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Fraudulent Transfer Claims

Does the bankruptcy court's decision in *In re Mortensen* spell the end of the asset protection trust?

The first bankruptcy case involving an Alaska asset protection trust (APT), *In re Mortensen*,[1] has been decided. This case (we'll refer to it as *Mortensen II*, as it was the second of three related rulings) revolved around the February 2005 settlement of an Alaska APT by Thomas Mortensen and his transfer of a Seldovia, Alaska real estate parcel into the APT at the time of settlement. Thomas thereafter filed bankruptcy in August 2009, and the bankruptcy trustee sued to set aside the Seldovia transaction on the grounds that it was a fraudulent transfer. Relying on Section 548(e) of the Bankruptcy Code, the bankruptcy court agreed with the trustee and avoided the transfer.

Some claim that *Mortensen II* stands for the proposition that any transfer to an APT is a per se fraudulent transfer and can survive a settlor's bankruptcy only if challenges are barred by the 10-year statute of limitations, created by Section 548(e), for APTs. If this per se view is correct, then many domestic asset protection structures may be endangered, both in and out of bankruptcy. Others argue that Section 548(e) merely extends the limitations period for fraudulent transfer suits and that the 10-year limitation period is a concern only in the bankruptcy context.

We believe that transfers to APTs aren't per se fraudulent. Rather, a plaintiff's fraudulent transfer claims are still subject to the same principles and evidentiary requirements that existed before Section 548(e) was added to the Bankruptcy Code in 2005. For the reasons set forth below, we believe our view is consistent with established case law, the legislative history behind the 2005 amendment to the Bankruptcy Code and the comments of the National Conference of Commissioners on Uniform State Laws (NCCUSL). We also believe that any conclusive presumption of fraud violates well-settled due process principles of constitutional law.

Background

In the early 1800s, corporations first began to emerge in the United States as business organizations that would legally limit liability of business owners.[2] At that time, much of the public, as well as many business individuals, thought that such statutory protection was morally wrong and that a person shouldn't be permitted to use an entity as an asset protection vehicle to shield himself from personal liability. Gradually, all 50 states and Washington, D.C. adopted corporate statutes, and what was once viewed as morally wrong became a common business practice.

Today, a similar issue is often raised as to whether an individual should be able to settle an APT and protect some part of his assets from the chance of being sued in the future. While the debates grow,

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so too does the number of states that have adopted domestic APT statutes. Presently, 12 states have passed asset protection legislation, and several other states are considering doing the same.

In 2005, Congress became concerned with possible abuses of APTs in bankruptcy and decided to provide unlimited protection to self-settled APT interests provided the relevant transfers into trust were non-fraudulent. Additionally, the "look back" period for challenging a transfer as fraudulent would be extended to 10 years.[3]

Congress enacted Bankruptcy Code Section 548(e)(1), which states:

> In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if—

Some practitioners see Mortensen II as a "bad facts" case; one that ultimately reached the right result, with twists along the way, but without any substantive changes in governing legal principles.

> (A) such transfer was made to a self-settled trust or similar device;
> (B) such transfer was by the debtor;
> (C) the debtor is a beneficiary of such trust or similar device; and
> (D) the debtor made the transfer with the *actual intent* to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.[4]

All four of the above tests must be satisfied, but the key element when dealing with an asset protection trust lies in the interpretation of (D)—the actual intent to hinder, delay or defraud a creditor.[5] Practitioners are now debating what constitutes actual intent under Section 548(e)(1), as well as what was actually held in *Mortensen II*.

Different Views

As noted above, some opponents of APTs are seizing upon *Mortensen II* as proof that APTs are inherently fraudulent, while others see *Mortensen II* as a "bad facts" case that ultimately reached the right result, albeit with some confusing twists along the way, but without any substantive changes in the governing legal principles.

