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NOVEMBER 10, 2022

FRAUD BY ANY OTHER NAME IS STILL FRAUD

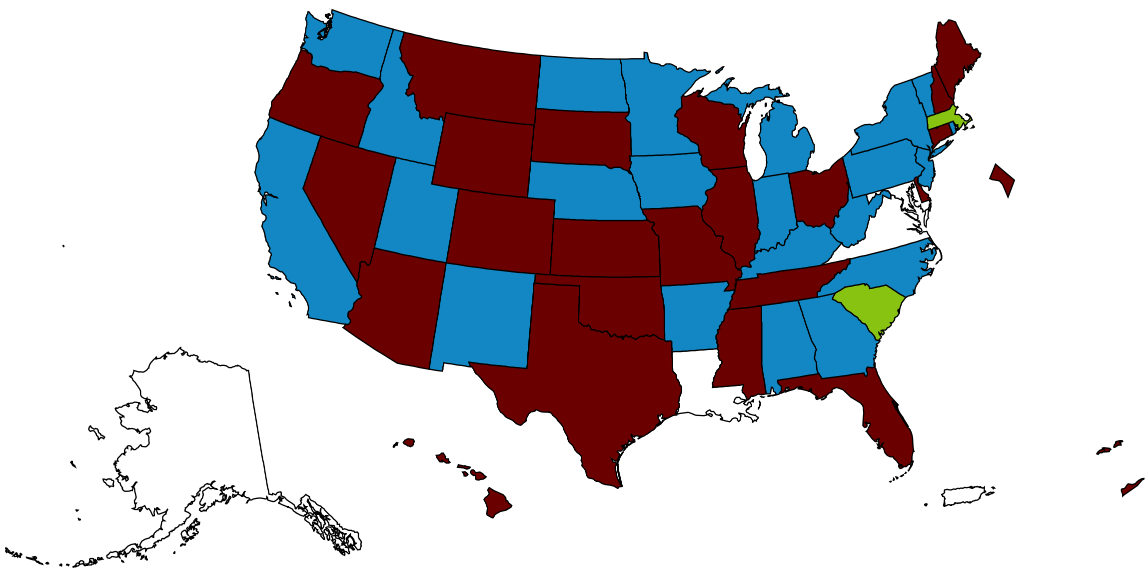
[A LOOK AT FRAUDULENT CONVEYANCE LAWS, THE UNIFORM VOIDABLE TRANSACTIONS ACT, AND THE INTERPLAY OF STATE LAWS WITH THE BANKRUPTCY CODE]

View Only

2014 | Voidable Transactions Act

Consumer Protection & Labor | Business Regulation | Civil Procedure & Courts

Map | Bill List | Summary | Enactment History



Enactment Map • Introduced • Enacted • Prior Version Enacted

Description

Description

The Uniform Voidable Transactions Act (UVTA), formerly named the Uniform Fraudulent Transfer Act (UFTA), strengthens creditor protections by providing remedies for certain transactions by a debtor that are unfair to the debtor's creditors. The 2014 amendments address a few narrowly-defined issues and are not a comprehensive revision of the 1984 act. For further information about the UVTA, please contact Legislative Program Director Kaitlin Wolff at 312-450-6615 or kwolff@uniformlaws.org.

Contact

For information about enacting please contact:

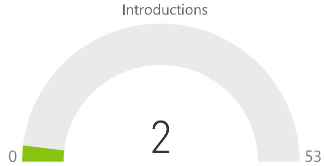
Kaitlin Wolff | kwolff@uniformlaws.org

Legislative Program Director | (312) 450-6615

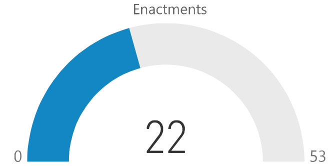
Endorsements

Included as Suggested State Legislation by the Council of State Governments (CSG). Approved by the American Bar Association in 2015.

Introductions



Enactments



Completed by the Uniform Law Commission in 2014.

View Only

2014| Voidable Transactions Act

Consumer Protection & Labor | Business Regulation | Civil Procedure & Courts

Map | Bill List | Summary | Enactment History

Enactment History

Jurisdiction	1984 Revision	2014 Revision
Alabama	Prior Version Enacted	Enacted
Alaska		
Arizona	Prior Version Enacted	
Arkansas	Prior Version Enacted	Enacted
California	Prior Version Enacted	Enacted
Colorado	Prior Version Enacted	
Connecticut	Prior Version Enacted	
Delaware	Prior Version Enacted	
District of Columbia	Prior Version Enacted	
Florida	Prior Version Enacted	
Georgia	Prior Version Enacted	Enacted
Hawaii	Prior Version Enacted	
Idaho	Prior Version Enacted	Enacted
Illinois	Prior Version Enacted	
Indiana	Prior Version Enacted	Enacted
Iowa	Prior Version Enacted	Enacted
Kansas	Prior Version Enacted	
Kentucky	Prior Version Enacted	Enacted
Louisiana		
Maine	Prior Version Enacted	
Maryland		
Massachusetts	Prior Version Enacted	Introduced
Michigan	Prior Version Enacted	Enacted
Minnesota	Prior Version Enacted	Enacted
Mississippi	Prior Version Enacted	
Missouri	Prior Version Enacted	
Montana	Prior Version Enacted	
Nebraska	Prior Version Enacted	Enacted
Nevada	Prior Version Enacted	
New Hampshire	Prior Version Enacted	
New Jersey	Prior Version Enacted	Enacted
New Mexico	Prior Version Enacted	Enacted
New York		Enacted
North Carolina	Prior Version Enacted	Enacted
North Dakota	Prior Version Enacted	Enacted
Ohio	Prior Version Enacted	
Oklahoma	Prior Version Enacted	
Oregon	Prior Version Enacted	
Pennsylvania	Prior Version Enacted	Enacted
Puerto Rico		
Rhode Island	Prior Version Enacted	Enacted
South Carolina		Introduced
South Dakota	Prior Version Enacted	
Tennessee	Prior Version Enacted	
Texas	Prior Version Enacted	
US Virgin Islands	Prior Version Enacted	
Utah	Prior Version Enacted	Enacted
Vermont		Enacted
Virginia		
Washington	Prior Version Enacted	Enacted
West Virginia	Prior Version Enacted	Enacted
Wisconsin	Prior Version Enacted	
Wyoming	Prior Version Enacted	

FRAUD BY ANY OTHER NAME IS STILL FRAUD
[A Look at Fraudulent Conveyance Laws, the Uniform Voidable Transactions Act, and the Interplay of state laws with the Bankruptcy Code.]

In 2014, the Uniform Law Commission completed the Uniform Voidable Transactions Act ("UVTA") which is intended to strengthen creditor protections by providing remedies for certain transactions by a debtor that are unfair to the debtor's creditors. To date, only 22 states have adopted the UVTA and two states have bills pending to adopt same. The Uniform Fraudulent Transfer Act was adopted in 45 states with some states maintaining their own form of fraudulent transfer/conveyance laws. The U.S. Bankruptcy Code Section 548 gives a trustee the authority to avoid fraudulent transfers made within two years prior to a bankruptcy filing. This program will focus on cases from various courts which have opined on what is or is not fraudulent and the panel will discuss the changes which have been brought by the UVTA. There will also be a discussion about cases when there is a juxtaposition of the state laws and bankruptcy laws.

Wanda Borges, Moderator, Borges & Associates, LLC – For more than forty years, Ms. Borges has concentrated her law practice on commercial litigation and creditors' rights in bankruptcy matters, representing corporate clients and creditors' committees throughout the United States in Chapter 11 proceedings, out of court settlements, commercial transactions, and preference litigation. She is a member and Past President of the Commercial Law League of America and has been an Attorney Member of its National Board of Governors, a Chair of the Bankruptcy Section and Creditors' Rights Section as well as President of the Commercial Law League Fund for Public Education. She is a member of several bar associations, including the American Bar Association, the American Bankruptcy Institute, and the New York State Academy of Trial Lawyers. Ms. Borges serves on the Board of Directors of the International Association of Commercial Collectors, of which her firm is an associate member. She is an internationally recognized lecturer and author on various legal topics which impact trade creditors. She is the Vice-Chair of the Board of Associate Editors for the Commercial Law League of America's "Commercial Law World" magazine and regularly contributes articles to that magazine as well as her column "Heard and Overheard". Her treatise Hidden Liens: Who is Entitled to What? was published in the Fall, 1998 Edition of the Commercial Law Journal. She has authored Antitrust, Restraint of Trade and Unfair Competition: Myth Versus Reality, published by the NACM and most recently updated in 2017. Ms. Borges is the lead author and Editor-in-Chief of Enforcing Judgments and Collecting Debts in New York, a treatise updated annually and published by Thomson West Publishing Company. She routinely publishes articles for the National Association of Credit Management "Business Credit" magazine and has published articles for its "Fraud Prevention News". Upon the passage of the BAPCPA in 2005, Ms. Borges prepared and presents educational programs on this new legislation and co-authored The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 – An Overhaul of U.S. Bankruptcy Law, published by the NACM. Her article titled "Uniform Voidable Transactions Act" was published in Insolvency Intelligence, a law journal published by Thomson West in the UK. Ms. Borges has been included in the New York Super Lawyers – Metro Edition list (Bankruptcy & Creditor/Debtor Rights) each year since 2009. In November 2010, Ms. Borges received the "Robert E. Caine Award for Leadership" from the Commercial Law League of America. She is listed in Who's Who in America.

