THE TUITION "CLAW BACK" PHENOMENON: REASONABLY EQUIVALENT VALUE AND PARENTAL TUITION PAYMENTS

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A new phenomenon has developed in recent bankruptcy proceedings in which trustees are "clawing back" tuition payments made by debtor-parents on behalf of their children. Relying on Bankruptcy Code section 548, trustees are arguing that because parents have no legal obligation to pay for their child's college tuition, they receive no "reasonably equivalent value" for such payments, thereby making such transfers fraudulent and eligible for clawback in bankruptcy. These clawbacks are increasingly troubling considering the rising cost of post-secondary education and the burden such expenses can impose on this generation's college graduates. This Note addresses the confusion in bankruptcy courts over the proper resolution of tuition clawback cases. While some courts have allowed these clawbacks, others have invoked notions of parental and societal obligations to protect debtor-parents who make tuition payments on the eve of bankruptcy. This Note explores several solutions to this problem including both amending the Bankruptcy Code and providing for an alternative reading of "reasonably equivalent value."

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I. INTRODUCTION

Under Bankruptcy Code ("Code") sections 548 and 550, trustees of chapter 7 bankruptcy estates can file suit to avoid and recover transfers made by the debtor within two years of the bankruptcy filing.[1] The trustee must prove either that the debtor made a transfer in an attempt to defraud creditors or that the debtor did not get reasonably equivalent value in consideration of a transfer made while the debtor

[1] 11 U.S.C. § 548 (2012); 11 U.S.C. § 550 (2012).

was insolvent.[2] These suits, which may be filed against the transferee, are known as "avoidance actions."[3] A recent trend has developed in which chapter 7 trustees seek to avoid and recover tuition payments made by insolvent debtors on behalf of their children in the time leading up to the bankruptcy filing.[4] The trustees in these cases argue that since the parents have no legal obligation to pay for their child's tuition, they do not receive reasonably equivalent value for the tuition payment. Therefore, the transfer should be avoided and the funds returned to the bankruptcy estate.[5]

This Note analyzes the recent cases that have considered avoidance actions against parental tuition payments.[6] It argues that the value (whether economic or otherwise) parents receive as a result of paying for their children's tuition should reasonably constitute equivalent value for purposes of section 548, and therefore courts should reject clawback attempts against such payments.

Part II of this Note introduces sections 548 and 550 of the Code and discusses the process of avoidance actions and fraudulent transfer recovery in a typical bankruptcy case. Part III analyzes recent bankruptcy court opinions that deal with tuition clawbacks and explores the various interpretations of reasonably equivalent value as it relates to parental tuition payments. Finally, Part IV discusses potential solutions to the split in bankruptcy courts, including refining the definition of reasonably equivalent value and providing an exemption for tuition payments in the Code itself.

2 11 U.S.C. § 548 (2012).

3 5 COLLIER ON BANKRUPTCY ¶ 550.01 (Alan N. Resnick & Henry J. Sommer eds., 16th rev. ed. 2012).

4 *See* Katy Stech, *Bankruptcy Trustees Claw Back College Tuition Paid for Filers' Kids*, WALL ST. J. (May 5, 2015, 7:50 PM), http://www.wsj.com/articles/bankruptcy-trustees-claw-back-college-tuition-paid-for-filers-kids-1430869820 [https://perma.cc/LED3-Z3R4].

5 *Id.*

6 *See* discussion *infra* Part III.

II. BACKGROUND

A. Avoidance Powers in Bankruptcy Proceedings

When a debtor files a bankruptcy petition under chapter 7, one of the bankruptcy court's first steps is to appoint a trustee to "administer the case."[7] In a chapter 7 liquidation case, section 704 of the Code tasks the trustee with certain duties, including, but not limited to, collecting and reducing to money the property of the estate, being accountable for all property received, and scrutinizing any improper proofs of claim against the estate.[8] In addition to these required duties, the Code also gives the trustee certain rights and discretionary powers, such as avoiding certain pre-bankruptcy transfers.[9] The ability to avoid fraudulent transfers is extremely important in the bankruptcy context because "to the extent that a transfer is avoided under certain of the trustee's avoiding powers, the trustee may recover, for the benefit of the estate, the property transferred or . . . the value of such property."[10] As may seem apparent, these avoidance powers are "designed to maximize the property available to pay creditors of the bankruptcy

7 6 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 700.02. It may helpful at this point to provide a brief overview of the differences between a chapter 11, chapter 7, and chapter 13 bankruptcy petition. Chapter 7 governs liquidation of a debtor. Liquidation is a form of bankruptcy relief that involves "the collection, liquidation and distribution of the nonexempt property of the debtor." *Id.* at 700.01. Chapter 11 of the Code "provides an opportunity for a debtor to reorganize its business or financial affairs . . . . It is fashioned primarily for business debtors." 7 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 1100.1. Chapter 13 is similar to a reorganization under chapter 11 in many ways. Chapter 13 permits the creation of a plan that sets out how the debtor is going to pay the various creditors. Ordinarily the payments are made from the debtor's income rather than assets. 8 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 1300.1.

8 *See* 11 U.S.C. § 704 (2012).

9 *See* 11 U.S.C. § 544 (2012); 11 U.S.C. § 545 (2012); 11 U.S.C. § 547 (2012); 11 U.S.C. § 548 (2012).

10 9B AM. JUR. 2D *Bankruptcy* § 2056, at 519 (2d ed. 2006).

estate."[11] Three key avoidance powers are the "strong-arm" clause of section 544, the preferential transfer avoidance power of section 547, and the fraudulent transfer avoidance power of section 548.

Briefly, section 544 allows the trustee to "'step into the shoes' of a creditor and avoid the debtor's transfers of property or property interests that could have been avoided by the creditor outside of bankruptcy."[12] The strong-arm clause's purpose "is to cut off unperfected security interests, secret liens and undisclosed prepetition claims against the debtor's property as of the commencement of the case."[13] Section 547, on the other hand, gives the trustee the power to "avoid certain transfers made within 90 days . . . preceding the bankruptcy filing that would otherwise benefit one or more creditors at the expense of other creditors."[14] Such transfers are known as "preferences."[15] The trustee's sole ability to avoid certain transfers of property and to assert certain claims on behalf of the creditors allows the bankruptcy case to proceed more efficiently with a more even distribution of assets amongst the creditors.[16] Section 548, which is the main focus of this Note and which will be discussed more thoroughly below, contains the fraudulent transfer power.

1. Section 548 Overview

The fraudulent transfer power of section 548 "incorporates the law of fraudulent transfers into the

11 Bryan D. Hull, *A Void in Avoidance Powers? The Bankruptcy Trustee's Inability to Assert Damages Claims on Behalf of Creditors Against Third Parties*, 46 U. MIAMI L. REV. 263, 264 (1991).

12 *Id.* (citing 11 U.S.C. § 544 (1988)).

13 KATHLEEN P. MARCH, ALAN M. AHART & JANET A. SHAPIRO, THE RUTTER GROUP CALIFORNIA PRACTICE GUIDE: BANKRUPTCY § 21:150 (2015) (quoting *In re* Canney, 284 F.3d 362, 374 (2d Cir. 2002)).

14 *Id.* § 21:410.

15 *Id.*; *see also infra* Section IV.A. *See generally*, 11 U.S.C. § 547 (2012).

