* note 202, at 132.

293. *Id.* at 133.

294. *Id.* at 161.

295. MARK LINO ET AL., U.S. DEP'T OF AGRIC., MISC. REP. NO. 1528-2015, EXPENDITURES ON CHILDREN BY FAMILIES, 2015, at ii (2017), https://fns-prod.azureedge.net/sites/default/files/crc2015_March2017.pdf.

296. *Id.* at 2.

297. ELIZABETH WARREN & AMELIA WARREN TYAGI, TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 6 (2003). Several provisions of the Bankruptcy Code address debt related to raising children. *See, e.g.*, 11 U.S.C. § 507(a)(1) (2018) (providing for priority treatment for "unsecured claims for domestic support obligations that . . . are owed to or recoverable by a . . . child of the debtor, or such child's parent"); 11 U.S.C. § 522(f)(4) (providing that "household goods" that may be exempted by the debtor include educational materials, furniture, toys, and hobby equipment that are used by or for the debtor's minor dependent children); 11 U.S.C. § 523(a)(5) (providing that domestic-support obligations may not be discharged).

The economic relationship between parents and their children, however, does not abruptly end at age 18. In fact, prior to the 1970s, the legal age of majority in many states was 21.[298] Moreover, the economic upheaval since the recession of 2008 "appears to be giving rise to a protracted set of economic ties between parents and their adult children."[299] Young adults today must contend with "[h]igh rates of unemployment . . . , the shrinking middle class, and stagnant wages."[300] All of these factors "mean that economic uncertainty is high."[301] Many young adults remain economically dependent on their parents, to some degree, well into their twenties.[302] In fact, more than a third of young adults ages 18 through 24 regularly receive money or other financial assistance from their family.[303]

Many young adults live in the home of a parent.[304] Importantly, the level of education attained by an adult child is a key indicator of whether that adult child is likely to live at home with a parent.[305] Forty percent of young adults ages 18 through 31 with a high school degree or less education live in a parent's home.[306] For college graduates in that same age group, only 18% live at home with their parents.[307] When young adults live with their parents, they tend to contribute to the household. Many of them share in household expenses.[308] Some of them pay rent.[309] Almost half of young adults living at

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298. 16 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 262 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1900) (footnote omitted) ("By the common law the age of majority is fixed at twenty-one years for both sexes, and, in the absence of any statute to the contrary, every person under that age, whether male or female, is an infant."). The legal age of majority continues to be 21 in some states, provided the child is in school. *See, e.g.*, N.Y. FAM. CT. ACT § 413(1)(a) (McKinney 2019) (specifying that parents have a duty to support children under 21); OR. REV. STAT. ANN. § 107.108 (specifying that students under 21 are minors for purposes of child support laws).

299. Kim Parker, *The Boomerang Generation, Feeling OK About Living with Mom and Dad*, PEW RES. CTR. 3 (Mar. 15, 2012), http://www.pewsocialtrends.org/2012/03/15/the-boomerang-generation/.

300. TERESA CIABATTARI, SOCIOLOGY OF FAMILIES 62 (2017). The unemployment rate for young adults remains comparatively high. For February 2020, the unemployment rate for individuals between 20- and 24-years-old was 6.4%, compared with 3.5% in the population overall. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STAT., https://www.bls.gov/web/empsit/cpseea10.htm (last updated Apr. 3, 2020).

301. CIABATTARI, *supra* note 300, at 62.

302. *Id.* at 61.

303. Parker, *supra* note 299.

304. RICHARD FRY, PEW RESEARCH CTR., A RISING SHARE OF YOUNG ADULTS LIVE IN THEIR PARENTS' HOME 1 (2013), https://www.pewsocialtrends.org/2013/08/01/a-rising-share-of-young-adults-live-in-their-parents-home/ (reporting that, in 2012, the proportion of adults between 18 and 31 living with their parents hit 36%).

305. *Id.* at 9.

306. *Id.*

307. *Id.*

308. Parker, *supra* note 299.

309. *Id.*

home with their parents contribute through non-monetary assistance like cooking, cleaning, or childcare.[310]

B. Interconnected Nature of the Family Beyond Finances

In addition to having finances that are often intertwined, parents and their children often otherwise share a symbiotic relationship. In fact, numerous studies show that the emotional, psychological, and even physical well-being of parents is linked to the well-being or perceived well-being of their children.[311]

Parents view the accomplishments and challenges of their children as indicative of their own success or failure.[312] Parents stay invested in their children's lives throughout adulthood.[313] Some social scientists have dubbed the parents' interest in the successes and challenges of their children a "developmental stake."[314] Because parents feel like they hold a stake in the personal and professional development of their children, it is not surprising that they experience psychological distress and other problems when they are worried about the well-being of their children.[315] Parents who do not believe their child is "on schedule" to become an independent member of society "experience[] strain and a sense of personal failure."[316] Parents may feel like "they [can]not carry on with their own lives until their children progress[] successfully."[317]

The success of grown children also impacts the parent-child relationship.[318] *Ambivalence theory* in psychology posits that "[i]ndividuals experience ambivalence when there are incompatible norms or expectations that cause contradictory emotions or beliefs."[319] A parent may experience ambivalence as a result of "competing desires to launch their children into adulthood and to support . . . children in need."[320] Feelings of ambivalence

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310. Jenna Goudreau, *Nearly 60% of Parents Provide Financial Support to Adult Children*, FORBES (May 20, 2011), https://www.forbes.com/sites/jennagoudreau/2011/05/20/parents-provide-financial-support-money-adult-children/#10f92ac11987.

311. *See infra* text accompanying notes 312–21.

312. Karl Pillemer & J. Jill Suitor, *Will I Ever Escape My Child's Problems*, 53 J. MARRIAGE & FAM. 585, 586 (1991).

313. *Id.*

314. *Id.* (citation omitted).

315. *Id.*

316. *Id.*

317. *Id.*

318. Kira S. Birditt et al., *Adult Children's Problems and Successes: Implications for Intergenerational Ambivalence*, 65 J. GERONTOLOGY 145, 145 (2010).

319. *Id.* (citation omitted).

320. *Id.*

regarding their children are "associated with greater depression, lower quality of life, and poorer health among parents."[321] Parents feel more ambivalent towards children with personal or financial problems.[322] A parent tends to experience more ambivalence for adult children who are less successful professionally and children who attain less education.[323]

C. The Benefits of College to Students and Their Parents

In today's economy, both parents and young adults view obtaining a college degree as necessary to financial security.[324] That belief is reflected in the increasing number of individuals obtaining a college degree. In 2016, 40% of employed adults ages 25 to 29 obtained an educational level of at least a bachelor's degree, compared to only 32% in the prior generation.[325] Enrollment in college is expected to hit a record high from fall 2020 through fall 2026.[326] Between fall 2015 and fall 2026, enrollment in college is projected to increase 13%.[327]

The economic benefits of obtaining a college degree are well-established. College-educated young adults are less likely to be unemployed, as compared to young adults without a college education.[328] They are also more likely to be employed full-time.[329] In addition, the average college graduate earns twice as much as the average high-school graduate.[330] This difference totals more than $1 million over a lifetime.[331] When comparing

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321. *Id.* (citation omitted).

322. *Id.* at 147.

323. *Id.* at 146.