View 1: Per se fraudulent transfer. The *Mortensen* trust stated its purpose was "to maximize the protection of the trust estate or estates from creditors' claims of the Grantor and to minimize all wealth transfer taxes." Toward the end of *Mortensen II*, the court stated, "[A] settlor's expressed intention to protect assets placed into a self-settled trust from a beneficiary's potential future creditors can be evidence of an intent to defraud"[6] and also stated that "the trust's express purpose was to hinder, delay and defraud present and future creditors."[7]

If these were the court's only statements on the intent issue, and if it had not issued two other opinions on the same case, the per se theory might hold some weight. However, this was simply not the case, as the court made other observations in *Mortensen II* and also issued two other key rulings: 1) A Jan. 14, 2011 denial of the bankruptcy trustee's motion for summary judgment (*Mortensen I*);[8] and 2) A July 8, 2011 denial of the defendant's motion for reconsideration (*Mortensen III*).[9]

For instance, in *Mortensen II*, the court stated:

> However, there is additional evidence which demonstrates that Mortensen's transfer of the Seldovia property to the trust was made with the intent to hinder, delay, and defraud present creditors.[10]

The evidence showed that Thomas was, to put it mildly, financially distressed when he settled his trust. This made *Mortensen* a quintessential "bad facts" case. Because these other concerns were expressly part

of the court's reasoning, and because the court did no more than make the rather unremarkable observation that "a settlor's expressed intention to protect assets … can be evidence of an intent to defraud"[11] (which differs sharply from saying that a settlor's expressed intention to protect assets is conclusive proof of an intent to defraud), it seems quite a stretch to say that *Mortensen II* holds that self-settled APTs are per se fraudulent.

The court's other opinions further support this view. For example, in *Mortensen I*, as part of denying the bankruptcy trustee's motion for summary judgment, the court noted that the stated purpose of the trust was "to maximize the protection of the trust estate or estates from creditors' claims of the Grantor or any beneficiary and to minimize all wealth transfer taxes."[12] If a transfer to an APT was a per se fraudulent transfer, then the court could have easily ended the litigation with summary judgment because the trust itself would have established that "there [was] no genuine dispute as to any material fact and the movant [was] entitled to judgment as a matter of law."[13] However, the court expressly stated that "an intent to hinder, delay or defraud *cannot be presumed* simply from the language of the trust document itself."[14]

Another salient fact is the court's ruling in *Mortensen III*. Thomas had moved to reconsider, arguing that "creation of the trust itself" shouldn't be used as evidence of intent.[15] In response, the court stated, "In this case, I found that the trust's express purpose *could provide evidence of fraudulent intent*. However, it wasn't the only evidence upon which I base my decision."[16]

Hence, upon reviewing everything the court said, it's clear that *Mortensen II* didn't find APTs inherently fraudulent—even when the APT in question had an explicit asset protection motive—and instead required more proof before finding any fraudulent intent.

View 2: Correct result, no substantive change. The second view holds that *Mortensen II* reached the right result and worked no change to substantive fraudulent transfer law.

To understand this second view, it's helpful to start with the court's catalog of factors it considered in determining whether Thomas acted with fraudulent intent. As the court stated in *Mortensen I*:

> Proving that the debtor had the requisite intent is difficult to establish. As the Ninth Circuit has noted, 'the primary difficulty has been how to decide which transfers in fact hinder, delay, or defraud creditors.' Circumstantial 'badges of fraud' are often used to determine whether a transfer is a fraudulent conveyance. Some of the more common 'badges' include whether there was actual or threatened litigation against the debtor, whether the debtor transferred substantially all of his property and whether he retained an interest in it after the transfer, whether the debtor was insolvent, and whether there was a special relationship between the debtor and the transferee.[17]

In addition, there are other badges of fraud found in the Uniform Fraudulent Transfer Act (UFTA), that could just as easily have been cited on Thomas' fact pattern, such as whether: (1) the debtor was insolvent at the time of transfer or became insolvent shortly after the transfer was made; and (2) the transfer occurred shortly before or after a substantial debt was incurred.[18]

In any event, when applied to Thomas' situation, the combined impact of the badges of fraud compellingly showed that the debtor was financially troubled and engaged in an abusive transaction that merited unraveling by the bankruptcy court.