16 Hull, *supra* note 11, at 281–83.

Bankruptcy Code"[17] and "allows creditors to avoid transactions which unfairly or improperly deplete a debtor's assets or that unfairly or improperly dilute the claims against those assets."[18] Section 548 allows a trustee to avoid a pre-bankruptcy transfer provided that one of two conditions are met: the transfer must either have been made "with actual intent to hinder, delay, or defraud" creditors or the debtor must have received "less than reasonably equivalent value" for a transfer made within two years of the bankruptcy filing and was insolvent or became insolvent as a result of such transfer.[19] This second type of fraudulent transfer is known as constructive fraud.[20] In sum, section 548, much like the other avoidance powers, attempts to "protect creditors from transactions which are designed, or have the effect, of unfairly draining the pool of assets available to satisfy creditors' claims."[21]

The Uniform Fraudulent Transfer Act ("UFTA")[22] also attempts to protect creditors from unfair transactions and parallels section 548 in many respects. The UFTA "is the applicable state fraudulent conveyance law of all but about five states"[23] and applies both inside and outside of bankruptcy proceedings. UFTA section 4 most closely mirrors Code section 548, and provides that:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's

17 5 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 548.01.

18 *Id.*

19 11 U.S.C. § 548(a)(1) (2012).

20 Irina Fox, *"Reasonably Equivalent Value" in § 548 Avoidance Actions: An Analytical Framework Post-*In re TOUSA, Inc., 20 NORTON J. BANKR. L. & PRAC. 4 Art. 2, at 2 (2011).

21 5 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 548.01[1][a].

22 Now referred to as the Uniform Voidable Transactions Act ("UVTA").

23 John D. Ayer, et al., *The Trustee's Power to Avoid Fraudulent Transfers*, AM. BANKR. INST. J., May 2004, http://www.kirkland.com/siteFiles/kirkexp/publications/2402/Document1/Friedland_Trustees_Power.pdf [https://perma.cc/UH3P-TFB6].

> claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . without receiving a reasonably equivalent value in exchange for the transfer or obligation . . . .[24]

One practical effect of the UFTA is that "[u]nder certain circumstances, a bankruptcy trustee may base a fraudulent transfer action on both § 548(a)(1)(B) and on a state's adoption of the UFTA through § 544(b)."[25] However, because section 548 is federal law whereas the UFTA is state law, certain differences in case law can produce different results, "depending upon whether the trustee's action is brought under state law as applied through § 544(b) or under federal law pursuant to § 548(a)(1)(B)."[26] Specifically, there are three key differences between the UFTA and section 548. First, "the time period to set aside fraudulent transfers is generally longer under state law than the two-year period set forth in § 548."[27] Second, under state fraudulent conveyance law, "the trustee will generally be subject to defenses that could have been asserted against an actual creditor," while under section 548, "the trustee sues in his or her own right."[28] Lastly, "state fraudulent transfer law generally has a more stringent standard of proof than § 548."[29] In any event, since the meaning of reasonably equivalent value is the crux of this argument and is found both in the UFTA and the Code, the differences between the two statutes will not have a substantive bearing on the subsequent analysis.[30]

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24 UNIF. VOIDABLE TRANSACTIONS ACT § 4 (UNIF. LAW COMM'N 2014).

25 Ryan M. McCabe, *Causes of Action to Set Aside or Recover for Fraudulent Transfer or Obligation Under Uniform Fraudulent Transfer Act*, *in* 55 CAUSES OF ACTION 2D 467, § 3 (2012).

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 Leibowitz v. Parkway Bank & Trust Co. (*In re* Image Worldwide), Ltd., 139 F.3d 574, 577 (7th Cir. 1998) ("[T]he UFTA is a uniform act, and it derived the phrase 'reasonably equivalent value' from 11 U.S.C. §

2. The Meaning of Reasonably Equivalent Value

In situations where actual fraud is impossible to prove, constructive fraud becomes the only available cause for avoidance, therefore, "avoidability of a transaction under § 548 [often] turns on how courts apply the concept of 'reasonably equivalent value' to the facts present in a specific case."[31] While section 548 provides practitioners with definitions to several terms used within the section,[32] it is unfortunately silent when it comes to the meaning of "reasonably equivalent value." The meaning of the phrase is also absent from any legislative history.[33] As scholars have noted, "this omission has proven to be a serious problem"[34] and reasonably equivalent value is "a murky concept subject to a variety of interpretations."[35]

In the abstract, reasonably equivalent value is focused on "the net effect of the transfer on the debtor's estate and the funds available to the debtor's creditors."[36] There are typically two determinations that must be made when looking at whether a transfer garnered "reasonably equivalent value."[37] First, it must be determined "whether any value at all has been received for the transfer."[38] Second,

548(a)(2) . . . Thus we can look to interpretations of 'reasonably equivalent value' from §548 cases, as well as cases from courts interpreting other states' versions of the UFTA.").

31 Fox, *supra* note 20, at 2.

32 *See* 11 U.S.C. § 548(d)(2) (2012) (defining the terms "value," "charitable contribution," and "qualified religious or charitable entity or organization" but not defining reasonably equivalent value).

33 Marie T. Reilly, *A Search for Reason in "Reasonably Equivalent Value" After* BFP v. Resolution Trust Corp., 13 AM. BANKR. INST. L. REV. 261, 266 (2005).

34 Scott Todd Salmonson, *Avoiding A Landmine: A Practitioner's Guide to Disarming the Reasonably Equivalent Value Requirement of Section 548 of the Bankruptcy Code*, 67 ST. JOHN'S L. REV. 959, 960 (1993).

35 Fox, *supra* note 20, at 1.

36 9C AM. JUR. 2D *Bankruptcy* § 2233, at 59 (2006).

37 *Id.*

38 *Id.*

the court must decide whether the value given was reasonably equivalent to the value of the property transferred.[39] In voluntary transactions, "the fair market value of the objects of exchange will usually be the most important factor" in determining whether reasonably equivalent value was received.[40] However, some courts, specifically in the foreclosure sale context, have refused to look solely at fair market value. In *BFP v. Resolution Trust Corp.*, the Supreme Court "decline[d] to read the phrase 'reasonably equivalent value' in § 548(a)(2) to mean, in its application to mortgage foreclosure sales, either 'fair market value' or 'fair foreclosure price.'"[41] The Court deemed instead "that a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with."[42] Additionally, these determinations are objective, and should be considered from the perspective of the debtor's creditors.[43] Despite these generally accepted parameters, courts have grappled with the uncertainty surrounding reasonably equivalent value for several decades now.[44] One scholar noted that "each court seems to address the issue in a subjective and almost personal manner."[45] For example, where a transfer has been made for the benefit of third parties, the lack of a uniform definition of reasonably equivalent value has created vastly different outcomes amongst courts.[46] While some courts, both at the bankruptcy court level and the circuit court level, have held that a payment by the debtor to a third party (for example, paying

39 *Id.*, at 59–60.

40 5 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 548.05[2][a].

41 BFP v. Resolution Trust Corp., 511 U.S. 531, 545 (1994).

42 *Id.*

43 Jack F. Williams, *Revisiting the Proper Limits of Fraudulent Transfer Law*, 8 BANKR. DEV. J. 55, 79–80 (1991).

44 *See* Reilly, *supra* note 33, at 269.

45 *See* Williams, *supra* note 43, at 82.