324. Lynda Lytle Holmstrom et al., *Why Parents Pay for College: The Good Parent, Perceptions of Advantage, and the Intergenerational Transfer of Opportunity*, 34 SYMBOLIC INTERACTION 265, 284–85 (2011) (noting the common expectation among parents that investing in their child's college education will deliver a return by increasing the likelihood their child will be financially secure).

325. Nikki Graf, *Today's Young Workers Are More Likely than Ever to Have a Bachelor's Degree*, PEW RES. CTR. (May 16, 2017), http://www.pewresearch.org/fact-tank/2017/05/16/todays-young-workers-are-more-likely-than-ever-to-have-a-bachelors-degree/.

326. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2017-094, DIGEST OF EDUCATION STATISTICS: 2016, at 9 (2018), https://files.eric.ed.gov/fulltext/ED580954.pdf.

327. *Id.*

328. *Id.* at 673 fig.22.

329. Graf, *supra* note 325.

330. CIABATTARI, *supra* note 300, at 64; *see also* Elka Torpey, *Measuring the Value of Education, Career Outlook*, U.S. BUREAU LAB. STATS. (Apr. 2018), https://www.bls.gov/careeroutlook/2018/data-on-display/education-pays.htm ("U.S. Bureau of Labor Statistics (BLS) data consistently show that, in terms of dollars, education makes sense. . . . [T]he more you learn, the more you earn.").

331. ANTHONY CARNEVALE ET AL., GEORGETOWN UNIV. MCCOURT SCH. OF PUB. POLICY, THE ECONOMIC VALUE OF COLLEGE MAJORS 4 (2015), https://cew.georgetown.edu/wp-content/uploads/The-Economic-Value-of-College-Majors-Full-Report-web-FINAL.pdf. Millennial college graduates ages 25 to 32 who are working full-time earn more annually—about $17,500 more—than employed young adults holding only a high-school diploma. RISING COST, *supra* note 42, at 3.

todays' generation of young adults with prior generations, the disparity in economic outcomes between college graduates, on the one hand, and those with a high-school diploma or less formal schooling, on the other, "has never been greater in the modern era."[332]

In addition to the financial benefits realized by the college graduate, parents may also benefit financially from their children's education. Not surprisingly, young adults with a college degree are less likely to be economically dependent on their parents.[333] Moreover, parents often receive some assistance from an adult child when the parents become elderly, "especially if the parent-child relationship is an agreeable one."[334] Given their greater earning potential, adult children with college degrees are more likely to be able to help elderly parents financially.[335]

The Bankruptcy Code reflects the economic benefit of a college education. Specifically, some debts are very difficult, if not impossible, to eliminate or reduce through bankruptcy.[336] Student loan debt is a type of debt for which relief in bankruptcy is available only in limited circumstances.[337] The debtor may receive a discharge of student loan debt in bankruptcy if the debtor proves that the repayment of the debt would impose an undue hardship on the debtor.[338] One of the policy considerations behind the legislature's decision to make student loan debt difficult to discharge in bankruptcy was its desire to prevent students from incurring debt to obtain an education, a thing that may generate substantial financial returns, and then shedding that debt before they have begun to utilize that education for its expected economic gains.[339]

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332. RISING COST, *supra* note 42, at 3.

333. *See* CIABATTARI, *supra* note 300, at 64 (reporting that young adults without college degrees have less financial security than those that do); RISING COST, *supra* note 42, at 3 (reporting that 21.8% of high-school graduates live in poverty, while 5.8% of college graduates live in poverty).

334. Holmstrom et al., *supra* note 324, at 285 (citation omitted).

335. *Id.*

336. *See, e.g.*, 11 U.S.C. § 523(a)(8) (2018) (exempting student loans from discharge under Chapters 7, 11, 12, and 13 as a general rule).

337. 11 U.S.C. § 523(a)(8).

338. 11 U.S.C. § 523(a)(8). Congress amended the Bankruptcy Code in 1998 to provide that federally guaranteed student loans could not be discharged unless the debtor could prove the debt was an undue hardship. Higher Education Amendments of 1998, Pub. L. No. 105-244, sec. 971, 112 Stat. 1581, 1837. Congress again amended the Bankruptcy Code in 2005 to extend this discharge exemption to all student loan debt. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, sec. 220, 119 Stat. 23, 59 (codified as amended at 11 U.S.C. § 523(a)(8)).

339. *See* Martin v. Great Lakes Higher Educ. Grp. (*In re* Martin), 584 B.R. 886, 891 (Bankr. N.D. Iowa 2018) (quoting Long v. Educ. Credit Mgmt. Corp. (In re Long), 322 F.3d 549, 554 (8th Cir. 2003)) ("[C]ongress intended to prevent recent graduates who were beginning lucrative careers and wanted to escape their student loan obligation from doing so."); *see also* Strand v. Sallie Mae Serv. Corp. (*In re* Strand), 298 B.R. 367, 376 (Bankr. D. Minn. 2003) (explaining that, to establish "undue hardship," a debtor must show that he or she cannot both maintain a minimal standard of living and repay the student

Having a college degree also correlates with benefits that are not directly financial in nature. Since the late 1990s, mortality rates for individuals who have less than a college degree have been steadily increasing in various age groups.[340] During this same period, longevity has continued to improve for individuals who hold a college degree.[341] For example, in 2015, the mortality rate for men ages 50 to 54 who do not hold a bachelor's degree was 867 per 100,000, while the mortality rate for men of the same age group who hold a bachelor's degree was just 243 per 100,000.[342]

D. Societal Benefits of College

Society also benefits from having a population that is more highly educated. On average, college graduates earn more money.[343] As a result, they also pay more in taxes.[344] In 2018, individuals who held a college degree paid an average of 82% more in taxes each year, as compared to individuals who had not obtained an education past high school.[345]

Individuals who hold a college degree are also much less likely to be dependent on taxpayer-funded, social support programs, as compared to individuals who do not hold a college degree.[346] Amounts expended on social

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loan debt); *accord* Rivera v. N.J. Higher Educ. Student Assistant Auth. (*In re* Rivera), 284 B.R. 88, 90 (Bankr. D.N.J. 2002); *accord* Hatfield v. William D. Ford Fed. Direct Consolidation Program (*In re* Hatfield), 257 B.R. 575, 580, 582–83 (Bankr. D. Mont. 2000). The economic landscape has changed significantly since § 523(a)(8) of the Bankruptcy Code was enacted. Student loan debt has ballooned as the cost of education has risen. Victoria J. Haneman, *Intergenerational Equity, Student Loan Debt, and Taxing Rich Dead People*, 39 VA. TAX REV. 197, 224–25 (2019) (describing a three-fold increase in student loan debt between 2004 and 2018). As student loan debt has continued to rise, some commentators have observed what appears to be a trend in the courts towards relaxing the standard required for student loan debt to be deemed dischargeable. In fact, some courts state expressly that courts should revise the standard to allow the courts to consider the totality of the circumstances surrounding the debtor's particular situation in determining whether to approve the discharge of student loan debt in bankruptcy. *See, e.g.*, Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 920 (B.A.P. 9th Cir. 2013) (Pappas, Bankr. J., concurring) (asserting that the current test for "undue hardship is too narrow [and] no longer reflects reality" and arguing that "bankruptcy courts should be free to consider the totality of a debtor's circumstances in deciding whether a discharge of student loan debt for undue hardship is warranted").