Unfortunately, the court's analysis, while ultimately correct, was also somewhat superficial in connection with one key badge of fraud—insolvency—and was therefore marred by seemingly contradictory remarks. This issue deserves closer review to understand exactly what the court did.

Some planners erroneously assume that post-transfer solvency is the sole factor in successfully implementing a non-fraudulent APT settlement. Solvency is a key consideration, especially if the post-transfer solvency arises by design and thus shows an intent to protect the interests of reasonably foreseeable future creditors. It's also true that debtors who gratuitously transfer assets out of their name and leave themselves insolvent are likely to be accused of defrauding creditors. However, solvency can still be a complicated issue because there are different types of solvency to consider.

For example, *Mortensen II* reviewed the debtor's balance sheet as it existed at the time the trust was settled (Feb. 1, 2005) and expressly found that, for state law purposes, Thomas was solvent at that time. Although the court had some difficulty in determining Thomas' net worth on the date of the settlement, due to some uncertainty about the exempt status of some his assets and the extent of his liabilities, the court nonetheless concluded that Thomas was solvent even after assuming certain property was exempt (and hence not included in an UFTA-style solvency analysis) and using the highest available liability figures. Specifically, the court concluded that Thomas had approximately $144,000 of non-exempt assets, including a $100,000 receivable from his mother and between $50,000 and $85,000 of credit card debt before the transfer.[19] Moreover, this balance sheet didn't include the Seldovia property, which was apparently treated as having already been entrusted to the APT.

> In concluding that the debtor was "under water," the court relied on cash flow analysis and the debtor's inability to pay debts when due.

In other words, the balance sheet indicated, and the court expressly found, that "Mortensen was solvent at the time he created the trust."[20]

The court then seemingly contradicted itself and essentially found that Thomas was flat broke at the time of transfer, notwithstanding its earlier balance sheet-based finding that the debtor was solvent. The court stated:

> Mortensen was coming off some very lean years at the time he created the trust in 2005. His earnings over the preceding four years averaged just $11,644.00 annually. He had burned through a $100,000.00 annuity which he had cashed out in 2000. He had also accumulated credit card debt of between $49,711.00 to $85,000.00 at the time the trust was created. He was experiencing 'financial carnage' from his divorce. Comparing his low income to his estimated overhead of $5,000.00 per month (or $60,000.00 per year), Mortensen was well 'under water' when he sought to put the Seldovia property out of reach of his creditors by placing it in the trust.[21]

Accordingly, the court expressly found that Thomas was simultaneously solvent and "under water." It's little wonder if that mixed message leaves a reader perplexed. However, this seeming contradiction isn't at all contradictory after considering the difference between balance sheet insolvency and cash flow insolvency.

In reaching its conclusion that the debtor was solvent, the court expressly stated that, "insolvency is established for purposes of Alaska's asset protection trust law if the debtor's liabilities exceed its assets, excluding the value of fraudulent conveyances and exemptions."[22] This conclusion was a matter of first impression, as the court found no controlling state law authority for determining solvency under Alaska's APT statute.[23] Given this lack of controlling authority, the court apparently borrowed the balance sheet definition of "insolvent" found in Section 101(32)(A) of the Bankruptcy Code.