46 5 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 548.05[2][b].

off a relative's debt) cannot be deemed reasonably equivalent value,[47] other circuit courts have ruled the exact opposite, holding that "a debtor may sometimes receive 'fair' consideration even though the consideration given for his property or obligation goes initially to a third person."[48]

Another example of the disparity between courts' definitions of reasonably equivalent value is the importance placed on the quantifiable nature of the benefit. While some bankruptcy level courts have held that "an indirect benefit to the debtor from a transfer . . . cannot be 'reasonably equivalent value,' unless it is (1) an 'economic' benefit; (2) concrete; and (3) quantifiable,"[49] certain other circuit courts have found that "it is appropriate to take into account intangible assets not carried on the debtor's balance sheet, including, *inter alia,* good will."[50]

3. Section 550 Overview

Once a transfer is properly avoided under section 548, "the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from . . . the initial transferee of such transfer."[51] The transferee of a transfer that has been avoided by section 548 may be forced by a court to turn over the property transferred, or in cases where this is not feasible, to return the value of such property.[52] The purpose

47 *Id*. (citing SEC v. Res. Dev. Int'l LLC, 487 F.3d 295, 301 (5th Cir. 2007); Nat'l City Bank v. Lockwood Auto Grp., Inc. (*In re* Lockwood Auto Grp., Inc.), 370 B.R. 658, 663 (Bankr. W.D. Pa. 2007); Ackerman v. Schultz (*In re* Schultz), 250 B.R. 22, 32–33 (Bankr. E.D.N.Y. 2000)).

48 Rubin v. Mfrs. Hanover Tr. Co., 661 F.2d 979, 991 (2d Cir. 1981).

49 Gold v. Marquette Univ. (*In re* Leonard), 454 B.R. 444, 457 (Bankr. E.D. Mich. 2011).

50 Mellon Bank, N.A. v. Metro Commc'ns, Inc., 945 F.2d 635, 647 (3d Cir. 1991), *as amended* (Oct. 28, 1991).

51 11 U.S.C. § 550 (2012).

52 Speciner v. Gettinger Assocs. (*In re* Brooklyn Overall Co.), 57 B.R. 999, 1004 (Bankr. E.D.N.Y. 1986) ("Where it is impractical for the trustee

of section 550 is to "restore the estate to the financial condition it would have enjoyed if the transfer had not occurred."[53] Whether to allow for the recovery of the property itself, or the value of such property, is within the court's discretion. A court will generally look at "whether the value of the property (1) is contested; (2) is not readily determinable; or (3) is not diminished by conversion or depreciation."[54] It is important to note that while sections 548 and 550 are closely related, and serve generally the same function, they are distinct sections, and therefore claims for avoidance and claims for recovery are distinct claims that must be brought separately.[55] Recovery is not available until a transfer has been avoided.[56]

Like section 548, section 550 also has a parallel section in the UFTA. The meanings of UFTA section 8 and Code section 550 are nearly identical, and comment two of section 8 specifically acknowledges that the language of section 8 "is derived from § 550(a) of the Bankruptcy Code."[57] Therefore, while it is important to acknowledge that section 550 has a parallel in the UFTA, the differences between the two statutes will not make a substantive difference to the analysis in this Note.

III. REASONABLY EQUIVALENT VALUE AND TUITION CLAWBACKS

Recently, trustees have used sections 548 and 550 to avoid and recover tuition payments made by insolvent parents within two years of filing for bankruptcy.[58] The crux

to recover the property, the court will generally authorize the recovery of its value.").

53 Hirsch v. Gersten (*In re* Centennial Textiles, Inc.), 220 B.R. 165, 176 (Bankr. S.D.N.Y. 1998).

54 *Id.* at 177.

55 3B BANKR. SERV. LAW. EDITION § 33:42 (2016).

56 25 AM. JUR. 3D *Proof of Facts* 591, § 4 (1994).

57 UNIF. VOIDABLE TRANSACTIONS ACT § 8 cmt. 2 (UNIF. LAW COMM'N 2014).

58 *See* Stech, *supra* note 4.

of these actions rests on the argument that the debtor parents receive no reasonably equivalent value for the tuition payments, and thus such payments fall under the constructive fraud category of section 548 (presumably because parents are not paying tuition payments to *purposely* deceive creditors).[59] While several bankruptcy courts have dealt with the uncertainty surrounding these tuition clawbacks, the rulings fall on both sides of the issue. The dearth of case law on the subject complicates analysis of the issue.

A. Recent Cases Allowing Tuition Clawbacks

Although there are other cases that deal with clawing back tuition payments made for a child's primary and secondary education,[60] the number of cases that involve undergraduate education is unfortunately limited.

1. *Gold v. Marquette University* (*In re Leonard*)

Gold v. Marquette University is a recent case in which a court allowed a tuition clawback.[61] In this case, the trustee of a chapter 7 estate filed an adversary proceeding against Marquette University, "seek[ing] to avoid and recover, as fraudulent transfers, four payments that the Debtors made to Defendant Marquette University."[62] The debtors filed a chapter 7 bankruptcy petition on November 17, 2008.[63] In the fall of 2008, the debtors' son began attending Marquette University, and in the months preceding the bankruptcy filing, the debtors made four payments to Marquette to cover their son's tuition, totaling $21,527.00.[64] The first of the

59 *Id.*

60 *See In re* Akanmu, 502 B.R. 124 (Bankr. E.D.N.Y. 2013); *In re* Karolak, No. 12-61378, 2013 WL 4786861 (Bankr. E.D. Mich. Sept. 6, 2013).

61 *In re* Leonard, 454 B.R. 444, 460 (Bankr. E.D. Mich. 2011).

62 *Id.* at 445.

63 *Id.* at 446.

64 *Id.*

payments was made seven months prior to the petition and the final payment was made three days after the bankruptcy filing.[65] At the time of all four transfers, the debtors' son was 18 years old.[66] The trustee claimed that the transfers constituted both actual fraud, under section 548(a)(1)(A) of the Code, and also constructive fraud, under section 548(a)(1)(B).[67] The debtor, however, did not seek summary judgment for the actual fraud claim, so constructive fraud was the only claim at issue. Marquette defended against the constructive fraud claim, asserting that although "the Debtors were insolvent when the transfers were made . . . the Debtors received 'reasonably equivalent value' for each of the transfers."[68]

The court held hearings on the trustee's motion for summary judgment and specifically requested "post-hearing briefing relating to issues of 'reasonably equivalent value.'"[69] Marquette claimed that "because the transfers enabled [the debtors'] son to attend and receive a college education at Marquette," the tuition payments received reasonably equivalent value in exchange.[70] Specifically, Marquette argued that "[w]hile it may be impossible to quantify, clearly this education bestowed peace of mind upon the Debtors that their son will be afforded opportunities throughout his lifetime" and that, "in a more tangible sense, the Debtors anticipate that they will not remain financially responsible for [their son] as his education will afford him future employment opportunities."[71]

65 *Id.*

66 *Id.*

67 *Id.* at 447–48.

68 *Id.* at 449.

69 *Id.*

70 *Id.* at 454.

71 Defendant's Brief In Response To Plaintiff's Motion For Summary Judgment at 5, Gold v. Marquette University (*In re* Leonard), 454 B.R. 444 (Bankr. E.D. Mich. 2011) (No. 10-4608).