340. Anne Case & Angus Deaton, *Mortality and Morbidity in the 21st Century*, BROOKINGS PAPER ON ECON. ACTIVITY 397, 416 (2017), https://www.brookings.edu/wp-content/uploads/2017/08/casetextsp17bpea.pdf.

341. *Id.* at 416, 466.

342. *Id.* at 417.

343. JENNIFER MA ET AL., COLLEGE BD., EDUCATION PAYS 2019: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 4 (2019), https://research.collegeboard.org/pdf/education-pays-2019-full-report.pdf.

344. *Id.*

345. *Id.* at 9.

346. *Id.* at 35.

support programs, such as Medicaid, unemployment compensation, and the Supplemental Nutrition Assistance Program (SNAP), are significantly lower for individuals with higher levels of education.[347] Further, individuals without a college degree are much more likely to experience living in poverty.[348] In 2018, only 7% of individuals ages 25 and older who held a college degree lived in poverty, compared to 13% of individuals who held only a high-school diploma.[349]

E. Paying for College—What is Ordinary Course?

The majority of families in the United States believe that both parents and students should contribute to paying for college.[350] In 69% of families, parents contribute to the college educational expenses of their children.[351] These parents pay, on average, about a third of the total cost of attendance for their children.[352] In fact, the view that college is a necessary investment and the expectation that parents will contribute to that investment has become so engrained in our society, that "[t]he notion that parents will do whatever is required—including taking out loans and remortgaging homes—to ensure their children's education has simply become part of the 'world as taken-for-granted.'"[353]

The calculation of student need by educational institutions reflects the expectation that parents will contribute to the costs of their children's undergraduate education. To be considered for federal financial assistance for educational expenses, the student must complete the Free Application for Federal Student Aid (FAFSA).[354] As a part of this application, students who are under the age of 24 and financially dependent on their parents must provide their parents' financial information in addition to providing their own financial information.[355] The information provided is used to determine the

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347. *Id.* at 8.

348. *Id.* at 34.

349. *Id.*

350. *See* SALLIE MAE BANK, HOW AMERICA PAYS FOR COLLEGE 6 (2014), https://news.salliemae.com/files/doc_library/file/HowAmericaPaysforCollege2014FNL.pdf ("Three in 5 families believe that paying for college is a shared responsibility between the parent and student.").

351. *Id.* at 9.

352. *Id.* at 11 (reporting on data collected between 2010 and 2013). For academic year 2018–2019, parents covered an average of 40% of the costs of a college education, including 30% from parents' income and savings and 10% from loans taken by parents. SALLIE MAE, HOW AMERICA PAYS FOR COLLEGE 11 (2019), https://www.salliemae.com/assets/research/HAP/HowAmericaPaysforCollege2019.pdf.

353. Holmstrom et al., *supra* note 324, at 266 (citation omitted).

354. *Do I Have to Provide My Parents' Information on the FASFA Form?*, FED. STUDENT AID, https://studentaid.gov/resources/dependency-status-text (last visited Apr. 14, 2020).

355. *Id.*

"expected family contribution."[356] The expected family contribution is the amount the family is expected to contribute to the educational expenses of the student in the upcoming school year.[357] It is used to determine whether and to what extent the student will be eligible for federal financial assistance.[358] States and educational institutions also often use a student's expected family contribution to determine the student's eligibility for grants and loans from states and educational institutions.[359] Thus, the expectation that parents will contribute to the costs of their child's college education is so engrained in our society that it is taken as presumed by the federal government, state governments, and educational institutions.

Certain tax incentives further underscore the importance of a college education and the expectation that parents will contribute to the costs of their children's undergraduate education. For example, if a child is a student, a parent may claim that child as a dependent up to age 24.[360] Conversely, if a child is not a student, the parent may only claim the child as a dependent up to age 19.[361] Other programs encourage parental contributions to undergraduate education.[362] These incentives include tax savings on certain funds contributed to accounts established under a qualified state tuition program pursuant to § 529 of the Internal Revenue Code, known as "529 accounts" or "529 plans,"[363] and tax savings on certain savings trusts, known as "Coverdell Education Savings Accounts" or "Coverdell ESAs."[364]

Subject to certain limitations, the Bankruptcy Code expressly excludes from the bankruptcy estate—and thus distribution to creditors—funds used to purchase tuition credit and funds contributed to 529 accounts.[365] Similarly, the Bankruptcy Code excludes from the property of the bankruptcy estate funds deposited into Coverdell ESAs, provided certain requirements are

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356. 20 U.S.C. § 1087oo(a) (2018).

357. 20 U.S.C. § 1087mm.

358. *Expected Family Contribution (EFC)*, FED. STUDENT AID, https://studentaidhelp.ed.gov/app/answers/detail/a_id/2094/~/expected-family-contribution-%28efc%29 (last visited Apr. 14, 2020).

359. *What is the FAFSA?*, FED. STUDENT AID, https://studentaid.ed.gov/sa/help/fafsa (last visited Apr. 14, 2020).

360. 26 U.S.C. § 152(c).

361. 26 U.S.C. § 152(c); *Qualifying Child Rules*, INTERNAL REVENUE SERV., https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/qualifying-child-rules (last updated Mar. 26, 2020).

362. *See* 26 U.S.C. § 25A(b) (providing for the American Opportunity Tax Credit); 26 U.S.C. § 25A(c) (providing for the Lifetime Learning Credit). Congress intended these credits "[t]o assist low- and middle-income families and students in paying for the costs of post-secondary education." H.R. REP. NO. 105-148, at 316 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 678, 710.

363. 26 U.S.C. § 529.

364. 26 U.S.C. § 530.

365. 11 U.S.C. § 541(b)(6).

met.[366] The exclusion from property of the estate of funds deposited into 529 plans or Coverdell ESAs is permitted on a sliding scale.[367] Provided the conditions set forth in the Bankruptcy Code are met, all funds deposited into 529 plans or Coverdell ESAs more than 720 days (just under 2 years) prior to the date the debtor filed for bankruptcy protection are excluded from the property of the bankruptcy estate.[368]

Further demonstrating the expectation that parents will contribute to the costs of the undergraduate educational expenses of their children is the fact that these payments are very often stipulated to, or even mandated, in the context of the divorce or legal separation of parents. Many states give courts the power to impose support orders on parents for the support of their adult children who are enrolled in undergraduate degree programs.[369] Even in circumstances where such payments are not mandated by the courts, however, the payment of these expenses are often included in separation agreements and divorce-settlement agreements.[370]

V. UNDERGRADUATE EDUCATIONAL EXPENSES AND THE SEARCH FOR VALUE

Relatively few courts have assessed reasonably equivalent value in the context of the payment of undergraduate educational expenses by debtor-

366. 11 U.S.C. § 541(b)(5).

367. *Infra* note 368 and accompanying text.

368. 11 U.S.C. § 541(b)(5), (6). Funds deposited between 365 and 720 days prior to the debtor's bankruptcy filing are excluded from property of the bankruptcy estate up to the amount of $6,825. 11 U.S.C. § 541(b)(5)(C), (6)(C). This amount is adjusted on April 1 every three years. 11 U.S.C. § 104. It was last adjusted on April 1, 2019. 11 U.S.C. § 104. No funds contributed to these education savings accounts during this period of time that exceed the amount of $6,825 are excluded from the property of the bankruptcy estate—i.e., they remain property of the bankruptcy estate and thus are available for potential distribution to creditors. 11 U.S.C. § 541(b)(5)(C), (6)(C). Finally, no such contributions made within the year prior to the bankruptcy are excluded from the property of the bankruptcy estate. 11 U.S.C. § 541(b)(5)(C), (6)(C).

369. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 46b–56c (West 2019) (giving Connecticut courts the power to issue support orders for children enrolled in undergraduate education programs until they reach age 23); MASS. GEN. LAWS ANN. ch. 208, § 28 (West 2016) (giving Massachusetts courts the power to issue support orders for children enrolled in undergraduate education programs until they reach age 23); N.Y. FAM. CT. ACT § 413(1)(a) (McKinney 2019); N.Y. DOM. REL. LAW § 240(1-b) (McKinney 2019) (giving New York courts the power to issue support orders for children enrolled in undergraduate education programs until they reach age 21).

370. *See, e.g.*, Warren v. Warren (*In re* Warren), 160 B.R. 395, 396–97 (Bankr. D. Me. 1993) (involving a divorce settlement with a voluntary agreement to share the expenses of putting twin daughters through college). In addition to being expected, however, parental contributions play a key role in helping to ensure that the student's educational goals are, in fact, achieved. Studies show that parental financial assistance significantly increases the likelihood that the student will obtain a bachelor's degree. *See* Laura T. Hamilton, *More is More or More is Less? Parental Financial Investments During College*, 78 AM. SOC. REV. 70, 85–87 (2013) (modeling the impact of parental financial assistance on graduation rates).

parents on behalf of their adult children.[371] As of the writing of this Article, the opinion entered in the *Palladino* case, discussed in the introduction to this Article, is the only opinion a litigant has taken to a federal circuit court for review.[372] On November 12, 2019, the First Circuit Court of Appeals entered an order in the case, which reversed the bankruptcy court's decision in favor of SHU and remanded the matter back to the bankruptcy court.[373] In reversing the bankruptcy court's decision, the First Circuit found that the payments were constructively fraudulent because "[t]he tuition payments here depleted the estate and furnished nothing of direct value to the creditors."[374]

The decision of the bankruptcy court in *Palladino*, on the one hand, and the decisions entered by the First Circuit in *Palladino* and the *Dunston* court, on the other, illustrate the highly inconsistent treatment courts have afforded tuition payments made by debtor-parents on behalf of their adult children under fraudulent transfer law.[375] Under one approach, the courts conclude that, while the payment by the debtor-parent of educational expenses for the debtor's adult child may result in value to the adult child (in the form of an education), no value is given to the debtor and, as such, the value is not reasonably equivalent.[376] Because, according to this view, the debtor did not

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371. *See generally* Mackenzie, *supra* note 43. Although litigants have asked relatively few courts to rule on the question of whether tuition payments made by a debtor-parent on behalf of the debtor's adult child should be construed as constructively fraudulent, in recent years, a number of plaintiffs have claimed that such payments are constructively fraudulent. *See* Derek A. Huish, *Clawing Back Tuition Payments in Bankruptcy: Looking to Ancient and Recent History to Define the Future*, 104 IOWA L. REV. 2151, 2207–21 (2019) (collecting cases, including cases that were settled or dropped without judgment by the relevant court).

372. DeGiacomo v. Sacred Heart Univ. (*In re* Palladino), 942 F.3d 55, 55 (1st Cir. 2019).

373. *Id.* at 55, 60.

374. *Id.* at 59.

375. The payment of undergraduate educational expenses is often addressed, either by settlement or by mandated court order, in the context of the divorce or legal separation of parents. *See supra* notes 369–70 and accompanying text. Given that these payments arise as a result of a prior adjudication or prior stipulated resolution, they are generally treated differently as compared to payments by parents that are not paid pursuant to a prior agreement or court order. *See, e.g.*, *In re Warren*, 160 B.R. at 397–400 (holding that educational payments required by a prior divorce agreement are non-dischargeable, even though they would have been dischargeable absent the agreement). The unique treatment of these payments is beyond the scope of this Article. It is worth noting, however, that courts presented with challenges to payments that are mandated by prior agreement or a divorce decree may take the position that such payments are beyond the reach of fraudulent transfer laws or may permit the defense of issue preclusion to protect such payments. Mimi Faller, *Separation Agreements: Could They Be Considered Constructively Fraudulent?*, 25 NORTON J. BANKR. L. & PRAC., Feb. 2016, Art. 5. In fact, payments that a court mandates by a divorce decree may be permitted to continue even after a debtor files for bankruptcy protection. *In re* Smith, No. 15-B-36486, 2016 WL 7441605, at *4 (Bankr. N.D. Ill. Dec. 27, 2016).

376. Gold v. Marquette Univ. (*In re* Leonard), 454 B.R. 444, 457 (Bankr. E.D. Mich. 2011); *see also* Boscarino v. Bd. of Trs. of Conn. State Univ. Sys. (*In re* Knight), Ch. 7 Case No. 15-21646, Adv. No. 15-02064, 2017 WL 4410455, at *3 (Bankr. D. Conn. Sept. 29, 2017) (defining "value" in bankruptcy jurisprudence as benefits that preserve a debtor's wealth to the benefit of creditors, excluding "intangible social obligations," such as tuition for children).

receive reasonably equivalent value, the transfer may be deemed constructively fraudulent and the payments may be recovered from the educational institution that received the subject payments or from the student who received the education.[377]

In another case in point, *Gold v. Marquette University (In re Leonard)*, the Chapter 7 Trustee sought to recover payments made by the debtors to Marquette University for the debtors' 18-year-old son's tuition and other expenses related to his education at Marquette.[378] Falling in line with the benefits-to-the-creditors approach to defining value, the court held that, in analyzing the value given by a transferee, "the focus should be on the overall effect on the debtor's net worth after the transfer."[379] Consequently, the court concluded, the benefit given to the debtor must be an "economic" benefit that is "concrete" and "quantifiable."[380] In considering the benefits the debtors may have received as a result of the payment of their son's educational expenses, the court found that any benefit they received "did not increase their 'net worth,' nor did such benefits increase the Debtors' assets in any way that could be used to pay their creditors."[381] Accordingly, reasonably equivalent value was lacking.[382]

In assessing reasonably equivalent value, courts have drawn a distinction between payments made on behalf of minor children and payments made on behalf of adult children. In *In re Sterman*, the trustee sued the daughters of the debtors, seeking to recover education-related payments the debtors made on behalf of their daughters.[383] With respect to the payments made on behalf of one of the daughters, the debtors made some of these payments before the daughter reached the age of majority and made others after the daughter reached the age of majority.[384] Regarding the payments the debtors made when the daughters were adults, the court found that the debtors had not received reasonably equivalent value in exchange for the payments.[385] The court recognized that making these payments might be "economically

377. *Cf., e.g.*, Roach v. Skidmore Coll. (*In re* Dunston), 566 B.R. 624, 626, 635, 637 (Bankr. S.D. Ga. 2017) (finding a material issue of fact as to whether the debtor received reasonably equivalent value in return for paying her daughter's tuition, thus leaving open the door for the trustee to recover the payments as constructively fraudulent).

378. *In re Leonard*, 454 B.R. at 445.

379. *Id.* at 457 (quoting Lisle v. John Wiley & Sons (*In re* Wilkinson), 196 F. App'x 337, 343 (6th Cir. 2006)).