However, in concluding that the debtor was "under water" and that the APT settlement was a fraudulent transfer for purposes of Section 548(e), the court plainly relied on cash flow analysis and the debtor's inability to pay debts when due. This is consistent with long-standing fraudulent transfer analysis. For instance, UFTA Section 2(b) states, "A debtor who is generally not paying his [or her] debts as they become due is presumed to be insolvent." As explained by NCCUSL's Prefatory Note to UFTA, "The definition of insolvency under the Act is adapted from the definition of the term in the Bankruptcy Code. Insolvency is presumed from proof of a failure generally to pay debts as they become due."[24]

Thus, even if Thomas was solvent for balance

sheet purposes, he was plainly insolvent under the cash flow analysis that's typically used in fraudulent transfer cases, which in turn means that the seeming contradiction of the "under water but solvent" debtor isn't contradictory at all. It may be somewhat confusing because the court, without explanation, used cash flow solvency concepts for purposes of its analysis under federal bankruptcy law and Section 548(e) after it first referred to federal law concepts of balance sheet solvency for state law purposes. A confusing explanation, however, isn't the same as a contradictory result. Ultimately, the court had good grounds to find Thomas was insolvent when he entrusted the Seldovia parcel.

Intent to Defraud

In any event, the court found that Thomas intended to defraud creditors for purposes of federal law for the following six reasons in *Mortensen II*, several of which overlap, and some of which were repeated in *Mortensen III*:

1. Thomas was "under water" when he funded the trust, as his expenses exceeded his income at the time of transferring the Seldovia property into trust;[25]

2. He never paid off his creditors and, in fact, incurred additional unpaid debt during the time between the trust settlement and his bankruptcy;[26]

3. Thomas placed into the APT $80,000 of the $100,000 he received from his mother after settling the APT,[27] thus putting those funds (a substantial portion of his net worth) beyond the reach of creditors;

4. He used the trust as a vehicle for making stock market investments rather than simply to preserve the Seldovia property for his family;[28]

5. The APT's express purpose was to shelter assets from creditors;[29] and

6. Thomas also suffered from serious credibility problems.[30]

All of this led the court to "conclude that Mortensen's transfer of the Seldovia property and the placement of $80,000 into the trust constitutes persuasive evidence of an intent to hinder, delay and defraud present and future creditors."[31]

Under longstanding fraudulent transfer law:

> The presence of a single badge of fraud may spur mere suspicion; the confluence of several can constitute conclusive evidence of actual intent to defraud, absent 'significantly clear' evidence of legitimate supervening purposes.[32]

Given the six factors noted above, it's little wonder that Thomas' APT was unraveled.

Moreover, it's also possible that Thomas was the architect of his own demise because he acted as his own attorney for at least some part of the APT planning. The record shows that Thomas researched Alaska APT law and then drafted his APT instrument by using a template he downloaded from the Internet.[33] Although he had an attorney review the trust document itself,[34] it's unclear whether he also asked the attorney to engage in any sort of due diligence or client vetting to determine if Thomas was suitable for an APT. This last point is important because routine client screening would probably have caused a competent practitioner to tell Thomas that his poor finances and low net worth made him an unsuitable candidate for APT planning. Consequently, *Mortensen II* was clearly a "bad facts" case that was correctly decided, even if the court's analysis sometimes left something to be desired.

However, the big question still remains: Are APTs

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inherently fraudulent?

APTs Aren't Per Se Fraudulent

For a variety of reasons, APTs can't and shouldn't be considered per se fraudulent. *Mortensen II* didn't establish a per se rule and, more generally, there's no per se rule whether a debtor is in bankruptcy or out. Various considerations support these contentions.

First, any rule of law that says APTs are automatically fraudulent would violate well-established notions of due process. Advocates of the per se rule are essentially

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arguing for an irrebuttable presumption of fact, that is, that APT settlors must be found to have acted with the requisite fraudulent intent merely because they settled an APT. However, such irrebuttable presumptions are routinely rejected because they prevent courts and litigants from basing decisions on the real facts of a specific case.[35] Consequently, courts must consider all the facts and evidence, as expressly recognized by the NCCUSL's comments to UFTA,[36] and any per se rule that ignores the specific facts of a particular case is unconstitutional.