Acknowledging that the Code does not define reasonably equivalent value,[72] the court looked to Sixth Circuit precedent to determine that "an indirect benefit to the debtor from a transfer is not considered 'value,' and therefore cannot be 'reasonably equivalent value,' unless it is (1) an 'economic' benefit; (2) concrete; and (3) quantifiable."[73] Applying this definition to the case at hand, the court held that "it is clear that the Debtors did not receive any 'value' for their tuition payments to Marquette, and therefore did not receive 'reasonably equivalent value.'"[74] The court dismissed Marquette's argument regarding the parents' benefit of not having to be financially responsible for their son due to the opportunities afforded by the education by noting that the parents would not have "any legal obligation to support their adult son, either at the time of the transfers, when Debtors' son was 18 years old, or at any time in the future."[75] The court also rejected Marquette's "peace of mind" argument, holding that "[w]hile satisfying such a moral obligation and receiving such 'peace of mind' may be very real benefits that are personally quite important to the Debtors, these intangible benefits are not 'economic' . . . nor are they 'concrete' and 'quantifiable.'"[76]

2. *Banner v. Lindsay* (*In re Lindsay*)

In re Lindsay is another tuition clawback case involving reasonably equivalent value in which the court allowed the clawback.[77] However, unlike in *In re Leonard*, the court in *In re Lindsay* actually ordered the *parents themselves* to pay back the trustee.[78] In August and September of 2006, the

72 *In re Leonard*, 454 B.R. at 455.

73 *Id.* at 457 (citing Lisle v. John Wiley & Sons, Inc. (*In re* Wilkinson), 196 F.App'x 337, 342–43 (6th Cir. 2006)).

74 *Id.* at 457.

75 *Id.*

76 *Id.*

77 Banner v. Lindsay (*In re* Lindsay), No. 06-36352 (CGM), 2010 WL 1780065, at *8 (Bankr. S.D.N.Y. May 4, 2010).

78 *Id.* at *9–10.

debtor used the proceeds from the sale of certain vehicles to pay for his son's tuition at the University of St. Andrews.[79] Three months later, in December of 2006, the debtor filed for bankruptcy under chapter 7.[80] The trustee brought an adversary proceeding against the debtor to avoid these and other transfers under both the debtor and creditor laws of New York and the Code.[81] The complaint alleged that the transfers to St. Andrews were fraudulent because the debtor received no "fair consideration" in return.[82] The debtor defended the transfers by claiming that he had a "moral obligation" to pay for his son's college.[83]

The court rejected the debtor's argument, noting first that "the Court is not aware of any law requiring a parent to pay for child's college education."[84] The court then looked to precedent to note that the debtor did "not offer any authority in support" of the moral obligation argument.[85] Additionally, the court cited another bankruptcy case in which "the bankruptcy court rejected the debtor's contention that paying for his children's college education was his 'responsibility.'"[86] Ultimately, the court held that "defendants must turn $35,055 over to the Plaintiff, representing the money used to pay for the son's tuition."[87]

79 *Id.* at *5 (noting debtor transferred to the University $12,500 from the sale of his car, $2,500 from the sale of his motorcycle, and $20,055 from the sale of his trailer to make the tuition payment).

80 *Id.* at *1.

81 Complaint to Avoid Transfers and Recovery Property at 2, Banner v. Lindsay (*In re* Lindsay), No. 06-36352 (CGM), 2010 WL 1780065, at *8 (Bankr. S.D.N.Y. May 4, 2010).

82 *Id.* at 4–8.

83 *In re Lindsay*, 2010 WL 1780065, at *9.

84 *Id.*

85 *Id.*

86 *Id.* (citing *In re* Godios, 333 B.R. 644, 647 (Bankr. W.D.N.Y. 2005)).

87 *Id.* at *10.

B. Recent Cases Denying Tuition Clawbacks

1. *DeGiacomo v. Sacred Heart University, Inc.* (*In re Palladino*)

In contrast, there have been several cases in which courts have rejected trustees' attempts to claw back tuition payments, the most recent of which is *In re Palladino* from the District of Massachusetts Bankruptcy Court.[88] In this case, the parents of a student enrolled at Sacred Heart University ("SHU") paid to the school over a two-year period a total of $64,696.22 to cover tuition and fees.[89] After being caught orchestrating a Ponzi scheme and being convicted of fraud, the parents filed for chapter 7 bankruptcy relief.[90] The trustee then sought to claw back the $64,696.22 under section 548.[91] The court ultimately denied the claw back, holding:

> I find that the Palladinos paid SHU because they believed that a financially self-sufficient daughter offered them an economic benefit and that a college degree would directly contribute to financial self-sufficiency. I find that motivation to be concrete and quantifiable enough. The operative standard used in both the Bankruptcy Code and the UFTA is "reasonably equivalent value." The emphasis should be on "reasonably." Often a parent will not know at the time she pays a bill, whether for herself or for her child, if the medical procedure, the music lesson, or the college fee will turn out to have been "worth it." But future outcome cannot be the standard for determining whether one receives reasonably equivalent value at the time of a payment. A parent can reasonably assume that paying for a child to obtain an undergraduate degree will enhance the

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

89 *Id*. at 12.

90 *Id*.

91 *Id*. at 13.

> financial well-being of the child which in turn will confer an economic benefit on the parent. This, it seems to me, constitutes a *quid pro quo* that is reasonable and reasonable equivalence is all that is required.[92]

While the court in *Palladino* emphasized the economic value of paying for a child's college tuition, other courts, as the cases below illustrate, have focused on the familial responsibility aspect of such payment.

2. *Sicirica v. Cohen* (*In re Cohen*)

In *In re Cohen*, the trustee brought an adversary proceeding against the debtors to avoid certain pre-bankruptcy transfers under both the Code and the Pennsylvania Code.[93] This case arose out of a lawsuit between a disbanded law firm and the owner of the law firm's former office building.[94] In that trial, the court rendered a verdict against the debtor and held the debtor jointly and severally liable for approximately $3,274,000.[95] After the court entered its initial judgment, but before the final judgment, the debtor filed a petition for bankruptcy under chapter 7.[96] Soon thereafter, the trustee filed an adversary proceeding, claiming that certain funds deposited into the debtor's joint account with his wife were subsequently transferred in violation of fraudulent transfer law.[97] Specifically, the trustee challenged the transfer of

92 *Id*. at 16.

93 Sikirica v. Cohen (*In re* Cohen), No. 05-38135-JAD, 2012 WL 5360956, at *3 (Bankr. W.D. Pa. Oct. 31, 2012), *aff'd in part, rev'd in part on other grounds*, 487 B.R. 615 (W.D. Pa. 2013). Unlike the New York Code in *In re Lindsay*, the Pennsylvania Code uses "reasonably equivalent value" just as the Bankruptcy Code does. *See* 12 PA. CONS. STAT. ANN. § 5104 (2014).

94 *Id*. at *1.

95 *Id*.

96 *Id*. at *2.