380. *Id.*

381. *Id.* at 457–58.

382. *Id.* at 457.

383. Geltzer v. Oberlin Coll. (*In re* Sterman), 594 B.R. 229, 233 (Bankr. S.D.N.Y. 2018).

384. *Id.* The age of majority in New York—the applicable jurisdiction in *In re Sterman*—is 21. *Id.* at 236 n.8.

385. *Id.* at 236.

prudent."[386] Nonetheless, the court found that, although these payments purportedly benefited the debtor by increasing the likelihood that their daughters would become self-sufficient, and also provided "psychic and other intangible benefits" to debtors by guaranteeing that their daughters would have a place to live and food to eat, these benefits did not constitute "value" under the Bankruptcy Code.[387] With respect to payments the debtor made while their daughter was a minor, however, the court held that the debtors had received reasonably equivalent value because the payments had satisfied the debtors' obligation to provide their minor daughter with an education.[388]

Courts espousing the view that the payment of educational expenses for an adult child does not result in value to a debtor-parent appear to accept that the value received by the debtor may be indirect (i.e., that it need not flow directly to the debtor from the transferee). But they nonetheless generally adopt an overly narrow view of value as something that must be immediately and unquestionably leviable on behalf of the creditors, thereby failing to recognize the benefits that accrue to the debtor as a member of the family economic unit with the child who is receiving the education.[389] Similar to the entity whose credit-worthiness and financial stability may be enhanced by monies and other benefits that flow to a closely affiliated entity, the credit worthiness and financial stability of the debtor-parent is almost certainly enhanced by the debtor's child receiving a college education.[390] Additionally, while they are living with their parents, adult children generally contribute financially or otherwise to the maintenance of the debtor's household.[391] Further, parents generally provide their young adult children with most or all of the essentials for living—housing, clothing, food, utilities, and the like—regardless of whether those adult children are receiving an education at the

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386. *Id.*

387. *Id.* at 236–38 (citation omitted).

388. *Id.* at 238 (quoting Geltzer v. Xaverian High Sch. (*In re* Akanmu), 502 B.R. 124, 132 (Bankr. E.D.N.Y. 2013)).

389. This analysis of value is, of course, akin to the narrow value analysis employed by some courts in the context of intercorporate guarantee obligations, which leads these courts to fail to recognize value obtained by the corporate enterprise in conjunction with intercorporate guarantees or other intercorporate transfers. *See, e.g.*, 3V Capital Master Fund Ltd. v. Official Comm. of Unsecured Creditors of TOUSA, Inc. (*In re* TOUSA, Inc.), 444 B.R. 613, 655–61 (S.D. Fla. 2011) (correcting the bankruptcy court's over-narrow view of value in a case involving intercorporate guaranties), *aff'd in part, rev'd in part*, 680 F.3d 1298 (11th Cir. 2012).

390. *Compare supra* notes 178–80 and accompanying text (discussing the indirect benefits of upstream and cross-stream guaranties), *with supra* Part IV.C (discussing the benefits to the family of a child's college education).

391. *See supra* notes 308–10 and accompanying text (discussing the contributions children make to the household when they live in their parents' home).

time.[392] In fact, if children are living with their parents at the time the parents file for bankruptcy protection, most bankruptcy courts accept this financial reality in determining whether and to what extent the debtors will be able to repay their creditors in bankruptcy.[393]

Although a trustee might pursue either the adult child or the educational institution for the payments made by debtor-parents, in situations where it is the college or university that is required to return tuition payments to a trustee, there are, nonetheless, potential consequences for the adult children who received the education. For example, when an adult child has not yet graduated, the school may place a hold on the student's degree—meaning the student will not graduate until the debt is paid.[394] Even when a student has already received a diploma, the school may nonetheless pursue the former student for the amounts the college or university was required to pay to the trustee.[395] Under such circumstances, a debtor-parent may voluntarily take on the debt, thereby undermining the fresh start the debtor was supposed to receive.[396] As society has come to see college as a necessity, it should not be surprising that a debtor-parent would give up the fresh start bankruptcy offers to ensure the debtor's child is permitted to graduate and is not retrospectively saddled with unexpected debt.

As compared to those courts that have permitted the recovery of such payments, courts that reject attempts by trustees to recover from colleges and universities take a radically different view of whether value was given to the debtor-parent. In *Palladino*, discussed in the Introduction to this Article, the

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392. *See* Richard Eisenberg, *Parents' Support to Adult Kids: A Stunning $500 Billion a Year*, FORBES (Oct. 2, 2018), https://www.forbes.com/sites/nextavenue/2018/10/02/parents-support-to-adult-kids-a-stunning-500-billion-a-year/#5708ee235c87 (citing a recent study on this "hidden economy of support").

393. *See supra* note 239 and accompanying text (discussing educational expenses in the context of calculating projected disposable income).

394. Stech, *Claw Back*, *supra* note 41.

395. *Id.*

396. In one case, a university allowed the adult child to graduate, but only after the debtor-parent signed an installment agreement to pay $250 a month to settle the debt. *Id.*; *see also* Huish, *supra* note 371, at 2207–21 (noting several cases that were resolved by settlement-agreements that included payments to the trustee by the debtor). In the Chapter 13 case of *In re Riegodedios*, the court recognized the connection between the fresh start objective of bankruptcy and the payment of college tuition by debtor-parents. *In re* Riegodedios, 146 B.R. 691, 693 (Bankr. E.D. Va. 1992). In that case, the court considered a creditor's objection to the debtors' proposed plan in a Chapter 13 case because the debtors proposed in their plan that they be permitted to pay $614 a month to cover tuition and rent for their daughter's last year of college. *Id.* at 692–93. In approving the debtors' plan, the court determined that the proposed expenditure of $614 per month for tuition and rent was "reasonably necessary" because a college education that would make their daughter a more productive and useful citizen, and this goal was part of the "fresh start" envisioned by the Bankruptcy Code. *Id.* at 693. The court also took notice that the proposed payment was "not a new expense of the debtors" and that the "debtors are not expending unreasonable amounts of money in sending their daughter to an expensive private school." *Id.*

court rejected as "overly rigid" the trustee's contention that the only value in the transaction that should be considered was the education given to the debtors' daughter by the university.[397] In rejecting this narrow view of value, the court explained that, in making the payments to SHU, the debtors "believed that a financially self-sufficient daughter offered them an economic benefit and that a college degree would directly contribute to financial self-sufficiency."[398] In the court's view, such motivation was "concrete and quantifiable enough" to establish "reasonably equivalent value."[399]

Similarly, in *In re Cohen*, the trustee challenged $102,573 in payments that the debtor-parents made for their son and daughter's post-secondary educations, including $46,060 for their son's undergraduate education, $7,562 for their daughter's undergraduate education, and $39,205 for their daughter's graduate education.[400] In rejecting the trustee's contention that the payments related to undergraduate expenses were constructively fraudulent, the court held that "such expenses are reasonable and necessary for the maintenance of the Debtor's family."[401] The court, however, limited its holding only to the payments made by the parents to cover undergraduate educational expenses, stating that "children in graduate school are well into adulthood."[402] Because the *Cohen* court found that the undergraduate expenses paid by the debtor-parents were "reasonable and necessary for the maintenance of the Debtor's family," the court held that the trustee failed to prove that the parents did not receive reasonably equivalent value in exchange for these payments.[403]

Likewise, in *In re Oberdick*, the trustee challenged $82,536 worth of expenditures that paid for the undergraduate tuition and living expenses of the debtor's adult children.[404] The *Oberdick* court agreed with the reasoning of the *Cohen* court, finding that the payment of the educational expenses was necessary for the maintenance of the debtor's family and, as such, was not constructively fraudulent.[405] In reaching this conclusion, the court stated as follows:

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397. DeGiacomo v. Sacred Heart Univ. (*In re* Palladino), 556 B.R. 10, 15 (Bankr. D. Mass. 2016), *rev'd*, 942 F.3d 55 (1st Cir. 2019).