Second, when it comes to Section 548(e) in particular, it's clear that Congress didn't intend to make APTs per se fraudulent for bankruptcy purposes, but instead intended to require proof of fraudulent intent. This is shown by both the plain language of the statute itself, as well as the related legislative history.

The statutory analysis is quite simple. Nothing in Section 548(e) prohibits or invalidates all APTs; rather, APTs are avoided only if all four prongs of Section 548(e) are satisfied, including proof of fraudulent intent.[37] Consequently, advocates of a per se view make an argument that's cut adrift from statutory text.

The need to prove intent, and the corresponding lack of any per se rule under Section 548(e), is further confirmed by the Congressional debates over the two competing approaches to APTs.

Under the proposed "Schumer amendment," offered by Sen. Charles E. Schumer (D-N.Y.) to the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, a bankruptcy trustee would have been empowered to,

> avoid a transfer of an interest of the debtor in property made by an individual debtor within 10 years before the date of the filing of the petition to an asset protection trust if the amount of the transfer or the aggregate amount of all transfers to the trust or to similar trusts within such 10-year period exceeds $125,000 …[38]

The proposed Schumer amendment was so broad that it led Sen. Orrin Hatch (R-Utah) to complain that: "What the amendment … does is do away with essentially all self-settled trusts …, not just fraud."[39] Ultimately, the Senate rejected the Schumer amendment,[40] in part because Congress wasn't even sure whether there was an existing abuse that needed correcting and, if so, whether the Schumer amendment would have unintended consequences.[41]

The other approach was the so-called "Talent amendment," sponsored by Sen. Jim Talent (R-Mo.), which includes the text of current Section 548(e).[42] Sen. Talent proposed a 10-year look-back period because he felt that the one-year period under existing bankruptcy rules, and even the proposed two-year period that was part of the broader 2005 bankruptcy legislation, was simply too little time to properly review potentially fraudulent transactions.[43] Regardless of the size of the look-back window, however, the Talent amendment was expressly designed to require a showing of intent to defraud, as demonstrated by the remarks of Sen. Talent:

> My amendment is simple. It closes the asset protection trust loophole by empowering bankruptcy courts to go back 10 years to take away fraudulent transfers that criminals have sheltered away in an attempt to avoid paying back

their debts.[44]

The need to prove intent under Section 548(e) was confirmed by the critique of Sen. Schumer, who complained, "My friend from Missouri has offered an amendment that frankly keeps the status quo . . . It requires a showing of intent to defraud in order to not shield the assets."[45] Despite Sen. Schumer's complaints, the Senate adopted the Talent amendment by an overwhelming margin of 73 to 26,[46] and did so with a clear understanding that the new Section 548(e) required proof of fraudulent intent before an APT could be set aside. The Talent amendment eventually became law and is the same provision that was at issue in *Mortensen II*.

Accordingly, the legislative history confirms what's plain from Section 548(e)'s text: APTs aren't per se fraudulent, and a Section 548(e) complaint can succeed only if an actual intent to hinder, delay or defraud is proven.

Third, even the *Mortensen* trilogy rejects a per se rule and finds that Section 548(e) simply extends the limitations period. As detailed above, *Mortensen I* stated that, "an intent to hinder, delay or defraud cannot be presumed simply from the language of the trust document itself"[47] and refused to grant summary judgment even though the trust document expressly stated an asset protection motive. The *Mortensen III* court merely "found that the trust's express purpose could provide evidence of fraudulent intent"[48] and expressly based its decision on other evidence,[49] including the facts that poor Thomas was "under water"[50] and suffered credibility problems. In the end, the *Mortensen II* court recognized that Section 548(e) does no more than what Sen. Talent intended it to do: extend the limitations period for proving a routine fraudulent transfer claim. Citing *Collier on Bankruptcy*, the *Mortensen II* court said of Section 548(e):