97 *Id*. ("[T]he Trustee argues that the Debtor's deposits into the Entireties Account which were not subsequently spent on necessary living

"$46,059.97 for their son's undergraduate education, $7,562 for their daughter's undergraduate education, and $39,205 for their daughter's graduate education."[98] The trustee based its claim on the theory that "because Pennsylvania law does not require parents to pay for their children's post-secondary education, such education is not a necessity, and [the Trustee] may therefore recover payments the Defendants made for post-secondary education of their children."[99]

The court, however, rejected the trustee's argument, stating that "while the Pennsylvania legislature has not yet enacted a statute that requires parents to pay for their children's post-secondary education, this Court holds that such expenses are reasonable and necessary for the maintenance of the Debtor's family for purposes of the fraudulent transfer statutes only."[100] Although the court did not flesh out its reasoning, the court made sure to limit the holding to "payments the Defendants made for their children's undergraduate education as such children in graduate school are well into adulthood."[101]

3. *Shearer v. Oberdick* (*In re Oberdick*)

The court also denied a trustee's tuition clawback attempt in another Pennsylvania case.[102] Coincidentally, this case arose out of the same commercial lease dispute lawsuit that served as the backdrop of *In re Cohen*.[103] Just like the debtor in *In re Cohen*, the debtor in *In re Oberdick* filed for chapter 7 upon being found jointly and severally liable for

expenses constitute fraudulent transfers under Pennsylvania law, and therefore seeks recovery of $1,190,734.74 pursuant to 11 U.S.C. §§ 544, 548, and 550, and 12 Pa.C.S.A. §§ 5104 and 5105.").

98 *Id.* at *9.

99 *Id.*

100 *Id.* at *10.

101 *Id.*

102 Shearer v. Oberdick (*In re* Oberdick), 490 B.R. 687, 693 (Bankr. W.D. Pa. 2013).

103 *Id.* at 692; *see also, supra* note 73 and accompanying text.

approximately $3,000,000.[104] The trustee filed the adversary proceeding in an attempt to collect on the judgment based on a claim of fraudulent transfer under the Pennsylvania UFTA.[105] Additionally, the trustee sought "a judgment against both the Debtor and Mrs. Oberdick for the amount of the transfers to be avoided as fraudulent, pursuant to 11 U.S.C. § 550(a)(1)."[106] Specifically, the trustee challenged "$82,536.22 worth of expenditures from the [Debtor's] Entireties Account during the relevant period that were used to pay for the college education of two of the Defendants' children."[107] Just as the trustee did in *In re Cohen*, the trustee in this case "point[ed] to Pennsylvania law providing that parents have no legal obligation to provide for the education of their children beyond the age of 18."[108] The debtors defended the education transfers by arguing that "they viewed college tuition and related educational expenses for the children as a family obligation" as well as "point[ing] to unrebutted testimony to the effect that, except for small unsubsidized student loans, they were denied student aid for college for the two children by both the state and federal government because of their 'expected family contribution.'"[109] The court ultimately agreed with the holding in *In re Cohen*, noting:

> What is a "necessity" for purposes of family obligation law is not necessarily congruent with what should be considered a necessity for purposes of an action under *PaUFTA*. Even though there may not strictly speaking be a legal obligation for parents to assist in financing their children's undergraduate college education, in following Judge Deller's lead in

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

105 *Id.* As mentioned in *In re Cohen*, the Pennsylvania Code uses the same language (i.e. "reasonably equivalent value") as Code section 548. *See supra* note 93.

106 *Id.* at 695.

107 *Id.* at 711.

108 *Id.*; *see also supra* note 99 and accompanying text.

109 *Id.* at 711–12.

> the *Cohen* case, 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. If there were some evidence that the Defendants had made the educational expenditures in question as part of a strategy or with an ulterior motive to shield the funds from the reach of [the creditor], the Court might view this differently. The evidence, however, points to the contrary, *i.e.,* that the expenditures were made out of a reasonable sense of parental obligation.[110]

However, the court made sure to strictly limit the types of expenses that would qualify for the parental obligation exception. It allowed the trustee to recover certain semi-education related expenses such as "[a] $1,000 gift to a friend of Defendants' son to help with his college tuition . . . . Payments totaling $4,741.15 for high school trips taken by the Defendants' children to Italy . . . [p]ayments totaling $155 to the University of Pittsburgh as alumni contribution" and "an expenditure of $560 on February 16, 2007, for 'Delta Upsilon Fraternity'."[111]

C. Comparing Reasonably Equivalent Value

Looking at the cases in the preceding sections, it becomes clear that, at least in the tuition clawback context, courts have interpreted reasonably equivalent value disparately. In *In re Leonard*, *In re Lindsay*, and in some respects *In re Palladino*, the courts seem to focus on concrete, quantifiable value.[112] This definition of reasonably equivalent value is more in line with the traditional application of the phrase, which focuses on tangible, market rate valuation.[113]

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110 *Id.* at 712.

111 *Id.*

112 *See supra* Sections III.A, III.B.1.

113 *See* Cooper v. Ashley Commc'ns (*In re* Morris Commc'ns NC, Inc.), 914 F.2d 458, 466 (4th Cir. 1990) (noting that while reasonably equivalent value is not synonymous with market value, "market value is an

In contrast, the courts in *In re Cohen* and *In re Oberdick* seem to disregard this economic value notion in their interpretation of reasonably equivalent value. As illustrated above, these cases focus more on non-economic and non-quantifiable "benefits" received by the debtor, the type of indirect benefits that other cases tend to deem insufficient for purposes of section 548. For example, the court in *In re Cohen* notes that the "maintenance of the [d]ebtor's family" is what makes the tuition transfer reasonable for purposes of the avoidance action.[114] Unlike in *In re Leonard*, the court makes no mention of the market value, quantifiability, or the tangibility of the exchange. Likewise, in *In re Oberdick*, the court declined to focus on the economic benefits (or lack thereof) and instead highlighted the importance of the "societal expectation" and "reasonable sense of parental obligation" when analyzing the benefit the parents received.[115]

D. The Need for Clarity in Reasonably Equivalent Value Definition

Analysis of these cases illustrates just how stark a difference there can be amongst courts' application of reasonably equivalent value. As scholars have noted, "[o]ne does not need to review years of often conflicting jurisprudence to immediately realize that the term 'reasonably equivalent value' is a murky concept subject to a

extremely important factor to be used in the Court's assessment of reasonable equivalence."); Sullivan v. Schultz (*In re* Schultz), 368 B.R. 832, 836 (Bankr. D. Minn. 2007) ("If the measure for reasonable equivalency is the value of an indirect benefit then that benefit must be tangible." (quoting Meeks v. Don Howard Charitable Remainder Trust (*In re* Southern Health Care of Arkansas, Inc.), 309 B.R. 314, 319 (8th Cir. BAP 2004))); Lindquist v. JNG Corp. (*In re* Lindell), 334 B.R. 249, 256 (Bankr. D. Minn. 2005) ("The important elements to consider are (1) fair market value and (2) whether there was an arm's length transaction." (citing Barber v. Golden Seed Co., 129 F.3d 382, 387 (7th Cir. 1997)).

114 *See supra* note 100 and accompanying text.

115 *See supra* note 110 and accompanying text.

variety of interpretations."[116] This lack of clarity is especially troubling in tuition claw back contexts, where a child's opportunity to obtain higher education is potentially dependent on which definition of reasonably equivalent value the court relies on in that particular case.[117] While colleges have thus far allowed the student to graduate on time following a tuition claw back,[118] this practice can still place a substantial burden on the student. If the college decides to place a hold on the student's account, the student's participation in certain school activities may be limited. If the school refuses to offer university housing to the student, the student is forced to look for off-campus housing that may be less reliable and more expensive.