398. *Id.* at 16.

399. *Id.*

400. Sikirica v. Cohen (*In re* Cohen), Ch. 7 Case No. 05-38135, Adv. No. 07-02517, 2012 WL 5360956, at *1 (Bankr. W.D. Pa. Oct. 31, 2012), *rev'd in part on other grounds*, 487 B.R. 615 (W.D. Pa. 2013).

401. *Id.* at *10.

402. *Id.*

403. *Id.*

404. Shearer v. Oberdick (*In re* Oberdick), 490 B.R. 687, 711 (Bankr. W.D. Pa. 2013).

405. *Id.* at 712.

> Even though there may not strictly speaking be a legal obligation for parents to assist in financing their children's undergraduate college education . . . this Court has little hesitation in recognizing that there is something of a societal expectation that parents will assist with such expense if they are able to do so.[406]

As in the case of intercorporate guarantees, courts that employ a narrow benefits-to-the-creditor analysis of value, focusing narrowly on the immediate net benefit to the creditor, fail to account for the larger context in which the payments are made and the larger impact of the education received by the adult children.[407] Further, with this overly narrow view of value, we are confronted squarely with the problem of the "confounding of purpose and effect" that "has lead [sic] many a court astray in assessing fraudulent transfer liability."[408] Conversely, courts that have found that these payments are not constructively fraudulent recognize and account for the practical, cultural, and societal context in which debtor-parents make these payments. Decisions that protect these payments underscore the reasonably equivalent value requirement as a doctrine aimed at protecting creditors from transfers that are outside the debtor's ordinary course of affairs.[409]

VI. Assessment of Reasonably Equivalent Value to the Family Economic Unit

This Article proposes a model of fraudulent transfer law—as applied to undergraduate educational expenses paid by debtor-parents—that is true to the historical roots of fraudulent transfer law and in line with the fresh start and fair treatment goals of bankruptcy. The proposed model rejects the traditional view reflected in fraudulent transfer jurisprudence that the reasonably-equivalent-value analysis must focus on direct value to the debtor as an isolated unit, viewed from the standpoint of the debtor's creditors. As

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406. *Id.* The *Oberdick* court, however, distinguished expenses not directly related to the education of the debtor's children, such as those related to the debtor's son's school trip to Italy and contributions to a fraternity, finding that those expenses were not necessities and were subject to recovery as fraudulent transfers. *See also* Eisenberg v. Penn. State Univ. (*In re* Lewis), 574 B.R. 536, 541 (Bankr. E.D. Pa. 2017) (holding that a parent's payment of a child's undergraduate college expenses is a reasonable and necessary expense for maintenance of the family and for preparing family members for the future, and therefore, the parent receives reasonably equivalent value in exchange for the tuition payment).

407. *See supra* Part IV.C (surveying the benefits that accrue to families with college-educated children).

408. Williams, *Fallacies*, *supra* note 48, at 1421; *see also supra* Part I.C (dissecting the purpose of fraudulent transfer law).

409. *Supra* Part II.C.

discussed, a benefits-to-the-creditor approach is overly narrow.[410] This approach has threatened many transactions never intended by the drafters of the statutes to be subject to undoing under fraudulent transfer law.[411] Where the elements of a constructively fraudulent transfer claim are otherwise satisfied, a narrow understanding of value would likely result in the avoidance of most payments to educational institutions made by debtor-parents on behalf of their adult children. This result does not comport with the notion of fraudulent transfer law as a tool to protect creditors against unexpected risks[412] and undermines the fresh start objective of bankruptcy.[413] The indirect-benefits and the identity-of-interests doctrines are similarly unsatisfactory because there is no consistent understanding of what constitutes a cognizable benefit or what amount of benefit satisfies the reasonably equivalent value requirement.[414] Such unclear standards result in uncertainty and inefficiency in the resolution of these disputes.

Acknowledging that consumer bankruptcy law considers the financial wherewithal of the debtor as a member of a household[415] and recognizing fraudulent transfer law as a tool to protect creditors from unexpected harm,[416] this Article advocates for a pragmatic and contextual assessment of reasonably equivalent value. The proposed test asks whether the payment of the educational expenses by the debtor-parent provided value—including the reasonable anticipation of value—to the debtor's household, looking to the economic unit approach utilized by many bankruptcy courts for purposes of understanding the term "household."[417]

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410. *Supra* text accompanying notes 90–98.

411. *See supra* Part II.A, B (offering, as examples, property-for-services transactions, failed investments, and intercorporate guaranties).

412. Williams, *Fallacies*, *supra* note 48, at 1424 (asserting that the purpose of fraudulent transfer law is to protect creditors from unexpected harm); *see also supra* notes 189–90 and accompanying text (explaining what constitutes an unexpected risk).

413. *See supra* text accompanying notes 270–75 (explaining the fresh-start function of bankruptcy).

414. For a thorough discussion of the inadequacies of the indirect-benefits doctrine, see generally Williams, *Fallacies*, *supra* note 48.

415. *See supra* notes 217–60 and accompanying text (outlining the significance of the household in consumer bankruptcy law and explaining methods for defining the debtor's "household").

416. Williams, *Fallacies*, *supra* note 48, at 1424 (asserting that the purpose of fraudulent transfer law is to protect creditors from unexpected harm caused by transactions outside the debtor's ordinary course of affairs).

417. *See supra* text accompanying notes 250–54 (explaining the economic-unit approach to defining the debtor's household).

A. The Proposed Test

Under the proposed test, the analysis of reasonably equivalent value rests on three factors: (1) whether reasonably equivalent value has been given to the adult child of the debtor in exchange for payments made by the debtor-parent; (2) whether the expenses paid by the debtor-parent were necessary for the adult child to receive the education provided; and (3) whether, at the time the payments were made, the debtor-parent and adult child should be deemed a member of the same economic unit, such that they should be viewed as a single unit for fraudulent transfer purposes—i.e., were the economic lives of the debtor-parent and the debtor's adult child intertwined such that the payment of the educational expenses by the debtor-parent would be expected and such that the child's circumstances "directly impact[ed] the debtor's financial situation"?[418]

The first factor of the test would be met where the adult child indeed receives an education from the college or university that received the payments.[419] In situations in which the child did not actually receive the full benefits of the education[420]—for example, if the student stopped attending classes midway through the semester—the value given might be challenged. Similarly, where the educational institution in question is shown to essentially be a sham, the value given might be challenged.