Robert A. Bernstein, Bernstein & Bernstein, P.A. was admitted to practice law in the South Carolina courts in 1983. After graduating cum laude from the Honors College of the University of South Carolina, Bobby graduated from the South Carolina School of Law with honors, having served on the South Carolina Law Review, and being inducted into the Order of the Coif and the Order of the Wig and Robe honor societies. Bobby served as a judicial clerk to the Honorable Clyde H. Hamilton, United States District Judge from 1983-1985. After practicing for six years thereafter with Turner, Padget, Graham & Laney, P.C. in Columbia, SC, Bobby returned to Charleston in 1992. Since that time, Bobby has concentrated his practice in the areas of commercial and business litigation, collections, creditors' rights, corporate law, bankruptcy and general litigation. He has been listed as a South Carolina Super Lawyer in the fields of Business Law, Corporate Law and Commercial Law. Bobby is admitted to practice before all state and federal courts in South Carolina, as well as the United States Court of Appeals for the Fourth Circuit and the United States Supreme Court. Bobby has been actively involved with the South Carolina Bar, serving as an investigator for the ethics board, and is currently a representative on the Council of the Solo and Small Firm Section of the SC Bar. Bobby is a past President of the Charleston County Bar,and is a member of the Petigru Inn of Court.. Bobby is an active member in the Commercial Law League of America, (CLLA) an international association of attorneys and collection specialists, having served on the Executive Board of the national organization, as well as serving as Chair of the Creditors' Rights Section and the Southern Region. In 2021, he received the CLLA’s President’s Cup for outstanding service for the benefit of the CLLA. Bobby has lectured to both the legal community and the general public on issues affecting creditors' rights.

Judge Joan Feeney (Ret) JAMS Mediator, Arbitrator and Referee/Special Master - joined JAMS following almost 27 years on the bench of the United States Bankruptcy Court for the District of Massachusetts and 23 years as a member of the United States Bankruptcy Appellate Panel for the First Circuit. Judge Feeney is a Fellow of the American College of Bankruptcy, and served for three years on its Board of Regents. She is the co-author of the *Bankruptcy Law Manual,* a two volume treatise published by Thomson Reuters West, and the co-author of a book for consumers, *The Road Out of Debt,* published by John Wiley & Sons. Judge Feeney was the President of the National Conference of Bankruptcy Judges in 2011 and 2012 and has served that organization in numerous capacities, including on its Board of Governors, Chair of the Newsletter Committee, Editor in Chief and Reporter for Conference News, and on special projects. From 2016 to 2018, Judge Feeney was the Business Manager of *The American Bankruptcy Law Journal,* the premier and most cited specialty law review in the nation, and was an Associate Editor from 2013 to 2016. Judge Feeney is a founder of the M. Ellen Carpenter Financial Literacy Project, a joint venture of the United States Bankruptcy Court for the District of Massachusetts and the Boston Bar Association. She was a member of the International Judicial Relations Committee of the Judicial Conference of the United States from 2006 through 2012, and hosted many delegations of foreign judges in the United States and traveling to foreign countries on behalf of the federal judiciary. Judge Feeney was the Chair of the Massachusetts Bankruptcy Court’s Pro Bono Committee and Co-Chair of the Massachusetts Local Rules Committee for many years. She also served for several years on the Board of Directors of the American Bankruptcy Institute and as Judicial Chair of several regional ABI educational programs. Judge Feeney is a graduate of Connecticut College and Suffolk University Law

School. Judge Feeney is a frequent panelist and lecturer on bankruptcy law topics in Massachusetts and throughout the country. In 2005, Judge Feeney received the Boston Bar Association's Haskell Cohn Award for Distinguished Judicial Service and in 2009 the American College of Bankruptcy First Circuit Fellows recognized her for contribution to bankruptcy jurisprudence and practice. Judge Feeney was the 2018 recipient of the Charles P. Normandin Lifetime Achievement Award from the Boston Bar Association and the National Conference of Bankruptcy Judges Excellence in Education Award. Judge Feeney presided over a full range of cases, including complex commercial cases with multiple parties and conflicting interests. While on the bench, she wrote over 500 opinions in many different areas of the law.

Beverly Weiss Manne, Tucker Arensberg, P.C. – is an experienced attorney who represents secured and unsecured creditors, lessors, and buyers of assets in bankruptcy cases, non-judicial restructurings and in complex, and distressed business and commercial credit situations and commercial finance matters. Ms. Manne is licensed in Pennsylvania and Maryland. She also is an adjunct professor at University of Pittsburgh School of Law and teaches Payment Systems and Banking, and also taught Secured Transactions for many hears. From 1981 to 1986, she was an attorney with the USDA Office of General Counsel. Ms. Manne obtained her J.D. from the University of Pittsburgh as well as her B.A., magna cum laude, Phi Beta Kappa. She is a member of the Commercial Law League of America, serves on the Executive Council of its Creditors' Rights Section and has served on the Executive Council of its Bankruptcy Section. Ms. Manne is Chair of the PBA Business Law Section, a member and ex-officio of the PBA Shale Energy Law Committee, the 2014 Uniform Voidable Transfer Act adoption task force, 2013 Insolvency Law Task Force, UCC Article 9 Revisions Adoption Task Forces in 2000 and 2010, and the Insolvency Law Task Force in 1994-1996. Ms. Manne is a founding member and ex-officio of the Judith K. Fitzgerald Bankruptcy Inn of Court. Ms. Manne frequent is a speaker, panelist and course planner, locally and nationally on bankruptcy, mechanics lien, oil and gas and commercial issues. She is included in the Pennsylvania Super Lawyers Edition and Best Lawyers in America.

Joseph A Marino, Marino, Mayers & Jarrach, LLC. – is a Creditors' Rights Specialist, initially certified by the American Board of Certification 1994. Mr. Marino obtained his BS in Commerce from St. Louis University, MO in 1971 and obtained his Juris Doctor from the New England School of Law in 1976. He is admitted to practice law in the states of New Jersey and Florida as well as the District of Columbia. He is a member of the American Bar Association, the Association of Certified Fraud Examiners, and the Commercial Law League of America. He has served the CLLA as its Secretary and as the Chair of its Creditors' Rights Section. He is a frequent lecturer on creditors rights topics, including those focused upon fraud and fraudulent transfers. He contributes articles periodically to the Commercial Law World magazine of the CLLA. He is also an affiliate member of the Commercial Collection Agencies of America and the Marino, Mayers & Jarrach firm is an associate member of the International Association of Commercial Collectors. Mr. Marino established his firm as a full service Commercial Litigation Firm, assisting clients throughout the State of New Jersey and the United States of America, to provide comprehensive, skillful, and cost effective services to our clients. The firm prosecutes all Creditor Rights Claims: from general collections to more Complex Commercial Litigation including Fraud and Fraudulent Transfers, Bankruptcy, Replevin and RICO. Mr. Marino is also a member of the Unico Foundation, Confrerie de la Chaine des Rotisseurs and International

Honor Society of the Sovereign Military Order of St. John of Jerusalem, Knights of Malta. In 2018, Mr. Marino received the “Robert E. Caine Award for Leadership” from the Commercial Law League of America.

Joseph A. Molinaro, The Law Offices of Joseph A. Molinaro, L.L.C. - - Joseph A. Molinaro, born in Passaic, New Jersey, graduated from Upsala College in 1990 with a BA in Political Science and History. He graduated from the Thomas M. Cooley Law School in 1993 with a Juris Doctor degree. He was admitted to the New Jersey State Bar in 1994, the United States District Court for the District of New Jersey in 1997 and the United States Court of Appeals for the Third Circuit in 2019. He is a member of the Bergen County Bar Association and the Commercial Law League of America. Mr,. Molinaro established his own firm in 1999 and represents corporations in pursuing creditors rights issues including debt collection and business litigation. His firm’s service area includes all but the most southern counties within the State of New Jersey. His law firm is an associate member of the International Association of Commercial Collectors, Inc. and he is an affiliate member of the Commercial Collection Agencies of America. He is a member of the Executive Council of the Creditors Rights Section of the CLLA. Mr. Molinaro has reported decisions in Global Landfill Agreement Group v. 280 Development Corp., D.N.J. 1988, 992 F. Supp. 692, and MSKP Oak Grove, LLC v. Venuto 875 F.Supp.2d.426 (D.N.J.2012). He has contributed articles to the Commercial Law World, magazine of the CLLA.

Fraudulent Conveyances - the origins, and application to cases in the United States

Prepared by Robert A. Bernstein, Esq.
Bernstein & Bernstein P.A.
North Charleston, S.C.

UNIFORM FRAUDULENT TRANSFER ACT

The Uniform Fraudulent Transfer Act was promulgated in 1918, with the following preface:

The Uniform Fraudulent Conveyance Act was promulgated by the Conference of Commissioners on Uniform State Laws in 1918. The Act has been adopted in 25 jurisdictions, including the Virgin Islands. It has also been adopted in the sections of the Bankruptcy Act of 1938 and the Bankruptcy Reform Act of 1978 that deal with fraudulent transfers and obligations.

The Uniform Act was a codification of the "better" decisions applying the Statute of 13 Elizabeth. See Analysis of H.R. 12339, 74th Cong., 2d Sess. 213 (1936). The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of fraudulent transfer was part of the law of every American jurisdiction. Since Because the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on badges of fraud. The weight given these badges varied greatly from jurisdiction to jurisdiction, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on evidence of actual intent. An important reform effected by the Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing an action to avoid a transfer as fraudulent.[1]

Since the promulgation of the Uniform Fraudulent Transfers Act in 1918, it had been adopted in 43 states, and the District of Columbia. The states which did not adopt the Uniform Act were Alaska, Kentucky, Louisiana, Maryland, New York, South Carolina, and Virginia. In 2014, the Act was amended and Updated, and the name changes to the Uniform Voidable Transactions Act. However, those states which have not adopted the Act must still operate under their state's particular fraudulent conveyance Act statute.

FRAUDULENT CONVEYANCES UNDER THE STATUTE OF ELIZABETH.

The South Carolina statute, SC Code Ann §27-23-10, states:

Every . . . conveyance of lands . . . which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful . . . debts . . . must be deemed

[1] October 2013 Interim Draft, *Uniform Fraudulent Transfer Act* (National Conference of Commissioners on Uniform State Laws).

and taken . . . to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

CONSIDERATIONS IN BRINGING A FRAUDULENT CONVEYANCE CASE:

1) Jury or Nonjury? An action to set aside a fraudulent transfer is an equitable action, so there is no right to a jury trial. However, if you seek damages in addition to setting aside the conveyance, that may convert the case to one at law, and may entitle the Defendant to demand a jury trial.
2) Statute of Limitations? Does the statute run from the date of the transfer? From the date the debt was incurred? From the date the transfer was filed with the filing authority? From the date the creditor recovered judgment?
3) Standing? Under the old acts, the creditor must have been a creditor as of the date when the transfer occurred; if the debt was created after the transfer, the creditor was not defrauded by the transfer, did not rely on the debtor's property and therefore does not have standing to contest the transfer.
4) Actual or Constructive Fraud?
    a) Actual fraud requires proof of intent by clear and convincing evidence.
    b) Constructive fraud, i.e. "Badges of Fraud"

South Carolina legislature has passed certain statutory badges of fraud[2], but they are only applicable to a child support collection matter. Nonetheless, they mirror the common law badges of fraud which have been developed over the years to prove a rebuttable presumption of fraud.