The opaqueness of reasonably equivalent value is especially concerning considering the ever-rising cost of college tuition.[119] In fact, some have posited that increased

116 Fox, *supra* note 20, at 1.

117 Of course, even in the case of a tuition clawback, one might wonder whether the student loan industry is there as a backup to give students access to higher education. The problem with this argument is: (1) given the fact that the reason for the clawback is bankruptcy, the student and parents may have trouble qualifying for such a loan, and (2) is saddling a student with tens (and even hundreds) of thousands of dollars in debt really "providing the student access" to higher education? *See*, John T. Harvey, *Student Loan Debt Crisis?*, FORBES (Apr. 28, 2014, 12:26 PM), http://www.forbes.com/sites/johntharvey/2014/04/28/student-loan-debt-crisis/ [https://perma.cc/6D89-4FGX].

118 *See, e.g.*, Stech, *supra* note 4 (After giving back tuition payments to a parent's bankruptcy trustee, the University of Arizona put a hold on the debtor's daughter's academic record, and allowed her to graduate on time "only after [the father] signed an installment agreement to pay $250 a month to settle the bill.").

119 John Schoen, *Why Does a College Degree Cost So Much?,* CNBC (June 16, 2015), http://www.cnbc.com/2015/06/16/why-college-costs-are-so-high-and-rising.html [https://perma.cc/2ZJU-GRGE]. ("Between 2000 and 2013, the average level of tuition and fees at a four-year public college rose by 87 percent (in 2014 dollars)."); Stech, *supra* note 4 ("Average annual tuition and fees for private colleges now amount to $31,231 a year and have risen by 146% over the past three decades").

tuition costs are driving tuition clawbacks.[120] The argument is as follows: while tuition clawbacks have always been an option for bankruptcy trustees, they were never worth pursuing, given the low value amount of the tuition payments. Now that tuition costs have risen, the pre-bankruptcy tuition transfers have also increased, and it has become much more worthwhile for a trustee to bring avoidance actions against such transfers.[121] As practitioners have noted, the number of reported tuition clawback cases "represent[s] the tip of the iceberg."[122] Since 2008, "at least 25 colleges . . . have been asked to return money" to bankruptcy trustees.[123] However, many of these disputes are resolved prior to an adversary proceeding adjudication. For example, in 2013 the University of Arizona turned over $8,500 in tuition payments after a bankruptcy trustee threatened suit.[124]

Changes must be made to stop the growing tuition clawback trend. The lack of uniformity amongst courts in the meaning of reasonably equivalent value and the ever-rising cost of tuition in colleges and universities will only exacerbate the confusion until a solution is found. In today's economy, where young adults are saddled with enormous student debt loads,[125] a shrinking job market,[126] and rising

120 Katy Stech, *What's Behind Bankruptcy Lawsuits Over College Tuition?*, WALL ST. J.: BANKR. BEAT (May 6, 2015, 2:05 PM), http://blogs.wsj.com/bankruptcy/2015/05/06/whats-behind-bankruptcy-lawsuits-over-college-tuition/ [https://perma.cc/W4DG-ZLA5].

121 *Id.*

122 Client Alert, Hunton & Williams, Tuition Clawback in Bankruptcy (Feb. 2014), https://www.hunton.com/files/News/c9f98ab6-8f24-45fe-a991-2644c9c58091/Presentation/NewsAttachment/5a3842db-72cf-4876-8cf3-2a404f447b59/Tuition_Clawback_in_Bankruptcy_Cases.pdf [https://perma.cc/JZ3B-ASWS].

123 Stech, *supra* note 120.

124 *Id.*

125 Harvey, *supra* note 117 ("[S]tudent debt loads are a problem, and a serious one. Not only do they create a significant drag on short-term economic activity, but they will stunt our long-term growth as well. And the situation is deteriorating.").

housing costs,[127] parental contributions to college tuition are a welcome relief for students who would otherwise be unable to afford an education. Making it more difficult for these young adults to graduate college with relatively less debt seems to cut against the supposed purpose of bankruptcy; that is, providing a "fresh start."[128] While the "fresh start" notion is of course meant to apply to the parent-debtors themselves, allowing tuition claw backs essentially grants the parents a fresh start at the expense of their child, an undoubtedly troubling result. With the financial future of so many young adults at stake, it is crucial from both a bankruptcy law and socio-economic perspective that section 548 of the Code be reformed to solve the problems created by the current grab-bag application of "reasonably equivalent value."

IV. REFORMING REASONABLY EQUIVALENT VALUE IN LIGHT OF THE TUITION CLAWBACK PHENOMENON

A. Tuition Payments as a Preference Issue?

One potential change to the tuition clawback framework that may eliminate the confusion caused by the lack of

126 Chris Bower, Opinion, *Overqualified and Underemployed: The Job Market Waiting for Graduates*, FORBES (Aug. 15, 2014, 1:13 PM) http://www.forbes.com/sites/thecollegebubble/2014/08/15/overqualified-and-underemployed-the-job-market-waiting-for-graduates/ [https://perma.cc/N263-ZK58] (noting that the number of college graduates underemployed has been rising since 2001).

127 *Home Price Appreciation Outpaces Wage Growth in 76 Percent of U.S. Markets During Housing Recovery*, REALTYTRAC (Mar. 25, 2015) http://www.realtytrac.com/news/home-prices-and-sales/home-price-growth-versus-wage-growth-during-housing-recovery/ [https://perma.cc/4J5R-AQ6C] ("[H]ome price appreciation nationwide has outpaced wage growth by a 13:1 ratio.").

128 Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985) ("The principal advantage bankruptcy offers an individual lies in the benefits associated with discharge . . . discharge is viewed as granting the debtor a financial 'fresh start.'").

clarity in defining reasonably equivalent value is treating the tuition payments as a preferential transfer under section 547 rather than a fraudulent transfer under section 548. Under section 547, the trustee may avoid any transfer of the debtor's property if 5 conditions are met: (1) the transfer was to or for the benefit of a creditor; (2) the transfer was for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) the transfer made while the debtor was insolvent; (4) the transfer was made on or within 90 days before the date of the filing of the petition or one year if the transfer was made to an insider; and (5) the transfer enables such creditor to receive more than such creditor would receive if the case were a chapter 7 case and the transfer had not been made.[129] Although there is no applicable case law on the issue, under certain conditions a pre-petition tuition payment would likely qualify as a section 547 preferential transfer. First, the college or university would have to be deemed a creditor of the debtor parents. The Code defines creditor as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."[130] The courts would either have to construe the college as having a claim against the parents or the Code would have to be amended to treat it as such. The second issue with applying section 547 is that under section 547(c), there is a carve-out that prohibits the trustee from avoiding preferential transfers that constitute a contemporaneous exchange of new value given to the debtor.[131] Is allowing the debtor's child to be enrolled in college classes in exchange for tuition payments a contemporaneous exchange given to the debtor? This seems to run into a similar problem as the application of section 548, namely the issue of the beneficiary; can the enrollment

129 11 U.S.C. § 547(b) (2012).

130 11 U.S.C. § 101(10) (2012).

131 11 U.S.C. § 547(c) (2012).

of the child constitute an exchange given to the *parent*?[132] Unfortunately, the case law is silent on the issue.

However, arguably the most important reason for why section 547 has not been the central provision in tuition claw back cases and why it will likely not play a major role going forward is the shorter look-back period. Under section 547, preferential transfers can be avoided only if made within 90 days of filing the bankruptcy petition or within a full year if the transfer was made to or for the benefit of an insider.[133] Compare this to section 548, where the look-back period is a full two years.[134] Given section 547's shorter look-back period and the uncertainty over contemporaneous exchange of value and whether the university qualifies as a creditor, the more attractive path for trustees is to assert their claim to tuition payments under section 548.