The second factor focuses on the nature of the expenses paid by the debtor-parent.[421] It focuses on how closely that expense was tied to the education received by the adult child and whether the expense could be taken as necessary for the adult child to obtain the education provided. An expense like tuition would easily satisfy the requirement that the expense be necessary for the education provided. Similarly, expenses such as the cost of textbooks and lab fees would also seem to easily qualify as necessary expenses.[422] Expenses less clearly necessary for the education attained by the adult child would be subject to more scrutiny. For example, overseas travel and

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418. Johnson v. Zimmer, 686 F.3d 224, 237 (4th Cir. 2012).

419. *Cf.* DeGiacomo v. Sacred Heart Univ. (*In re* Palladino), 556 B.R. 10, 16 (Bankr. D. Mass 2016), *rev'd*, 942 F.3d 55 (1st Cir. 2019) (finding that the debtors received reasonably equivalent value for tuition paid on behalf of their daughter).

420. The fact that this Article focuses on undergraduate educational expenses is not intended to suggest that a similar argument could not be made in the context of the payment by parents of tuition and fees for their adult children to attend a vocational school.

421. *Cf.* Shearer v. Oberdick (*In re* Oberdick), 490 B.R. 687, 712 (Bankr. W.D. Pa. 2013) (identifying a subset of expenses paid by debtor-parents for their student children for which they did not receive reasonably equivalent value, including expenses for fraternity dues, alumni contributions, and international travel).

422. *Id.*

fraternity fees might not be deemed necessary for the adult child to obtain the education provided.[423]

The third factor of the proposed test requires an assessment of the relationship between the debtor-parent and the adult child, examining the interrelated nature of their economic lives.[424] It is important to recognize that the individual who would have the most direct and accurate knowledge of the debtor's living situation and economic ties—the debtor—is not likely to be a party to a fraudulent conveyance action. Moreover, the makeup of a debtor's economic unit may change over time. For these reasons, to make the inquiry more efficient, the test would operate with presumptions and burden-shifting.[425]

Under this third factor, if a debtor's adult child was listed as a dependent[426] on the debtor or the debtor's non-filing spouse's income-tax return for the period of time during which the subject payments were made, that adult child will be rebuttably presumed to be a member of the debtor's economic unit, such that the value received by the adult child may be taken as value received by the debtor-parent. The trustee, however, might

423. The court in *In re Oberdick* made this distinction, finding that expenses not directly related to the education of the debtor's children, such as those related to the debtor's son's school trip to Italy and contributions to a fraternity, were not necessary expenses and were subject to recovery as fraudulent transfers. *In re Oberdick*, 490 B.R. at 712.

424. It should be noted that, as discussed above, the Bankruptcy Code expressly permits debtors to move certain funds into tax savings accounts and outside the reach of creditors for the purpose of covering the educational expenses of qualified beneficiaries. *Supra* notes 362–68 and accompanying text. Importantly, qualified beneficiaries are not required to be members of the debtor's household and, in fact, may have no impact at all on the debtor's economic life. *See* 26 U.S.C. § 529(e)(1) (2018) (defining "designated beneficiary" without reference to a family or economic relationship). Moreover, all funds deposited in these plans more than two years prior to the debtor's bankruptcy filing are excluded from inclusion in the bankruptcy estate. 11 U.S.C. § 541(b)(5), (6).

425. *Cf. In re* Skiles, 504 B.R. 871 (Bankr. N.D. Ohio 2014) (adopting rebuttable presumptions and burden-shifting in the context of determining whether a child will be deemed a member of the debtor's "household" under the economic unit test for household).

426. A factor to which bankruptcy courts look in determining whether a child should be deemed a member of the debtor's "household" under the economic-unit approach is whether the debtor claimed the child as a dependent on the debtor's tax returns during the period of time in question. *See In re Skiles*, 504 B.R. at 879 (finding that the economic-unit approach takes a broader view of financial interdependence than the IRS-dependents approach). I.R.S. Publication 501 sets forth a five-factor test for determining whether a child is the debtor's dependent: (1) a relationship test, which requires that the potential dependent be "son, daughter, stepchild, foster child, . . . or a descendant of any of them"; (2) an age test, which requires that the person be under 19 years of age, under 24 years of age and a full-time student, or any age if permanently disabled; (3) a residency test, which requires that the person lived with the debtor for more than half of the year; (4) a financial support test, which requires that the child "not have provided more than half of his or her own support for the year"; and (5) a joint return test, which generally disallows anyone filing a joint return from being declared as a dependent on another person's tax return. INTERNAL REVENUE SERV., PUB. NO. 501, DEPENDENTS, STANDARD DEDUCTION, AND FILING INFORMATION 11 (2018), https://www.irs.gov/pub/irs-pdf/p501.pdf. There are certain modified tests for a dependent child of more than one person, such as in the case of divorce or separation. *Id.* at 13.

successfully rebut this presumption by providing documentation or other evidence that demonstrates that the adult child's financial life is not in fact intertwined with the financial life of the debtor-parent. If the trustee were to provide evidence to successfully rebut the presumption, the burden would shift to the target of the fraudulent conveyance action to provide countervailing evidence showing that the adult child should be construed as having been part of the debtor's economic unit at the time the subject payments were made.

Conversely, if the debtor had not listed the debtor's adult child as a dependent on the debtor or debtor's non-filing spouse's income-tax return during the time when the subject payments were made, that adult child is rebuttably presumed to not be a part of the debtor's economic unit. The target of the constructively fraudulent conveyance claim would have the initial burden to rebut this presumption by providing evidence showing that the adult child should be construed as part of the debtor's economic unit during the applicable period. If that party can provide satisfactory evidence, the burden would shift to the trustee to provide countervailing evidence.

With respect to evidence that might be used by either the trustee or the target of a claim of constructive fraud to rebut an applicable presumption regarding whether an adult child was a member of the debtor's economic unit, the body of jurisprudence analyzing the term "household" under the economic unit approach provides an abundance of guidance.[427] Evidence that might be considered includes, for example, (1) documentation completed during the period of time when the subject payments were made that identify members of the debtor's household—such as applications for government assistance, real property leases and rental applications, loan applications, or credit card applications;[428] (2) bank statements, credit card statements, or receipts;[429] (3) domestic support orders or divorce orders;[430] (4) evidence as to whether the adult child had ever lived independently;[431] (5) evidence regarding the adult child's employment history;[432] (6) the age of the adult child;[433] (7) whether and to what extent the adult child shared a residence

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427. *See infra* notes 428–35 and accompanying text (giving examples of evidence that may be relevant in analyzing the third factor of the Author's proposed test).

428. *In re Skiles*, 504 B.R. at 882 (identifying such evidence as relevant to the economic unit inquiry).

429. *Id.*

430. *See supra* notes 369–70 and accompanying text (explaining that the societal expectation that parents will help their children pay for college spills into divorce settlements).

431. *See, e.g.*, *In re* Jewell, 365 B.R. 796, 797–98 (Bankr. S.D. Ohio 2007) (assessing whether an adult son who had never lived independently was part of his debtor-parents' household).

432. *Id.*

433. *See, e.g.*, Sikirica v. Cohen (*In re* Cohen), Ch. 7 Case No. 05-38135, Adv. No. 07-02517, 2012 WL 5360956, at *10 (Bankr. W.D. Pa. Oct. 31, 2012), *rev'd in part on other grounds*, 487 B.R. 615

with the debtor;[434] and (8) whether the debtor-parent and the adult child are or could be treated as a single unit for other purposes, such as insurance coverage, federal or state student aid or student loans, or other federal or state aid programs.[435]

B. Illustrating the Benefits of the Proposed Test

Examining the application of the proposed test to a typical factual scenario from which a claim of constructive fraud may arise should illustrate the benefits of the proposed test as compared to the current doctrines.