Albertson v. Robinson, 371 SC 311, 638 SE 2d 81 (Ct. App 2006).

First Citizens Bank & Trust Co. V. Park at Durbin Creek, 419 SC 333, 797 SE2d 409 (Ct. App. 2017)

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[2] S.C. Code Ann. 27-23-10 (B):

(1) a close relationship between the transferor and transferee;
(2) the debtor retained possession or control of the property transferred after the transfer;
(3) the transfer or obligation was not disclosed or was concealed;
(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
(5) the transfer was substantially all of the debtor's assets;
(6) the debtor absconded;
(7) the debtor removed or concealed assets;
(8) the value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or after a substantial debt was incurred; and

(11) there was a departure from the usual method of business.

Albertson v. Robinson

Court of Appeals of South Carolina

September 12, 2006, Heard ; October 16, 2006, Filed

Opinion No. 4164

Reporter
371 S.C. 311 *; 638 S.E.2d 81 **; 2006 S.C. App. LEXIS 200 ***

Nathan Albertson and Amanda Byfield-Albertson, Appellants, v. Brian William Robinson a/k/a Brian W. Robinson, Maureen Ann Robinson and American General Financial Services, Inc., Respondents.

Subsequent History: [*1]**

Rehearing denied by Albertson v. Robinson, 2006 S.C. App. LEXIS 250 (S.C. Ct. App., Dec. 15, 2006)

Prior History: Appeal from Dorchester County. Patrick R. Watts, Master-in-Equity.

Disposition: REVERSED AND REMANDED.

Core Terms

conveyance, marital, valuable consideration, fraudulent transfer, defraud, conveyed, void

Case Summary

Procedural Posture
Appellant creditors sought a declaratory judgment and relief based on a claim that a transfer of respondent debtor's interest in property to respondent wife was void as a fraudulent transfer. The Master-in-Equity, Dorchester County (South Carolina), denied the complaint for declaratory relief. The judgment creditors appealed.

Overview
The creditors were awarded a judgment against the debtor in a contract action against him. The debtor transferred his interest in the property to his wife after that suit was filed, but before judgment was entered against him. The trial court found that the debtor was not indebted to the creditors at the time of the transfer, that there was no evidence he failed to retain sufficient assets to pay the resulting judgment, that the transfer was supported by adequate consideration, and there was no intent to defraud. The appellate court disagreed. The record compelled a finding that the transfer was not supported by valuable consideration. Among other things, the wife testified she had no recollection of actually transferring the stated consideration of five dollars. The debtor's claim that he conveyed the property pursuant to a separation agreement held no weight. The debtor and his wife did not separate until over a year after the conveyance. The inception of the obligation arose when the debtor breached his contract with the creditors, and the conveyance came much later. The debtor failed to retain sufficient assets to satisfy the debt. The conveyance was void as fraudulent.

Outcome
The judgment was reversed and the case was remanded for further proceedings.

LexisNexis® Headnotes

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN1[] **Judgments, Declaratory Judgments**

A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue.

Civil Procedure > Preliminary Considerations > Equity > General Overview

Real Property Law > Purchase & Sale > Fraudulent Transfers

Civil Procedure > Appeals > Standards of Review > General Overview

HN2[] Preliminary Considerations, Equity

An action to set aside a transfer as fraudulent pursuant to the Statute of Elizabeth is an action in equity. An appellate court therefore has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence.

Real Property Law > Purchase & Sale > Fraudulent Transfers

HN3[] Purchase & Sale, Fraudulent Transfers

See S.C. Code Ann. § 27-23-10 (Supp. 2005).

Real Property Law > Purchase & Sale > Fraudulent Transfers

HN4[] Purchase & Sale, Fraudulent Transfers

South Carolina courts have held that under the Statute of Elizabeth conveyances may be set aside under two conditions: first, where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration, and, second, where a transfer is made without actual intent to defraud the grantor's creditors, but without valuable consideration.

Real Property Law > Purchase & Sale > Fraudulent Transfers

HN5[] Purchase & Sale, Fraudulent Transfers

Grossly inadequate consideration for a conveyance is a "badge of fraud" and creates a rebuttable presumption of intent to defraud.

Real Property Law > Purchase & Sale > Fraudulent Transfers

HN6[] Purchase & Sale, Fraudulent Transfers

Where a transfer is made without valuable consideration being exchanged, the transfer will be set aside only when the creditor establishes the following: (1) the grantor was indebted to the creditor at the time of the transfer, (2) the conveyance was voluntary, and (3) the grantor failed to retain sufficient property to pay his indebtedness to the creditor in full, not merely at the time of transfer, but in the final analysis when the creditor seeks to collect the debt.

Real Property Law > Purchase & Sale > Fraudulent Transfers

HN7[] Purchase & Sale, Fraudulent Transfers

In the context of a fraudulent conveyance claim, it does not matter whether a creditor obtained the judgment against a property owner before the conveyance. It is only necessary that the debt should have been in existence or the right of action have accrued at or before the time of the transfer. It may be reduced to judgment at a later date. To determine whether a person is such an existing creditor as can invoke the protection of the statute the inception of the debt or obligation is the time which controls, and not the date of the subsequent entry of judgment.

Counsel: Robert A. Bernstein, of Charleston, for Appellants.

Christopher David Lizzi, of North Charleston, Maureen Ann Robinson, of Summerville and Thomas H. Brush, of Charleston, for Respondents.

Judges: KITTREDGE, J. ANDERSON and SHORT, JJ., concur.

Opinion by: KITTREDGE

Opinion

[*313] [82] KITTREDGE, J.:** This appeal involves a claim of a fraudulent conveyance pursuant to the Statute of Elizabeth, as codified in section 27-23-10 of the South Carolina Code (Supp. 2005). The trial court found the challenged transfer of real property from Brian Robinson to his then wife, Maureen Robinson, was not a fraudulent transfer. The judgment creditors appeal, and we reverse and remand.

I.

Brian and Maureen Robinson were married on October 4, 1980. The Robinsons experienced difficulties throughout their marriage resulting from Mr. Robinson's abuse of alcohol. These difficulties eventually led to the couples' divorce on February 18, 2005.

[*314] The property at issue in this case is the Robinsons' **[***2]** former marital home, which was purchased on September 2, 1985. During their marriage, the Robinsons conveyed an interest in the marital home several times between one another. On June 2, 1992, Mr. Robinson conveyed his interest in the marital residence to Mrs. Robinson. On February 28, 1996, Mrs. Robinson re-conveyed a one-half interest in the marital residence to Mr. Robinson. The reason for the conveyances was Mr. Robinson's alcoholism and Mrs. Robinson's fears that this disease would ultimately harm the family.

The underlying action arises from Mr. Robinson's failure to complete work on a pool he contracted to build for Nathan and Amanda Albertson in August 2000. At the time, Mr. Robinson was the sole proprietor of a business called Southeast Pool Specialties. The contract price for the Albertsons' pool was $ 16,995, and the Albertsons paid $ 11,895 as a down payment. Mr. Robinson did not complete the construction of the pool. He attributed his failure to complete the contract to his alcoholism.

In February 2001, the Albertsons filed suit seeking damages for breach of contract. Mr. Robinson did not respond to the lawsuit, but on June 15, 2001, Mrs. Robinson submitted a response **[***3]** to the court in the form of a letter to Mr. Albertson. On September 25, 2001, an entry of default was lodged against Mr. Robinson. As of September 2001, the Robinsons' marital residence was titled jointly in their respective names.

On March 1, 2002, Mr. Robinson conveyed his one-half interest in the marital home to Mrs. Robinson. The stated consideration for this conveyance was $ 5.00 and "love and affection." The Albertsons contend this conveyance should be found void as a fraudulent transfer because the transfer occurred after Mr. Robinson became indebted to them. In this regard, the Albertsons assert the transfer by Mr. Robinson to Mrs. Robinson of his interest in the property was done with the purpose of avoiding payment of the debt.

On July 22, 2002, the court conducted a damages hearing in the underlying breach of contract action. Mr. Robinson failed to appear **[**83]** for the hearing and judgment was entered against him on August 27, 2002, in the amount of $ 42,134.

[*315] The Robinsons separated on June 16, 2003, and a Separation Agreement was finalized and entered on August 29, 2003. The Robinsons were divorced on February 18, 2005.

The Albertsons filed the present action in 2004. The **[***4]** Albertsons sought a declaratory judgment and relief based on the claim that the March 1, 2002, transfer of Mr. Robinson's interest in the property was void as a fraudulent transfer.

The trial court, following a hearing, denied the Albertsons' Complaint for declaratory relief. The trial court found that Mr. Robinson was not indebted to the Albertsons at the time of the March 1, 2002 transfer; there was no evidence Mr. Robinson failed to retain sufficient assets to pay the resulting judgment; the transfer was supported by adequate consideration; and there was no intent to defraud creditors with the transfer.

II.

HN1[] A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. *Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)*. ***HN2***[] An action to set aside a transfer as fraudulent pursuant to the Statute of Elizabeth is an action in equity. *Future Group, II v. Nationsbank, 324 S.C. 89, 97 n.6, 478 S.E.2d 45, 49 n.6 (1996)*. This court therefore has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001).* **[***5]**

III.

The Albertsons contend the March 1, 2002 conveyance between Mr. and Mrs. Robinson should be voided as a fraudulent transfer. We agree.

Though the Albertsons raise several arguments on appeal, this case is best dealt with by combining these arguments and examining the law concerning fraudulent transfers as a whole. To do so, we first look to the statutes and case law concerning fraudulent transfers.