B. Amendment to Section 548

Another potential method of reform is to amend section 548 to include an exception for tuition payments made in the lead up to bankruptcy. This amendment would serve two helpful purposes. First, while it would not eliminate the difficulty of determining whether a transfer was given in exchange for reasonably equivalent value in every circumstance, it would end the confusion with respect to college tuition transfers. Second, the amendment would solve the seemingly incoherent practice of treating tuition payments made by parents on behalf of their children as a fraudulent transfer.

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132 For example, imagine a scenario where the child is learning skills that will be applied to the family business.

133 11 U.S.C. § 547(b)(4) (2012). One may question whether the child would be considered an insider here since, arguably, the tuition payment was "for the benefit" of the student. However, even classifying the child as an insider provides a look-back period of only one year, while section 548 provides two years, so couching these clawback claims under section 548 is still the better move for trustees.

134 11 U.S.C. § 548(a)(1) (2012).

Before analyzing in greater depth the effects of such an amendment, a discussion of what such an amendment would look like seems warranted. As it stands now, the phrase "reasonably equivalent value" is not defined in section 548. As illustrated above, simply inserting a definition of reasonably equivalent value is neither easy nor practicable, given the conflicting ways in which the courts have interpreted the statute.[135] However, a more practical solution would be to insert into the statute a simple carve-out for parental tuition payments. New language such as "in this section, a transfer by a parent (or someone with a legally equivalent status) to a college or university on behalf of that parent's child for the purposes of making tuition payments shall constitute reasonably equivalent value and shall not be avoided" could be added to the end of subsection d, where other definitions are found. This added provision would serve to include tuition payments as reasonably equivalent value, thus preventing trustees from clawing back such transfers, without getting caught up in the difficult task of defining reasonably equivalent value. One possible side-effect to this approach, however, is that courts may construe this to mean that tuition transfers are simply one of many possible examples of intangible benefits that constitute reasonably equivalent value, and the others simply have not been expressly defined in the statute. This may give activist courts the power to expand the meaning of reasonably equivalent value to include things even less tangible than the education of a child. One way to counteract such expansion might be to include statutory language expressly carving out tuition transfers, rather than simply including such transfers in the definition. Having such a particularized carve-out might give pause to judges looking for ways to expand the definition of reasonably equivalent value.

This simple amendment would provide a quick and relatively painless way to allow parents to continue to satisfy their parental responsibilities and help relieve their children

135 *See supra* Sections III.C and D.

of the burden of rising student loan debt without having to worry about such payments being clawed back should the parents come under financial troubles within the next two years. It would also provide uniformity in the case law and limit the differences in the applications of reasonably equivalent value *vis-à-vis* tuition payments that thus far exist from case to case.[136]

Of course, there would need to be a limit to the tuition payments carve-out. Parents making such payments should be careful to track their payments to ensure that the funds are indeed being used to make the tuition payments. For example, if a parent transfers $25,000 to a child's bank account to pay for a $15,000 tuition bill, the excess would not be exempt from a section 548 claim because it was not used to pay tuition. Likewise, the tuition payment carve-out should not protect tuition payments made to a child's graduate school. As the court in *In re Cohen* pointed out, "children in graduate school are well into adulthood,"[137] and therefore the parental obligation argument for exempting tuition payments from bankruptcy clawback carries much less weight.[138]

At least one member of Congress has supported an amendment to the current bankruptcy law regime. In May 2015, Representative Chris Collins "introduced a bill that

136 *See supra* Part III.

137 Sikirica v. Cohen (*In re* Cohen), No. 05-38135-JAD, 2012 WL 5360956, at *10 (Bankr. W.D. Pa. Oct. 31, 2012), *aff'd in part, rev'd in part on other grounds*, 487 B.R. 615 (W.D. Pa. 2013).

138 Another potential limitation on such an amendment might be requiring the student to choose the less expensive school when deciding where to attend. This provision would prevent students and parents from picking the most expensive and extravagant schools in an attempt to maximize the loans they receive. While this surely is a concern worth monitoring, limiting the child's school due to price might effectively cause the same effect that these tuition clawbacks are creating now, namely limiting the student's access to higher education due to financial concerns. The best solution should be to allow students to attend the college of their choice and, as long as 100% of the student loans are used toward schooling, be protected from future clawback.

would block bankruptcy trustees from filing lawsuits against universities and college students to recover tuition money that had been paid years before."[139] The *Wall Street Journal* pointed out that Collins' bill "would exclude tuition payments from the list of financial transfers that can be clawed back."[140] While this bill would presumably have a similar effect as the amendment proposed in this Note (*i.e.*, stopping tuition clawbacks in bankruptcy), the bill focuses on excluding the tuition payments, while this Note focuses on defining tuition payments as reasonably equivalent value. Collins introduced the bill on May 12, 2015, but the Speaker of the House referred it to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law on June 1, 2015, where it effectively died with the end of the 114th Congress.[141]

C. Interpreting Reasonably Equivalent Value to Include Parental Tuition Payments

Another potential solution to the tuition clawback phenomenon is to begin interpreting reasonably equivalent value in such a way that includes parental tuition payments on behalf of the debtor's child. Although the traditional reading of reasonably equivalent value followed by most courts would not characterize parental tuition payments as reasonably equivalent value since the debtor parents themselves do not directly receive anything in return for their payment,[142] the courts in *In re Cohen* and *In re*

139 Katy Stech, *Bill Proposes Ban on Tuition Clawbacks in Bankruptcy*, WALL ST. J.: BANKR. BEAT (May 12, 2015, 3:29 PM) http://blogs.wsj.com/bankruptcy/2015/05/12/bill-proposes-ban-on-tuition-clawbacks-in-bankruptcy/ [https://perma.cc/Y76T-B6NJ].

140 *Id*.

141 PACT (Protecting All College Tuition) Act of 2015, H.R. 2267, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/2267 [https://perma.cc/2GNA-AR67].

142 *See supra* Section III.A (discussing *In re Leonard* and *In re Lindsay*, where the courts held that indirect benefits to the debtor do not constitute reasonably equivalent value).

Oberdick provide strong arguments to the contrary.[143] As mentioned above, the courts in those cases pointed out not only that parental tuition payments for a child's undergraduate education were "reasonable and necessary for the maintenance of the Debtor's family,"[144] but also that there is "a societal expectation that parents will assist with such expense if they are able to do so."[145] Therefore, it would not seem too difficult a step to couch a new reading of reasonably equivalent value in the rationale of the *In re Cohen* and *In re Oberdick* decisions, as well as in the rationale of the various parental obligation statutes enacted in many states which require parents to provide education for their children.[146] Although these parental obligation statutes focus on primary and secondary education, as *In re Cohen* pointed out, this expectation should extend to the child's undergraduate education as well.[147]

Many of the reasons why states oblige parents to provide for their child's primary and secondary education hold true

143 *See supra* Section III.B.

144 Sikirica v. Cohen (*In re* Cohen), No. 05-38135-JAD, 2012 WL 5360956, at *10 (Bankr. W.D. Pa. Oct. 31, 2012), *aff'd in part, rev'd in part on other grounds*, 487 B.R. 615 (W.D. Pa. 2013).