Debbie and Dan have one child, 20-year-old Sam. Sam is a junior at State University. Over the last two years, Debbie and Dan have made approximately $40,000 in payments to State University for Sam's tuition, books, and room and board. Sam lives at school during the school year. During holidays and over the summer, Sam lives back at home with Debbie and Dan. Debbie and Dan claim Sam as a dependent on their jointly filed tax returns. Debbie and Dan own a small shop in which they sell handmade crafts and other goods. A fire in the shop destroys most of their inventory and badly damages the building. While battling with their insurance provider over coverage for the damage, they are forced to close the shop and have lost their primary source of income. They begin to default on loan payments and other bills. They eventually file for relief under Chapter 7 of the Bankruptcy Code.[436] The Chapter 7 trustee sues State University, seeking to recover the $40,000 in payments made by Debbie and Dan to the University. The trustee asserts that the payments were constructively fraudulent because, the trustee argues, any value given in exchange for the payments was given to Sam and not to Debbie and Dan.

Under the direct value requirement,[437] only Sam received value from State University in exchange for the payments made by Sam's parents. As such, assuming the other elements of constructive fraud are met,[438] the payments made by Debbie and Dan to State University would be recoverable as constructively fraudulent.

(W.D. Pa. 2013) (distinguishing between expenses for a college-age child and an adult child in graduate school).

434. *See, e.g.*, *In re Jewell*, 365 B.R. at 797–98 (considering the fact that the debtors' adult son and daughter lived with the debtors in determining the size of the debtors' household).

435. *See* Johnson v. Zimmer, 686 F.3d 224, 226 (4th Cir. 2012) (defining the "economic unit" to include all "those who are financially dependent on the debtor").

436. 11 U.S.C. §§ 701–84 (2018).

437. *See supra* notes 90–93 and accompanying text (discussing the benefits-to-the-creditor understanding of fraudulent transfer law).

438. 11 U.S.C. § 548(a)(1)(B)(ii).

Under the totality-of-the-circumstances,[439] indirect-benefits,[440] and identity-of-interests doctrines,[441] however, an argument can be made that value was provided to the debtors. The University could attempt to gather evidence of the indirect benefits that may have flowed to the debtors. When Sam was away at school, Sam was not consuming food or using the utilities at Sam's parents' home, thereby arguably benefitting the debtors by reducing their bills. The debtors may attest that they felt peace of mind by helping Sam obtain a college education, thereby permitting them to focus on running their business. When Sam was home, Sam may have added value to the household by doing chores at home and perhaps by working in the debtors' shop. Arguably, Sam provided this assistance, at least in part, in response to the financial support and educational opportunities provided to Sam by Sam's parents.

Of course, the trustee could question any benefits that arguably flowed to the debtor-parents.[442] Moreover, even if benefits are shown to have flowed to the debtor-parents, the trustee could question whether those indirect benefits constitute a reasonably equivalent value in exchange for the payments made by Debbie and Dan to State University. As existing caselaw illustrates, authorities would apply incoherent tests to the value requirement and may ultimately disagree on the result.[443]

The proposed test addresses the value requirement in a manner that is coherent and principled, looking to the policies and goals underpinning both fraudulent transfer law and bankruptcy. Under the proposed test, we would ask the following: (1) whether reasonably equivalent value was given to Sam in exchange for the payments made by Sam's parents; (2) whether the expenses paid by Sam's parents were necessary for Sam to receive the education provided; and (3) whether, at the time the payments were made, Sam should be deemed a member of the same economic unit with Sam's parents,[444] such that they should be viewed as a single unit for fraudulent transfer purposes.

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439. *See supra* text accompanying notes 141–54 (outlining the totality-of-the-circumstances doctrine).

440. *See supra* text accompanying notes 174–80 (outlining the indirect-benefits doctrine).

441. *See supra* text accompanying notes 181–86 (outlining the identity-of-interests doctrine).

442. *Cf.* Shearer v. Oberdick (*In re* Oberdick), 490 B.R. 687, 712 (Bankr. W.D. Pa. 2013) (finding in favor of the trustee on a subset of education expenses—including fraternity dues—that did not benefit the debtor-parents).

443. *Supra* Part V.

444. It should be noted that the answer to this question may have already been resolved in connection with determining the size of the debtors' household for other relevant purposes. *See supra* Part III.B (discussing bankruptcy eligibility).

The first requirement of the test would be met here.[445] In exchange for the payments made by Sam's parents, Sam received an education and room and board at the University. The second requirement likewise would be easily met here.[446] The payment of tuition would certainly be necessary for Sam to receive the education that Sam received. Similarly, Sam would need room and board while Sam obtains an education.

Finally, the third requirement would be satisfied here.[447] Sam's parents claimed Sam as a dependent on their tax returns for the time during which Sam's parents made the payments to the University. Based on the facts given, the trustee would be unable to rebut the presumption that Sam was a part of the same economic unit with the debtors at the time the debtors made the payments to the University on Sam's behalf. As such, a court should treat Sam and Sam's parents as one economic unit for purposes of the constructive fraud claim against the University. Thus, under the proposed test, the debtors have received a reasonably equivalent value in exchange for the payments they made to the University.

Creditors to a consumer borrower understand that the borrower's financial life is not entirely independent of the members of the borrower's household.[448] In fact, bankruptcy law reflects this reality.[449] Moreover, the expectation that parents will help to pay for the undergraduate educational expenses of their children is deeply engrained in our society.[450] Creditors of Debbie and Dan would not be unfairly prejudiced by viewing Sam as part of one economic unit with Debbie and Dan for purposes of fraudulent transfer law.

CONCLUSION

The test for value proposed above advocates a practical approach to the reasonably equivalent value requirement in the context of the payment by debtor-parents of educational expenses for their adult children. It is based on the economic, cultural, and societal realities that provide the context in which the payments at issue are made, while staying true to the equitable roots of

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445. *See supra* text accompanying note 419 (introducing the first prong of the Author's proposed test).

446. *See supra* text accompanying note 421 (introducing the second prong of the Author's proposed test).

447. *See supra* text accompanying note 424 (introducing the third prong of the Author's proposed test).

448. *See supra* text accompanying notes 259–60.

449. *See supra* notes 217, 297 (citing examples of Bankruptcy Code provisions that address the debtor's household).

450. *Supra* text accompanying note 353.

fraudulent transfer law. The proposed test protects the legitimate expectations of the debtor (including the debtor's children), the debtor's creditors, and the colleges and universities that receive payments from the debtor. It does not prohibit the avoidance of transfers generally understood as "true" fraudulent transfers—those transfers that unacceptably contravene norms of creditors' rights. A showing of actual fraud could nonetheless be used to void the rare instance in which a debtor-parent might intentionally make such payments to move assets beyond the reach of its creditors. Similarly, the proposed test does not prohibit the appropriate party from challenging the debtor's bankruptcy case as having been filed in bad faith. At the same time, however, the proposed test stays true to the historical underpinnings of fraudulent transfer law and to the fresh start goal of bankruptcy by properly aiming the reasonably equivalent value requirement at protecting creditors from unexpected, harmful transactions.