[*316] The Statute of Elizabeth, as codified in section 27-23-10 of the South Carolina Code (Supp. 2005), governs fraudulent conveyances and provides in relevant part:

> HN3[] Every . . . conveyance of lands . . . which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful . . . debts . . . must be deemed and taken . . . to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

HN4[] South Carolina courts have held that under the Statute of Elizabeth conveyances may be set aside under two conditions: first, where the transfer is made by the grantor with the actual **[***6]** intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration; and, second, where a transfer is made without actual intent to defraud the grantor's creditors, but without valuable consideration. McDaniel v. Allen, 265 S.C. 237, 242-43, 217 S.E.2d 773, 775-76 (1975). We dispose of this appeal pursuant to the latter situation. We therefore do not reach the trial court's finding that Mr. Robinson (in transferring his interest in the property) did not intend to defraud the Albertsons. *Cf.* Royal Z Lanes, Inc. v. Collins Holding Corp., 337 S.C. 592, 596, 524 S.E.2d 621, 623 (1999) (stating HN5[] grossly inadequate consideration for a conveyance is a "badge of fraud" and creates a rebuttable presumption of intent to defraud).

We thus begin our examination with a determination of whether the challenged conveyance was supported by valuable consideration. We find the record compels a finding that the transfer in question was not supported by valuable consideration.

The record yields but one reasonable inference-the transfer from Mr. Robinson to Mrs. Robinson was not accompanied by valuable consideration. **[***7]** For example, Mrs. Robinson testified she has no recollection of actually transferring the stated consideration of **[**84]** $ 5.00. Moreover, the Robinsons' testimony indicates the couple did not have a clear understanding as to what constituted the consideration. Mrs. Robinson stated she gave "all of [her] years being married to him" as consideration **[*317]** for the property. Mr. Robinson never testified as to what he considered consideration, and instead asserted he was afraid if he did not convey his interest in the property to Mrs. Robinson, the family would lose everything because of his addiction to alcohol. Mr. Robinson stated he "was looking out for [his] kids" and hoped this conveyance would save his marriage.

The Robinsons' additional claim that they conveyed the property pursuant to the separation agreement simply holds no weight. The Robinsons did not separate until over a year after the conveyance, and Mr. Robinson testified he was attempting to avoid a separation in March of 2002. In fact, there was testimony that Mr. Robinson may have still been living at the marital residence at the time the current declaratory action was commenced. We find no consideration was exchanged in the **[***8]** conveyance.

The absence of consideration does not end our inquiry. HN6[] Where a transfer is made without valuable consideration being exchanged, the transfer will be set aside only when the creditor establishes the following: (1) the grantor was indebted to the creditor at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay his indebtedness to the creditor in full, not merely at the time of transfer, but in the final analysis when the creditor seeks to collect the debt. Mathis v. Burton, 319 S.C. 261, 265, 460 S.E.2d 406, 408 (Ct. App. 1995).

We must, therefore, determine whether the Albertsons were "existing creditors" at the time of the March 1, 2002 conveyance. The case of Matthews v. Montgomery, 193 S.C. 118, 133, 7 S.E.2d 841, 848 (1940) is instructive. *Matthews* states that HN7[] it does not matter whether a creditor obtained the judgment against a property owner before the conveyance:

> It is only necessary that the debt should have been in existence or the right of action have accrued at or before the time of the transfer. It may be reduced to judgment at a later date. **[***9]** To determine whether a person is such an existing creditor as can invoke the protection of the statute the inception of the debt or obligation is the time which **[*318]** controls; and not the date of the subsequent entry of judgment.

Id.

"The inception of the debt or obligation" arose in 2000 when Mr. Robinson breached his contract with the Albertsons. The challenged conveyance came much later on March 1, 2002, after entry of default in the underlying breach of contract action. Application of *Mathis* and *Matthews* obliges us to find that the Albertsons were existing creditors at the time of the March 1, 2002 conveyance.

The second prong shown in *Mathis*, that the conveyance be voluntary, is not in dispute. The conveyance was voluntary.

The third and final prong of *Mathis* requires a determination of whether sufficient funds existed to pay the judgment after the conveyance. If the debtor retains sufficient assets to satisfy the debt in full, the challenged conveyance will not be set aside. *See* *Gardner v. Kirven, 184 S.C. 37, 42, 191 S.E. 814, 816-17 (1937)*.

Mr. Robinson's belief that the judgment would be between seven and ten thousand dollars is **[***10]** of no moment; however, he did not even maintain sufficient funds to pay this amount. Mr. Robinson testified he transferred his interest in the house to his wife because he was afraid he was going to lose everything, and it was "the last little bit I had. You know, there wasn't much there." He further testified that when he transferred the house, he did not keep anything other than his clothes. He stated he anticipated there would be a judgment against him, and while he thought he would be able to borrow enough money to pay the judgment, he did not have sufficient funds in the bank. Mr. Robinson apparently sold some tools, but he received around only $ 7,000 from the sale. Therefore, the evidence establishes that Mr. **[**85]** Robinson failed to retain sufficient assets to satisfy his debt in full to the Albertsons.

IV.

Accordingly, pursuant to the Statute of Elizabeth, we find the March 1, 2002 conveyance void as fraudulent. We reverse and remand for further proceedings.

REVERSED and REMANDED.

ANDERSON and SHORT, JJ., concur.

End of Document

First Citizens Bank & Trust Co. v. Park at Durbin Creek

Court of Appeals of South Carolina

November 17, 2016, Heard; February 15, 2017, Filed

Opinion No. 5469

Reporter
419 S.C. 333 *; 797 S.E.2d 409 **; 2017 S.C. App. LEXIS 19 ***; 2017 WL 605078

First Citizens Bank and Trust Company, Inc., Respondent, v. Park at Durbin Creek, LLC; Kenneth E. Clifton; and Linda G. Whiteman; Defendants, Of whom Park at Durbin Creek, LLC and Kenneth E. Clifton are the, Appellants.

Subsequent History: Rehearing denied by *First Citizens Bank v. Park at Durbin Creek, 2017 S.C. App. LEXIS 95 (S.C. Ct. App., Mar. 16, 2017)*

Writ of certiorari granted *First Citizens Bank v. Park at Durbin Creek, 2017 S.C. LEXIS 244 (S.C., Dec. 13, 2017)*

Writ of certiorari dismissed *First Citizens Bank & Trust Co. v. Park at Durbin Creek, LLC, 425 S.C. 338, 821 S.E.2d 920, 2018 S.C. LEXIS 143 (S.C., Dec. 5, 2018)*

Prior History: [*1]** Appeal From Laurens County. Eugene C. Griffith, Jr., Circuit Court Judge. Appellate Case No. 2014-002295.

Disposition: AFFIRMED.

Core Terms

conveyance, transferred, circuit court, loans, transfer of property, cotenant, tenant in common, ownership, maturity, badges, financial statement, fraudulent intent, defraud, third party, grantor, deed, void

Case Summary

Overview

HOLDINGS: [1]-The circuit court did not err in invoking *S.C. Code Ann. § 27-23-10(A) (2007)* to set aside a real estate developer's conveyance of a property to an LLC because clear and convincing evidence was presented to establish the developer transferred the property with the intent to delay, hinder or defraud a bank/creditor, including that the developer was indebted to the bank at the time of the transfer, the developer was a member of the LLC, and the developer failed to inform the bank of the transfer, and the developer failed to rebut the presumption of fraud; [2]-The circuit court did not err in admitting evidence of a subsequent transaction involving the LLC's transfer of the property to a third party because the developer failed to timely object to the evidence at trial and it was not preserved for appellate review.

Outcome
Decision affirmed.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Limited Liability Companies > Business & Corporate Law > Limited Liability Companies

Business & Corporate Law > Corporations > Corporate Governance

HN1[] **Businesses & Corporations, Limited Liability Companies**

S.C. Code Ann. § 33-44-404(c)(7) (2006) states that, in a member-managed LLC, the admission of a new member requires the consent of all members.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Burdens of Proof > Clear & Convincing Proof

Real Property Law > Purchase & Sale > Fraudulent Transfers

HN2[] **Standards of Review, De Novo Review**

A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth. An action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and the court applies a de novo standard of review.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Civil Procedure > Appeals > Standards of Review > Prejudicial Errors

HN3[] **Standards of Review, Abuse of Discretion**

The admission and exclusion of evidence are matters largely within the circuit court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion. To reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown.

Real Property Law > Purchase & Sale > Fraudulent Transfers

HN4[] **Purchase & Sale, Fraudulent Transfers**

South Carolina courts have set aside conveyances for existing creditors in two instances. First, when the challenged transfer was made for valuable consideration, it will be set aside if the plaintiff establishes that (1) the transfer was made by the grantor with the actual intent of defrauding his creditors, (2) the grantor was indebted at the time of the transfer, and (3) the grantor's intent is imputable to the grantee. Second, where the transfer was made without valuable consideration, no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him at the time of the transfer, (2) the conveyance was voluntary, and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full—not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt.

Evidence > Inferences & Presumptions > Presumptions

Real Property Law > Purchase & Sale > Fraudulent Transfers

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

HN5[] **Inferences & Presumptions, Presumptions**

When a party denies any fraudulent intent in transferring an asset outside the reach of a creditor South Carolina courts have inferred fraudulent intent if one or more of the following badges of fraud exist: the insolvency or indebtedness of the transferor, a lack of consideration for the conveyance, a relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, a departure from the usual method of business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property It is generally recognized that, although the identification of one badge of fraud does not create a presumption of fraud, when there is a concurrence of several such badges of fraud, an inference of fraud may be warranted. A badge of fraud creates a rebuttable presumption of intent to defraud.

Real Property Law > Estates > Concurrent Ownership > Tenancies in Common

Real Property Law > Estates > Transfers

HN6[] **Concurrent Ownership, Tenancies in Common**

Tenants in common each own a distinct and proportionate but undivided interest or estate in the property and do not have privity of estate with each other. As tenants in common, each cotenant may transfer his or her separate ownership interest in the property without consent or participation of the other. In the absence of a contrary contractual provision, one cotenant may sell, lease, or mortgage his share or interest in the property to third parties. If one cotenant conveys his or her interest to a third party, the third party—as grantee—becomes a tenant in common with the remaining cotenants. A conveyance by one cotenant to a third party conveys only the interest of the cotenant, and thus his grantee becomes a tenant in common with the other cotenants. Because the interest of a tenant in common is freely alienable it is subject to the claims of creditors.