145 Shearer v. Oberdick (*In re* Oberdick), 490 B.R. 687, 712 (Bankr. W.D. Pa. 2013). On the other hand, it seems odd that the court would say this in light of the debtor's bankruptcy petition (*i.e.*, wouldn't the fact that the parents filed for bankruptcy suggest that they were not "able to do so"?) Perhaps the court here is implicitly concluding that the law should favor payment of education expenses over payments to creditors.

146 *See, e.g.*, N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2016) (including in the definition of neglected child "the failure of his parent . . . to exercise a minimum degree of care in supplying the child with adequate food, clothing, shelter or education"); MO. ANN. STAT. § 167.031(1) (West 2009) ("A parent . . . or other person in this state having charge, control, or custody of a child . . . shall cause the child to attend regularly some public, private, parochial, parish, home school or a combination of such schools not less than the entire school term of the school which the child attends"); LA. CIV. CODE ANN. art. 224 (2016) ("Parents are obligated to support, maintain, and educate their child. The obligation to educate a child continues after minority as provided by law.").

147 *See supra* note 100 and accompanying text.

for undergraduate education as well. As mentioned above, clawing back college tuition payments is troubling in part because students face growing college expenses (thereby forcing students to take out more loans if their parents are unable to pay), there is a weak job market for young adults, and housing prices are rising, which make it increasingly difficult for millennials to get on their feet after graduation.[148] In addition, extending parents' educational obligation to the college level makes even more sense in light of recent trends whereby many have argued that a college degree is the new equivalent to the old high school diploma.[149]

This solution may also be more suitable from a mere pragmatic standpoint. Unlike amending section 548, which would require potentially difficult-to-achieve political concessions at the federal level, using a common law approach would avoid tangled political debates, and would allow the courts to begin ruling against tuition clawbacks while relying on the existing statutory framework. Of course, the main issue with this solution is implementation. One option is to have either an influential circuit court or the Supreme Court rule on a tuition clawback case in favor of the parents, thereby binding lower courts to this conclusion. The likelihood of the Supreme Court granting certiorari to

148 *See supra* notes 125–127 and accompanying text.

149 Catherine Rampell, *It Takes a B.A. to Find a Job as a File Clerk*, N.Y. TIMES (Feb. 19, 2013), http://www.nytimes.com/2013/02/20/business/college-degree-required-by-increasing-number-of-companies.html?_r=0 [https://perma.cc/JU6D-LNNA] ("The college degree is becoming the new high school diploma: the new minimum requirement, albeit an expensive one, for getting even the lowest-level job."); Richard Whitmire, *No Jobs Without College as Employers Treat Degree as a Minimum*, U.S. NEWS (Mar. 27, 2009, 7:00 AM), http://www.usnews.com/opinion/articles/2009/03/27/no-jobs-without-college-as-employers-treat-degree-as-a-minimum [https://perma.cc/M7D6-Q84N]; Robert Farrington, *A College Degree Is The New High School Diploma*, FORBES (Sep. 29, 2014, 9:29 AM), http://www.forbes.com/sites/robertfarrington/2014/09/29/a-college-degree-is-the-new-high-school-diploma/ [https://perma.cc/Y2LY-BDNJ].

such a case aside, such a ruling may not solve the confusion anyway because the UFTA provides trustees with a parallel state law cause of action. Even if federal common law requires bankruptcy courts to deem parental tuition payments as reasonable equivalent value, federal rulings would not apply to UFTA claims. The trustee could couch its claim solely in the UFTA in an attempt to circumvent the federal precedent.

Another potential issue with this solution is the length of time it might take to be implemented. As mentioned previously, tuition clawback cases have only been decided at the bankruptcy court level, and have yet to reach the district court level, let alone the circuit level.[150] It therefore may take years for a circuit split to develop that would entice the Supreme Court to resolve the dispute. This solution could prove much slower to implement than an amendment to section 548 if Congress reached political consensus quickly on the issue.

Finally, it is important to note that a strong argument against this common law approach centers around a somewhat beneath-the-surface policy choice that is inherent in these tuition claw back discussions. That is, when courts decide to protect the tuition payments made by parent-debtors, they are necessarily doing so at the expense of creditors. After all, the law of bankruptcy is mostly concerned with "providing a compulsory and collective system for satisfying the claims of creditors" not with providing protection for the debtors.[151] Should creditors be subjected to greater risk of non-payment when the debtors have college-aged children? Different debtors are also subject to potential unfairness. Should debtor A have more protections than debtor B simply because A has children in college? These questions are difficult to answer, partly because they involve weighing fiscal arguments against social value arguments. While these questions might

150 *See supra* Part III.

151 *See* Jackson, *supra* note 128, at 1395.

warrant an in-depth analysis of the balancing of parent-debtor rights *vis-à-vis* creditor rights in tuition claw back cases (which is unfortunately beyond the scope of this Note), the solution should be to achieve some sense of clarity and uniformity in the law, and let the parties adjust accordingly. As others have noted, achieving the "right" balance between debtor and creditor rights is extremely difficult if not impossible, and so the bankruptcy laws must "*at a minimum*, set forth clear rules and provide for predictable results so that creditors, debtors and their attorneys can plan their future relationships."[152] If it is made clear that the definition of reasonably equivalent value includes tuition payments made by debtors on behalf of their children, creditors can take this enhanced risk of non-payment into account when negotiating interest rates, for example. Likewise, parents can take this potential increase in interest rates into account when deciding if they are in a position to pay for their child's tuition. Ultimately, as long as the definition of reasonably equivalent value is made clear, the argument that it would upset the balance of debtor-creditor rights should not prevent courts and bankruptcy laws from protecting a parent's choice to assist her child in affording an education.

V. CONCLUSION

There has been a growing trend recently whereby bankruptcy trustees file claims under section 548 of the Code to claw back tuition payments made by debtors to colleges on behalf of their children.[153] The trustees generally argue that because the parents receive no reasonably equivalent value for the tuition payment, such payment is a fraudulent transfer, and therefore the trustee can avoid and potentially recover it.[154] Courts are split on this issue, with some holding

152 Mary-Alice Brady, *Balancing the Rights of Debtors and Creditors: § 522(f)(1) of the Bankruptcy Code*, 39 B.C. L. REV. 1215, 1215 (1998).

153 *See* Stech, *supra* note 4.

154 *Id.*

that such tuition payments do not constitute reasonably equivalent value and others holding that they do.[155] Because the Code fails to define reasonably equivalent value, and courts have not agreed on the meaning of the phrase, there continues to be great inconsistency in its application.[156] Also, because college tuition costs continue to grow and young graduates are struggling to bear the burden of their sometimes enormous student loan debt, tuition clawbacks should be stopped, and parents should not be punished for attempts to provide for their child's education.

An amendment to section 548 of the Code excluding parental tuition payments would provide a clear and immediate solution. However, such an amendment would be politically difficult. Alternatively, courts may begin interpreting reasonably equivalent value to include parental tuition payments, given the fact that parents are often deemed to have an obligation to provide for their child's education and parents no doubt derive value from these transactions, whether or not the value is concrete and measurable. Though it would avoid the potential political difficulties that an amendment would raise, this solution is not perfect, either, because the meaning of reasonably equivalent value would remain undefined, and could lead to potential issues down the road.

155 *See supra* Part III.

156 *Id.*