> Its main function is to provide the estate representative with an extended reachback period for certain types of transfers. However, the 'actual intent' requirement found in § 548(e)(1)(D) is identical to the standard … for setting aside other fraudulent transfers and obligations.[51]

Fourth, and more generally, when it comes to proving actual intent, the official comments to UFTA make clear that there are no conclusive or irrebuttable presumptions under UFTA. For example, in discussing the badges of fraud enumerated under UFTA Section 4(b), the NCCUSL states:

> Subsection (b) is a nonexclusive catalogue of factors appropriate for consideration by the court in determining whether the debtor had an actual intent to hinder, delay, or defraud one or more creditors. Proof of the existence of any one or more of the factors enumerated in subsection (b) may be relevant evidence as to the debtor's actual intent *but does not create a presumption* that the debtor has made a fraudulent transfer or incurred a fraudulent obligation.[52]

A per se rule imposes an irrebuttable presumption of intent where none was intended by the statutory draftsmen.

Thus, in addition to being an unconstitutional deprivation of due process rights, a per se rule also runs afoul of the generally accepted workings of all fraudulent transfer laws because a per se rule imposes an irrebuttable presumption of intent where none was intended by the statutory draftsmen.

Fifth, and overlapping somewhat with the fourth point, a per se rule ignores the statutory requirement that a transfer into trust is fraudulent only if the plaintiff proves the transfer was made with an intent to defraud.[53] Thus, in a recent Illinois opinion dealing with a Cook Islands APT, and notwithstanding older Illinois case law establishing a per se rule, the court

rejected a per se rule because it conflicted with the proof requirements of UFTA. The court stated:

> … the Fraudulent Transfer Act and the common law cannot exist in harmony. Crane and its progeny stand for the principle that self-settled trusts are per se fraudulent, but the Fraudulent Transfer Act requires a creditor to satisfy the conditions of [the statute] to bring a successful fraudulent transfer claim. If the legislature intended self-settled trusts to remain per se fraudulent under the common law, it would not have promulgated a statute defining the conditions required to prove a transfer was fraudulent. See Moore v. Green, 219 Ill.2d 470, 488, 848 N.E.2d 1015 (2006) (we presume the legislature did not intend legislation to be rendered superfluous or vaguely advisory).[54]

Thus, it's clear that *Mortensen II* doesn't and can't establish a rule that transfers to APTs are per se fraudulent.