Counsel: James Calhoun Pruitt, Jr., of Pruitt & Pruitt, of Anderson, for Appellants.

James H. Cassidy, Ella McKenzie Sims Barbery, and, Joseph Owen Smith, all of Roe Cassidy Coates & Price, P.A., of Greenville, for Respondent.

Judges: WILLIAMS, J. THOMAS and GEATHERS, JJ., concur.

Opinion by: WILLIAMS

Opinion

[410] [*336] WILLIAMS, J.**: The Park at Durbin Creek, LLC (PDC) and Kenneth Clifton (collectively, Appellants) appeal the circuit court's decision to set aside Clifton's conveyance of property to PDC on the grounds that the conveyance violated the Statute of Elizabeth. On appeal, Appellants claim the circuit court erred in setting aside the transfer of Clifton's interest in the property **[**411]** to PDC when (1) the testimony of both owners of the property established a valid purpose for the transfer, and (2) the property was transferred by both owners in a single deed without any showing of fraudulent intent. Additionally, Appellants claim the circuit court erred in admitting certain testimony regarding a subsequent conveyance of Clifton's interest in PDC to a third party, Streamline Management, LLC (Streamline). We affirm.

FACTS [*2]**

In 1995, Clifton and Linda Whiteman purchased approximately 370 acres (the Property) in Laurens County, South Carolina. They owned the Property in their individual names as tenants in common from 1995 until September 18, 2008. Testimony at trial established Clifton and Whiteman purchased the Property for retirement purposes. In addition to the Property, they purchased two other tracts of land in the early 1990s, which they also held as tenants in common in their individual names.

Clifton, a successful real estate developer, commonly purchased personal investment property in his name. If Clifton chose to develop the property, he would then transfer his interest in the property to a limited liability company (LLC), which he or employees of his company created. During Clifton's career, he organized over forty LLCs.

To generate capital to finance his developments, Clifton routinely borrowed money from third-party lenders. At issue in this case are three loans between Clifton and First Citizens Bank (Respondent), all generated to finance three separate development projects. The original principal amount of the three loans totaled $3,873,000. Respondent submitted evidence that none of these **[***3]** loans were intended to be long-term loans and Respondent continued to renew these loans as Clifton made progress payments over the years.

[*337] The real estate market began to decline in 2008. In early January 2008, Clifton sought extensions on two of his loans with Respondent that were approaching their maturity dates. Prior to agreeing to a modification of the loans' terms, Respondent requested Clifton submit a personal financial statement. Clifton presented a financial statement dated January 23, 2008, in which he claimed a $50 million net worth, with his real estate assets comprising over $48 million of his claimed net worth. Clifton listed the Property on his financial statement. Clifton claimed he possessed a 50% interest in the Property, it was unencumbered, and it was valued at approximately $1,570,000. Respondent stated it relied upon Clifton's representations in his financial statement, and as a result, extended these two loans to mature in January 2009.

Clifton's third loan was set to mature on July 12, 2008, but Clifton also requested an extension on this loan. Less than a week prior to Respondent granting the modification on the third loan, Clifton and Whiteman transferred their **[***4]** interests[1] in the Property to PDC. Without knowledge of this transfer, Respondent then granted Clifton's extension request on September 22, 2008, resulting in all three loans maturing in January 2009. During this timeframe, Clifton and Whiteman

[1] As discussed *infra*, Clifton testified he and Whiteman chose to transfer their interests in the Property to PDC based upon Whiteman's longstanding concerns regarding personal liability because the Property was being leased to third parties for recreational hunting.

transferred their interests in the other two tracts of land to LLCs. Clifton also transferred the bulk of his personal real estate holdings to other LLCs.[2] According to Respondent, it became concerned with Clifton's ability to pay the balance on the outstanding loans. Respondent requested Clifton to bring his interest payments current on the **[**412]** three loans and to **[*338]** provide additional collateral before agreeing to again extend the maturity dates on the loans. Despite Respondent's requests, Clifton failed to provide a business plan or secure additional collateral. As a result, Respondent accelerated the loans and commenced foreclosure proceedings in February 2009. Respondent obtained foreclosure judgments against Clifton, and after foreclosure and deficiency sales took place, a deficiency judgment totaling $745,317.86, plus interest, was entered against Clifton.

In the midst of Respondent obtaining foreclosure judgments against Clifton, Clifton and **[***5]** his two daughters entered into an assignment agreement on August 5, 2009. In the assignment agreement, Clifton agreed to disassociate from PDC and transfer his membership interest in PDC to Streamline, whose sole members were Clifton's two daughters and his ex-wife. Streamline was nonexistent on the date of the assignment but was subsequently organized in January 2010. Whiteman testified she did not authorize or consent to Clifton's transfer or assignment of his membership interest in PDC to Streamline.

In October 2010, Respondent initiated supplemental proceedings against Clifton in an effort to collect on the deficiency judgment. However, by this time, all of the assets listed in Clifton's financial statement to Respondent were foreclosed upon, transferred to one of Clifton's business partners as payment for outstanding debt, or disposed of in some manner, so that Clifton had no remaining assets to pay his debts to Respondent. Respondent filed suit against Appellants and Whiteman on October 20, 2010, seeking relief under the Statute of Elizabeth[3] and alleging causes of action for fraudulent conveyance, civil conspiracy, and partition. Each party timely answered.

The circuit court held **[***6]** a one-day nonjury trial and subsequently issued an order to set aside the conveyance of the Property to PDC. The circuit court concluded sufficient "badges of fraud" existed to infer Clifton possessed fraudulent intent when he transferred his interest in the Property to PDC. As a result, Clifton's conveyance of his 50% interest in the Property was null and void pursuant to the Statute of Elizabeth. To that end, Clifton's subsequent conveyance of his **[*339]** 50% interest in PDC—a company whose only asset was the Property—to Streamline was also improper and invalid. Specifically, the circuit court concluded the attempted transfer on August 5, 2009, was void ab initio as Streamline did not exist at that time. Even assuming Clifton could have transferred his interest at that time to a nonexistent entity, the court concluded Clifton failed to obtain Whiteman's consent to the admission of new members into PDC. As a member-managed LLC, Whiteman's lack of consent invalidated the Streamline transaction pursuant to *section 33-44-404(c)(7) of the South Carolina Code* (2006).[4] Appellants timely filed a *Rule 59(e), SCRCP*, motion to alter or amend, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

HN2[] "A clear and convincing evidentiary standard governs fraudulent **[***7]** conveyance claims brought under the Statute of Elizabeth." *Oskin v. Johnson, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012)*. "An action to set aside a conveyance under the Statute of Elizabeth is an equitable action," and this court applies a de novo standard of review. *Id. at 397, 735 S.E.2d at 463*.

HN3[] The admission and exclusion of evidence "are matters largely within the [circuit] court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion." *Commerce*

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[2] Specifically, Clifton and Whiteman transferred property they owned in their individual names since 1993 to Gardens at Fourteen, LLC, on July 31, 2008. On September 15, 2008, Clifton transferred personal ownership of four tracts of land that he had owned since at least 2004 to Pawley Plantation, LLC. Three days later, on September 18, 2008, Clifton and Whiteman transferred property they owned in their individual names since 1992 to Pelham at Boiling Springs, LLC. The following day, on September 19, 2008, Clifton transferred ownership of his office building, which he owned individually since 1997, to Central Office, LLC. All of these transfers occurred just prior to Respondent granting Clifton a final extension.

[3] *S.C. Code Ann. § 27-23-10* (2007).

[4] *HN1*[] *Section 33-44-404(c)(7)* states that, in a member-managed LLC, the admission of a new member requires the consent of all members.

Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545, 559, 556 S.E.2d 718, 725 (Ct. App. 2001). "[T]o reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown." Id. at 559, 556 S.E.2d at 726.

LAW/ANALYSIS

I. Statute of Elizabeth

Appellants contend the circuit court improperly invoked the Statute of Elizabeth **[**413]** to set aside the conveyance of the Property to PDC because Clifton made the conveyance pursuant to a legitimate purpose. We disagree.

The Statute of Elizabeth provides the following:

> **[*340]** Every gift, grant, alienation, bargain, transfer, and conveyance of lands . . . for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken . . . to be clearly and utterly void . . . .

S.C. Code Ann. § 27-23-10(A) (2007).

HN4[] Our courts have set aside conveyances for existing creditors, such **[***8]** as Respondent, in two instances. Mathis v. Burton, 319 S.C. 261, 264, 460 S.E.2d 406, 407 (Ct. App. 1995).

> First, whe[n] the challenged transfer was made for [] valuable consideration, it will be set aside if the plaintiff establishes that (1) the transfer was made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee. Second, where the transfer was [] made [without] valuable consideration, no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full—not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt.

Id. at 264-65, 460 S.E.2d at 408 (quoting *Durham v. Blackard, 313 S.C. 432, 437, 438 S.E.2d 259, 262 (Ct. App. 1993))*.

In this case, the circuit court found—and both parties agree—that valuable consideration was exchanged for the transfer of Clifton's interest in the Property to PDC. Accordingly, Respondent was required to establish by clear and convincing evidence that Clifton transferred the **[***9]** property with the "intent to delay, hinder, or defraud [Respondent]." § 27-23-10(A).

HN5[] When a party denies any fraudulent intent in transferring an asset outside the reach of a creditor—as Clifton asserts in the instant case—our courts have inferred fraudulent intent if one or more of the following "badges of fraud" exist:

> **[*341]** [T]he insolvency or indebtedness of the transferor, [a] lack of consideration for the conveyance, [a] relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, [a] departure from the usual method of business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property.

Coleman v. Daniel, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973). It is generally recognized that, although the identification of one badge of fraud does not create a presumption of fraud, "whe[n] there is a concurrence of several such badges of fraud[,] an inference of fraud may be warranted." Id. at 209-10, 199 S.E.2d at 79-80 (quoting 37 AM. JUR. 2D *Fraudulent Conveyances* § 10 (1968)). "A badge of fraud creates a rebuttable presumption of intent to defraud." Royal Z Lanes, Inc. v. Collins Holding Corp., 337 S.C. 592, 596, 524 S.E.2d 621, 623 (1999).

We find the circuit court properly held Clifton transferred the Property to PDC for purposes of avoiding Respondent's claims. We further find that several **[***10]** "badges of fraud," as recited by our supreme court in *Coleman*, create an inference of fraud in this case. First, Clifton was originally indebted to Respondent for close to $4 million. At the time of the transfer, Clifton was still indebted to Respondent. Clifton was in the process of negotiating another extension when he transferred the Property to PDC, and thus, we find this element is satisfied. Second, Clifton, as the transferor, was also one of two members of PDC, the entity to which he was transferring the Property. As Clifton's personal interests and those of PDC were essentially one in the same, we find this element is satisfied. Third, although Clifton contests litigation was looming, we—like the circuit **[**414]** court—conclude Clifton was well aware that his failure to satisfy his obligations to Respondent or to successfully negotiate another modification would result in inevitable litigation. It is uncontested Clifton was behind on his payments and Clifton never presented any evidence that Respondent guaranteed it would grant him an additional modification, particularly given its previous extensions, beyond the loans' original maturity dates. Fourth, Clifton was not forthright with **[***11]** Respondent in how he handled the conveyance. While actively negotiating an extension on these loans, Clifton **[*342]** transferred the Property to PDC. However, Clifton failed to inform Respondent he transferred the Property to PDC or to submit an updated financial statement to reflect his decreased net worth in the wake of transferring numerous, personally held properties to a number of LLCs. We find this course of conduct to be secretive, particularly given Clifton's knowledge that Respondent relied upon his ownership of these properties—and the unencumbered Property in particular—when it initially agreed to modify the loans' maturity dates. Last, Clifton reserved a benefit in the Property and retained possession of the Property after the conveyance. Clifton and Whiteman were the original members of PDC, each having a 50% ownership interest in the Property. After Clifton's conveyance, PDC's only asset was the Property. As a result, Clifton retained his 50% ownership interest in the Property, despite its transfer to PDC. Therefore, of the nine "badges of fraud," we find six of the nine factors[5] weigh in favor of finding Clifton intended to defraud Respondent of its rightful claim to the Property **[***12]** when he conveyed it to PDC.

Having found Respondent created a presumption of fraud, we next address whether Appellants successfully rebutted this presumption. Based upon our review of the record, we find Appellants failed to rebut this presumption. At trial, Clifton asserted he transferred the Property to PDC at the insistence of Whiteman. Clifton testified that Whiteman was "hammering" him every day to place the Property into an LLC based on her fear of the liability associated with the Property being used for recreational hunting. Renee Gilreath, Clifton's daughter, also testified they transferred the Property to PDC based on Whiteman's liability concerns as well as for legitimate business purposes. According to Whiteman, she agreed to transfer her interest in the Property to PDC due to "liability and the timing . . . because . . . [Clifton] was starting another subdivision." Whiteman denied having any knowledge of Clifton's financial uncertainties with Respondent and stated, while she agreed to transfer her interest in the Property to PDC, **[*343]** she never agreed to Clifton transferring his interest in the Property from PDC to Streamline.

Having heard the foregoing testimony and evidence, **[***13]** the circuit court concluded Clifton's testimony was not credible. The court stated Clifton and his office staff chose the timing of the transfer, and despite their joint ownership of the Property for over twenty years and Whiteman's request to transfer the Property into a LLC for years, it was not until September 2008 when Clifton was experiencing financial uncertainties with Respondent that this transfer was consummated. Further, the court acknowledged Clifton "also transferred essentially all [the] properties he owned individually into various LLCs. . . . By doing this, he essentially divested himself of any individual ownership interest in any real property which had any significant equity that could be reached by creditors." Because the Property was debt-free and had significant equity, the court concluded Clifton wanted to protect the Property from creditors, despite offering other legitimate reasons for the transfer.

We concur with the circuit court's findings that Clifton intended to unlawfully place the Property outside Respondent's reach. Because the Statute of Elizabeth prohibits a conveyance of land with the purpose to delay, hinder, or defraud a creditor, we hold the circuit **[***14]** court properly concluded Clifton's conveyance of his 50% interest in the Property to PDC was null and void.

[**415] II. Division of the Deed

Appellants also contend the circuit court's decision to set aside the conveyance to PDC was improper because Whiteman and Clifton transferred the Property in a single deed. According to Appellants, voiding the sale as to Clifton effectively divided the deed, which is error when Respondent failed to prove Whiteman acted with any fraudulent intent when she transferred her interest in the Property to PDC. We disagree.

The record shows Whiteman and Clifton owned the

[5] The remaining three factors—which do not apply in this case—include the following: lack of consideration for the conveyance, departure from the usual method of business, and the transfer of the debtor's entire estate. *See* Coleman, 261 S.C. at 209, 199 S.E.2d at 79.

Property as tenants in common. As tenants in common, each person owned a 50% undivided interest in the Property. *See* 6 S.C. JURIS. *Cotenancies* § 5 (1991) (*HN6*[] "Tenants in common each own a **[*344]** distinct and proportionate but undivided interest or estate in the property and do not have privity of estate with each other."). As tenants in common, each cotenant may transfer his or her separate ownership interest in the property without consent or participation of the other. *See* 6 S.C. JURIS. *Cotenancies* § 37 (1991) ("In the absence of a contrary contractual provision, one cotenant may sell, lease, or mortgage his share or interest in **[***15]** the property to . . . third parties."). If one cotenant conveys his or her interest to a third party, the third party—as grantee—becomes a tenant in common with the remaining cotenants. *See* 6 S.C. JURIS. *Cotenancies* § 39 (1991) ("A conveyance by one cotenant to a third party . . . conveys only the interest of the cotenant, and thus his grantee becomes a tenant in common with the other cotenants."). Because "[t]he interest of a tenant in common is freely alienable . . . [it] is subject to the claims of creditors." 6 S.C. JURIS. *Cotenancies* § 6 (1991).

Accordingly, we find the conveyances of Whiteman's 50% interest and Clifton's 50% interest to PDC were each distinct transfers that Whiteman and Clifton merely chose to accomplish in a single deed. The fact they utilized one instrument to transfer their separate interests does not negate the distinct ownership interest each person possessed in the Property. As mutually exclusive conveyances, we also find that the invalidity of one does not necessarily invalidate the other. To that end, Whiteman's intent in transferring her share of the Property to PDC is irrelevant to the circuit court's finding of fraudulent intent as to Clifton. Clifton's proportional interest is subject to the claims **[***16]** of his creditors, and he cannot legitimize the fraudulent transfer of his interest by lumping it together with Whiteman's presumably valid transfer of her interest. Regardless of the parties' choice of instrument to convey the Property, we find the circuit court properly set aside the conveyance pursuant to the Statute of Elizabeth.

III. Admission of Evidence

Last, Appellants contend the circuit court erred in admitting evidence of a subsequent transaction involving PDC's transfer of the Property to a third party, Streamline, because that issue was neither raised in the pleadings nor tried by consent. We find this issue is unpreserved. **[*345]** As an initial matter, Respondent claims Appellants failed to properly preserve this issue for our review. Respondent contends that Appellants failed to contemporaneously object when evidence concerning the Streamline transaction was first introduced at trial. Specifically, Respondent introduced "Plaintiff's Exhibit 4" to the court, which was a conveyance timeline for certain properties owned by Clifton. Included in this exhibit was an attachment containing the PDC assignment document, in which Clifton assigned his interest in PDC to Streamline. Respondent **[***17]** introduced this exhibit to the court without objection from Appellants. The next time the assignment of Clifton's interest in PDC was discussed occurred during Respondent's direct examination of Whiteman when Respondent questioned Whiteman regarding her knowledge of the transfer to Streamline. Appellants failed to object to this line of questioning. It was not until Renee Gilreath's testimony that Appellants objected to any evidence or testimony concerning the Streamline transaction.

Based on our review of the record, we find Appellants failed to timely object to this evidence at trial, and thus, it is not preserved for our review. *See* *Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 185, 708 S.E.2d 787, 794 (Ct. App. 2011)* (finding appellants failed to object contemporaneously **[**416]** at trial and concluding the issue was not preserved for appellate review). Further, Appellants' subsequent objections did not cure their failure to contemporaneously object when the evidence was first introduced. *Pinkerton v. Jones, 310 S.C. 295, 298, 423 S.E.2d 151, 153 (Ct. App. 1992)* (finding belated objection to evidence that was introduced earlier in trial did not cure earlier failure to object on the same ground). Accordingly, we find this issue is not preserved for our review.

CONCLUSION

Based on the foregoing, the circuit court's decision is

AFFIRMED.

THOMAS and GEATHERS, [*18] JJ., concur**.

End of Document

New York Joins the 21st Century by Updating Its 95-Year-Old Fraudulent Conveyance Statute and Adopting The Uniform Voidable Transactions Act

Wanda Borges, Esq.

Principal Member of Borges and Associates, LLC

Wanda Borges is the principal member of Borges & Associates, LLC, a law firm based in Syosset, NY. For more than 40 years, Ms. Borges has concentrated her practice on commercial litigation and creditors' rights in bankruptcy matters, representing corporate clients and creditors' committees throughout the United States in Chapter 11 proceedings, out-of-court settlements, commercial transactions and preference litigation.

borgeslawllc.com

The first written law which enabled fraudulent conveyances to be unwound when a transferor was insolvent was the Statute of 13 Elizabeth enacted by the English Parliament in 1571. In 1601, the *Twyne's* case[1] (76 Eng. Rep. 1809, England Star Chamber) became popularly known as the case about the "Most Infamous Flock of Sheep". Pierce (debtor) owed Twyne (creditor) £400 and owed C (creditor) £200. C sued Pierce for the debt. Pierce then secretly agreed to transfer all of his goods, amounting to £300, to Twyne. Pierce, however, kept possession of the goods and continued to use them. C obtained a judgment against Pierce, and the sheriff obtained a writ of execution. At Twyne's direction, Twyne's representatives resisted the sheriff's attempts to enforce the writ and claimed that the goods in question belonged to Twyne, not Pierce. The issue before the court was whether Pierce's transfer of his goods to Twyne was fraudulent.[2]

The Star Chamber (Sir Thomas Egerton, Chief Justice Popham and Anderson) held this was an attempt to defraud his creditors under the statute of 13 Elizabeth.