Endnotes

1. *In re Mortensen*, 2011 WL 5025249 (Bankr. D. Alaska May 26, 2011), Bankruptcy No. A09–00565–DMD. Adv. Pro. No. A09–90036–DMD 9 (*Mortensen II*).
2. New Jersey was the first state to allow business corporations, Delaware was second, and in 1819 the U.S. Supreme Court recognized corporations as business entities. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).
3. Commonly known as the "Talent Amendment."
4. 11 U.S.C. Section 548(e) (emphasis added).
5. *See, e.g., In re Mortensen*, 2011 WL 5025288 (Bankr. D. Alaska Jan. 14, 2011) at *2 (*Mortensen I)* ("The determinative issue here is whether Mortensen transferred the Seldovia property to the trust with actual intent to hinder, delay, or defraud his creditors") (internal quotes omitted).
6. *Mortensen II*, *supra* note 1 at *7 (emphasis added).
7. *Ibid.*
8. *Mortensen I*, *supra* note 5.
9. *In re Mortensen*, 2011 WL 5025252 (Bankr. D. Alaska July 8, 2011) (*Mortensen III*).
10. *Mortensen II*, *supra* note 1 at *7.
11. *Ibid.* (emphasis added).
12. *Mortensen I*, *supra* note 5 at *1.
13. Fed. R. Civ. Pro. 56(a), incorporated by reference into bankruptcy adversary proceedings by Bank. R. 7056.
14. *Mortensen I*, *supra* note 5 at *2 (emphasis added).
15. *Mortensen III*, *supra* note 9 at *1.
16. *Ibid.* (emphasis added).
17. *Mortensen I*, *supra* note 5 at *3 (internal cites, quotes omitted).
18. Uniform Fraudulent Transfer Act (UFTA) Sections 4(b)(9) and (10).
19. The $100,000 was apparently paid to the debtor by his mother as consideration for placing the Seldovia property into the asset protection trust (APT) to preserve it for use by her family, including her debtor-son and her grandchildren by the debtor. *See Mortensen II*, *supra* note 1 at *3.
20. *Mortensen II*, *supra* note 1 at *5.
21. *Ibid.* at *7.
22. *Ibid.* at *4.
23. *Ibid.* ("'Insolvent' is not defined in Alaska's asset protection trust statute or in any cases arising thereafter.")
24. *See* p. 4 of the official version of UFTA, available at *www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/ufta84.pdf.*
25. *See supra* note 21 ("Mortensen was well 'under water' when he sought to put the Seldovia property out of reach of his creditors by placing it in the trust.")
26. *Ibid.* (summarizing debt history).
27. *Ibid.*, stating, "Further, when Mortensen received the $100,000.00 from his mother he didn't pay off his credit cards. Rather, he transferred $80,000.00 into the trust after paying a few bills and began speculating in the stock market."
28. *Ibid.*, (noting that Thomas "began speculating in the stock market"). *See also ibid.* at *3 (referring to "speculative investments in the stock market").
29. *Ibid.* ("Here, the trust's express purpose was to

hinder, delay and defraud present and future creditors.")

30. *Ibid.* (Court stating it didn't believe Thomas' claim that he was repaid the $80,000 he lent the APT.)
31. *Ibid.*
32. *Mortensen I*, *supra* note 5 at *3 (collecting cases).
33. *Mortensen II*, *supra* note 1 at *2.
34. *Ibid.*
35. *See, e.g., Heiner v. Donnan*, 285 U.S. 312, 329 (1932) ("This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment"); *Ibid.*, at 325 ("a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment"); *Osorio v. Dole Food Co.*, 665 F. Supp.2d 1307, 1332 (S.D. Fla. 2009) ("Statutes creating permanent irrebuttable presumptions have long been disfavored, because a presumption which operates to deny a fair opportunity to rebut it is a denial of due process") (internal quotes, citations, brackets omitted); *Vlandis v. Kline*, 412 U.S. 441, 446 (1973) ("Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments"); *State ex rel. Wright v. Oklahoma Corporation Commission*, 170 P.3d 1024, 1042, par. 60, n. 26 (2007) ("It is held to be a denial of due process to legislatively mandate an irrebuttable presumption of a fact, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination") (internal citations, quotes, brackets omitted); *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St.3d 46, (1990) ("This court has previously stated that [d]ue process of law implies, in its most comprehensive sense, the right of the person affected thereby to be present before the tribunal which pronounces judgment upon a question of life, liberty or property, to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved …" and "[i]f any question of fact or liability be conclusively presumed against him, such is not due process of law") (brackets added, internal cites, quotes omitted).
36. UFTA Section 4, cmt. 6, stating, "In considering the [badges of fraud], *a court should evaluate all the relevant circumstances* involving a challenged transfer or obligation." (Emphasis added.)
37. *See* 11 U.S.C. Section 548(e), quoted above as the main text associated with endnote 4 *supra*.

SPOT LIGHT

"Mass" Produced

"Self-Portrait" (22 1/2 in. by 22 1/2 in.) by Andy Warhol, sold at Christie's Post-War Contemporary Evening Sale on Nov. 8, 2011 for $3,106,500. Much has been written about Warhol and his art, but few realize that although he famously depicted "Jewish Geniuses" in 1980, Warhol was actually a practicing Ruthenian Rite Catholic. He regularly attended mass, in secret, at Saint