1 *Attorney General v. Twyne & Pearce,* 76 Eng. Rep. 1809, England Star Chamber, April 1601

2 Recommended reading for a thorough analysis of the *Twyne's* case and enjoyable reading of the historical facts is Emily Kaden's treatise "New Light on the Twyne's Case", *94 American Bankruptcy Law Journal 1 (2020)*

In those days, the Court (Star Chamber) relied on reports prepared by prestigious attorneys. Edward Coke, the Prosecutor for the Attorney General on the *Twyne* case wrote the report for this *Twyne* case.[3] Coke's report outlined a test "composed of six 'badges of fraud', to evaluate when a transfer, even one made for good consideration, was done with the intent to defraud."[4] The six signs of fraud which Coke delineated were: 1) Pierce made a conveyance of all his personal property to Twyne, without excluding any necessaries, such as personal clothing; 2) After the conveyance, Pierce continued to treat the properties as his own, used them as his own and by virtue thereof, defrauded both sellers to him and buyers from him; 3) the conveyance was made in secret and such secret transfers were looked at with suspicion; 4) the transfer was made at a time when Pierce had knowledge of a pending suit for debt against him; 5) Pierce and Twyne had an agreement that the property would be held "in trust"; and 6) the transfer document itself contained language that said that the transaction "was made honestly, truly and bona fide". The inclusion of such a clause under the circumstances was thought also to be suspicious.

The Star Chamber relied on Coke's report which set forth these signs of fraud and, in conjunction with the surrounding facts of the case, determined that a fraudulent conveyance had taken place.

Perhaps the most important precedent to emanate from the *Twyne* case was the identification of these methods by which a plaintiff might prove that the conveyance was made for a fraudulent purpose. Although the *Twyne* case is often looked to as the first case utilizing these "badges of fraud", historians tell us that these "badges of fraud" most likely have their origins in Roman Law.[5] The *Twyne* case merely put the finishing touches on the badges of fraud approach.[6]

3 *See* Report of *Twyne's* Case, British Library (London, England), Harley MS6686, vol 2. Fol.489v

4 76 Eng. Rep at 812-14; 3 Co. Rep. at 81a

5 Emily Kaden, "New Light on Twyne's Case", *94 American Bankruptcy Law Journal 1 (2020),* citing Constantin Willems, "Coke, Collusion and Conveyances: Unearthing the Roots of Twyne's Case", 36 J. Legal Hist. 129,136- 41 (2015)

6 Kaden, *id*, citing D.A. Foster, Legal Demands Against the Beneficial Interest under a Trust, c. 1590–1759, at 56 (2019) (unpublished Ph.D. dissertation, University of London (QMUL)) (on file with author) ("The language of 'trust' in Coke's report is used in the sense of 'collusion' between donor and donee, rather than as grounds for the implication of a trust.").

THE CODIFICATION OF THE "BADGES OF FRAUD"

Twyne and Pierce may not have crossed the pond to America but the concept of a fraudulent transfer surely did and the Statute of 13 Elizabeth formed the basis for American laws regarding fraudulent conveyances.

In 1918 the National Conference of Commissioners on Uniform State Laws took the Twyne and other cases from the English courts which utilized these signs of fraud and developed the first codified fraudulent transfer law as the Uniform Fraudulent Conveyance Act (the "UFCA"). New York adopted the UFCA in 1925 and it became part of the New York Debtor and Creditor Law, Article 10 §§207 – 281. That law remained in existence until 2019 although the UFCA itself was revised in 1984 and its name was changed to the Uniform Fraudulent Transfer Act ("UFTA")of 1984.

The prefatory notes to the UFTA of 1984 state: The Uniform Act was a codification of the "better" decisions applying the Statute of 13 Elizabeth. See Analysis of H.R. 12339, 74th Cong., 2d Sess. 213 (1936). The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of fraudulent transfer was part of the law of every American jurisdiction. Since the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on badges of fraud. The weight given these badges varied greatly from jurisdiction, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on evidence of actual intent.[7]

The UFTA, therefore, codified the "badges of fraud" as eleven factors which were to be considered in determining that a fraudulent transfer had taken place. These factors include whether:

1. the transfer or obligation was to an insider;
2. the debtor retained possession or control of the property transferred after the transfer;

7 *See* UFTA, 1984, Prefatory Notes

3. the transfer or obligation was disclosed or concealed;
4. before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
5. the transfer was of substantially all the debtor's assets;
6. the debtor absconded;
7. the debtor removed or concealed assets;
8. the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
9. the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
10. the transfer occurred shortly before or shortly after a substantial debt was incurred; and
11. the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[8]

The UFTA was adopted by all but seven states. In 2014, the UFTA was further updated and renamed the Uniform Voidable Transactions Act ("UVTA"). Less than 50% of the states have adopted the UVTA. It is interesting to note that although New York never adopted the 1984 statute, in less than five years since its promulgation, New York decided to adopt the UVTA and finally update its archaic statute.

The purpose of the New York UVTA is stated as to " update the Debtor and Creditor Law by replacing the 1925 Fraudulent Conveyances Act with the Uniform Voidable Transactions Act. This new law will make the system more efficient and cost effective, and ensure greater consistency with federal bankruptcy law."[9] Governor Cuomo signed the New York Uniform Voidable Transactions Act into law to replace and supersede the prior Article 10 of the New York Debtor and Creditor Law on December 6, 2019.

THE CONTINUED EXISTENCE OF THE BADGES OF FRAUD UNDER THE UVTA

When the Commissioners on Uniform Law met to update, modernize, and refresh the Uniform Fraudulent Transfer Act, it was determined that the word "fraudulent" would be removed from the title of the statute. The Prefatory Note on the 2014 Amendments explain that the word "fraudulent" was sometimes used "inconsistently" under the UVTA. Therefore, the amended Act "consistently uses the word 'voidable' to denote a transfer or obligation for which the Act provides a remedy.". The Prefatory Note states further that "[N]o change in meaning is intended."[10]

The 2014 amendments were never intended to be a comprehensive revision of the statute. Some of the principal features of the UVTA are listed below.

Choice of Law. A new section has been added which sets forth a choice of law rule applicable to claims for the relief governed by the UVTA

Evidentiary Matters. New uniform rules have been added allocating the burden of proof and the standard of proof. These will be discussed in more depth.

Deletion of the Special Definition of "Insolvency" for Partnerships. Eliminating such a special definition results in the general definition of "insolvency" being applied to partnerships since there no longer exists any good reason to treat a partnership differently than for a non-partnership debtor whose debts are guaranteed by contract.

Defenses. The amendments clarify provisions relating to available defenses.[11]

Despite the elimination of the use of the word "fraudulent", the "badges of fraud" did not disappear. Those remain codified in the UVTA. The Official Comment to Section 4 of the UVTA says:

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

8 UFTA, Section 4 "Transfers as to Present and Future Creditors"
9 Introduction to Senate Bill 4236 subsequently codified as the New York Uniform Voidable Transactions Act.

10 *See* National Conference of Commissioners on Uniform State Laws, Prefatory Note (2014 Amendments)
11 id

evidence as to the debtor's actual intent but does not create a presumption that the debtor has made a voidable transfer or incurred a voidable obligation. The list of factors includes most of the so-called "badges of fraud" that have been recognized by the courts in construing and applying the Statute of 13 Elizabeth and § 7 of the Uniform Fraudulent Conveyance Act. Proof of the presence of certain badges in combination establishes voidability conclusively—i.e., without regard to the actual intent of the debtor—when they concur as provided in § 4(a)(2) or in § 5. The fact that a transfer has been made to a relative or to an affiliated corporation has not been regarded as a badge of fraud sufficient to warrant avoidance when unaccompanied by any other evidence of intent to hinder, delay, or defraud creditors. The courts have uniformly recognized, however, that a transfer to a closely related person warrants close scrutiny of the other circumstances, including the nature and extent of the consideration exchanged. See 1 G. Glenn, Fraudulent Conveyances and Preferences § 307 (Rev. ed. 1940). The second, third, fourth, and fifth factors listed are all adapted from the classic catalogue of badges of fraud provided by Lord Coke in Twyne's Case, 3 Coke 80b, 76 Eng. Rep. 809 (Star Chamber 1601). Lord Coke also included the use of a trust and the recitation in the instrument of transfer that it "was made honestly, truly, and bona fide," but the use of the trust is voidable only when accompanied by indicia of intent to hinder, delay, or defraud creditors, and recitals of "good faith" can no longer be regarded as significant evidence of intent to hinder, delay, or defraud creditors.

The eleven numerated factors to consider in determining whether or not a voidable transaction has occurred remain identical in the UFTA and the UVTA.

KEY CHANGES UNDER THE NEW YORK UVTA:

Statute of Limitations: New York attorneys often boasted that New York had the longest Statute of Limitations – six years - within which to commence an action to void a fraudulent transfer. Under the N.Y. UVTA the Statute of Limitations is now four years from the date of an allegedly voidable transaction. In the event of an intentionally fraudulent transaction, the Statute of Limitations has been changed from two years from the date of discovery of such intentionally fraudulent transaction to one year.

Choice of Law: New York's Debtor and Creditor Law contained a multi-factor test which led to substantial costs while battling over which law governed and which court had jurisdiction with mixed results. The UVTA provides that the law which controls is the law of the place where the debtor or the transferor is located at the time the transaction takes place. Similar to the laws for the perfection of a security interest under Article 9 of the Uniform Commercial Code, an individual is located at its residence. An organization is located at its principal place of business or if there is more than one principal place of business, then it is located at its chief executive office.

Pleading Standards: Perhaps one of the changes of which attorneys must pay close attention is the change to the burden of proof. The UFTA applied a "clear and convincing" requirement which is the standard burden that applies to common-law fraud. The UVTA has changed the burden of proof to a requirement that each element of the claim to the plaintiff and each element of an affirmative defense to the defendant must be proven by a "preponderance to the evidence".

Insider Preferences: Previously, there was no statutory predicate for avoidance of a transfer to an insider. Avoidances were permitted on a sometimes-vague basis that transfers to insiders could not possibly have been made in "good faith. The UVTA is now in sync with the U.S. Bankruptcy Code and provides "A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.[12]

Perhaps one of the most interesting aspects of this statute is the fact that most attorneys still refer to it as the Uniform Fraudulent Transfer Act. Creditors' rights attorneys are so ingrained to pursue actions against wrongdoers who have transferred assets to keep them out of the hands of legitimate creditors, that removing the word "fraudulent" and changing the title of the statute to a gentler sounding "Voidable Transactions Act" is not palatable to those attorneys. However, as this article should show, the Voidable Transactions Act still has plenty of teeth; and the stricter burden of proof both for the plaintiff and defendant should provide for interesting litigation in the years to come. ■

12 NY UVTA Section 274 (b)

CLLA Economic Loss Doctrine A Possible Defense to a Claim for Fraudulent Transfer

By Joseph A. Marino, Esq., Marino Mayers & Jarrach, LLC, Clifton New Jersey

Economic Loss Doctrine

The economic loss doctrine prohibits a party from recovering in tort economic losses arising from a Breach of a Contract. Most states have recognized the Economic Loss Doctrine, which distinguishes Fraud in the Breach or Performance versus Fraud in the Inducement, and; the Duty of Good Faith and Fair Dealing. The Economic Loss Doctrine deals with the conflict of contract law claims and tort law where fraud and contracts intersect. A very complex and esoteric area of law! The predominant purpose of the Doctrine employed by the Courts is the desire to keep a Breach of Contract Claim separate from a Tort-Fraud Claim. The Economic Loss Doctrine evolved from the common law "as an effort to establish the boundary line between contract and tort remedies." Dean v. Barrett Homes, Inc., 204 N.J. 286, 295 (2010). The doctrine bars tort remedies in strict liability or negligence when the only claim is for "economic loss", as opposed to physical injury or property damage. Ibid. However, the challenge arises when the same factual scenario yields a breach of contract claim, such as on a book account where debtor has not made and refused to make any payment, in the absence of a bonafide dispute, and there is some fraudulent behavior.

While this issue is complex, there are several basic rules and principles.

The Economic Loss Doctrine – Fraud in the Performance of a Contract

Many states including New Jersey contract law, generally attempt to remain faithful to the doctrine. Essentially holding that once two or more parties enter into a contract, their remedies for "economic loss" are limited to breach of the terms of their contractual relationship and may be governed by the Uniform Commercial Code (UCC), which is preferable to tort claims (civil wrongs) such as fraud.

For centuries, the Courts have kept Breach of Contract Claims separate from Tort-Fraud Claims. Time, amendments to various statutes, and case law have yielded many circumstances where the lines between contract and fraud are indiscernible. Notwithstanding, many Courts in various jurisdictions have endeavored to keep Breach of Contract claims separate from Tort Claims with numerous exceptions in the interest of justice. For example, Buyer signs a written contract with Seller/ Manufacture to fabricate fifteen widgets for the sum of $30,000.00, where payment is paid up front. Manufacture takes the money and make repeated promises to perform, knowing it will never make and deliver the promised widgets.

Under the economic loss doctrine, buyer is limited to suing Manufacture for breach of contract when the widgets are not delivered. Under the economic loss doctrine, a claim for fraud in the performance of the contract is not permitted. Thus, this is the economic loss doctrine. However, a few different and/or additional facts, can change the picture like a kaleidoscope. Thus, Fraud in the Performance of a Contract is a poor cause of action, if you are seeking concurrent claims for punitive damages and/or piercing the corporate veil, to reach the money. Such remedies are not available in a straight breach of contract action.

There are many exceptions to the economic loss doctrine. Here is where it becomes interesting, as most courts generally tend to disapprove denying relief to parties who are victims of an intentional tort such as fraud. There are also exceptions based on the status of the parties, particularly where fiduciaries are involved, i.e., a trust relationship, to wit: doctors, lawyers, insurance brokers, and manufacturers in products-liability law, and; persons with extra duty which allows for suits based on professional negligence, or malpractice under contract. The facts may also involve other causes of action, such as, conversion, embezzlement and fraud.

Most states have adopted Article 2 of the Uniform Commercial Code, which governs the sale of certain goods and other transactions, which provides for suits for fraud and the recovery of punitive damages, even when there is a contract.

EXCEPTIONS:

There has been a growing public policy movement that has created numerous exceptions to the economic loss doctrine. The adoption of Consumer Fraud Statutes by the states constitutes "a public policy compromise", enhancing consumers' ability to recover substantial and/or punitive damages, upon a claim of breach of consumer contracts, and, in some cases, the elimination of the element of "Intent". Thus, creating numerous exceptions to the economic loss doctrine. Likewise, the adoption of several Federal Statutes has also enhanced consumers' ability to recover substantial and/or punitive damages, creating even more exceptions to the economic loss doctrine.

The exploding area of Product Liability Laws has created numerous exceptions to the economic loss doctrine. Third parties who lack privity of contract have greater rights and access to recover damages and punitive damages.

Fraud in the Inducement

Fraud in the Inducement has always been recognized as an exception to the economic loss doctrine, as a matter of public policy and common-law tradition favoring a general relief for fraud victims.

Generally, Fraud in the Inducement deals with the corruption of a contract from its inception, thus giving rise to causes of actions for torts and an award of punitive damages. Fraud in the inducement occurs in the formation of a contract, when there has been deceit, the misrepresentation and/or concealment of material facts; and with the intent to trick or induce a party to enter a contract to their detriment. Intent, has been an essential element, to deceive the other party, but there is now a growing trend by amended statutes and case law to slowly eliminating the element of Intent.

False statements and/or altered documents may be involved to induce a party to change its position and enter the corrupted contract to its detriment. Thus, the fraud/wrongdoing occurs at the inception of the agreement not the performance, and the elements of Good Faith, ("honesty in fact") and Fair Dealing are absent.

Note: factually and/or practically, the parties could have had a long prior course of dealings, that were straight forward, before one party turns renegade and engages in fraud. This is significant, as each subsequent transaction may constitute a separate new contract. Therefore, identifying when fraud in the inducement occurred is relevant and important to identify the change to fraudulent behavior.

Be aware that defense counsel will endeavor to avoid or minimize this crucial point.

The Duty of Good Faith and Fair Dealing

"Every contract or duty within the UCC imposes an obligation of good faith in its performance or enforcement." (UCC §1-203 "Obligation of Good Faith". The definition of Good Faith is (Honesty in Fact"), UCC §1-201(19) and; a Duty of Fair Dealing, (an obligation to act or refrain from action that would frustrate the other party's anticipated benefit of the bargain, (UCC §2-104). Thus, the Duty of Good Faith and Fair Dealing are the cornerstones of breach of contract actions, supporting the economic loss doctrine. However, their absences are also the bases of Fraud, and may negate the doctrine's application. When the other party is thwarted or frustrated from receiving the benefit of the bargain a balancing test of facts will be determinative.

In conclusion, the economic loss doctrine, is one of many defenses that opposing counsel may raise in a motion to dismiss for failure to state a claim or summary judgment. It is a weak argument, as long as you keep in mind the timeline of facts in your pleadings. To wit: be specific as to the allegations of fraud, articulate the facts supporting the substantive elements of fraud, particularly the time when it occurred and reoccurred.

Changes Under the Uniform Voidable Transactions Act, Including the Burden of Proof

By: Joseph A. Molinaro, Esq.
Law Offices of Joseph A. Molinaro, LLC

I. HISTORY OF LEGISLATION

UNIFORM FRAUDULENT CONVEYANCES ACT (1918)

The Uniform Fraudulent Conveyances Act was promulgated by the National Conference of Commissioners on Uniform State Laws in 1918.

As of 1984 it had been adopted in 25 jurisdictions, including the Virgin Islands. It has also been adopted in the sections of the Bankruptcy Act of 1938 and the Bankruptcy Reform Act of 1978 that deal with fraudulent transfers and obligations.

The Uniform Fraudulent Conveyance Act has its roots and was a codification of the "better" decisions applying the Statute of 13 Elizabeth. The English statute, an act of the British Parliament from 1571 laid the foundations for fraudulent transactions to be unwound when a person had gone insolvent or bankrupt. While not adopted in all jurisdictions, codified cases relating to this British law, the voidability of fraudulent transfers, was part of the laws in every American jurisdiction.

Because intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on badges of fraud. The weight given these badges varied greatly from jurisdiction to jurisdiction, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on evidence of actual intent.

An important reform effected by the Uniform Fraudulent Conveyance Act was the elimination of any requirement that a creditor had obtained a judgment or execution returned unsatisfied before bringing an action to avoid a transfer as fraudulent. See American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 67 A.L.R. 244 (1929) (per C.J.Cardozo).

UNIFORM FRAUDULENT TRANSFER ACT (1988)

In 1988, The Commissioners determined to name the new Act the Uniform Fraudulent Transfer Act in recognition of its applicability to transfers of personal property as well as real property, "conveyance" having a connotation restricting it to a transfer of real property.

The basic structure and approach of the Uniform Fraudulent Conveyance Act are preserved in the Uniform Fraudulent Transfer Act. Both Acts declare a transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors to be fraudulent. Provisions of the new Act, carried forward with little change from the Uniform Fraudulent Conveyance Act, render a transfer made or obligation incurred without adequate consideration to be constructively fraudulent i.e., without regard to the actual intent of the debtor—under one of the following conditions:

(1) the debtor was left by the transfer or obligation with unreasonably small assets for a transaction or business in which the debtor was engaged or was about to engage;

(2) the debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, more debts than the debtor would be able to pay as they become due; or

(3) the debtor was insolvent at the time or as a result of the transfer or obligation.

As under the Uniform Fraudulent Conveyance Act, a transfer or obligation that is constructively fraudulent because insolvency concurs with or follows failure to receive adequate consideration (clause (3) above) is voidable only by a creditor in existence at the time the transfer occurs or the obligation is incurred. Either an existing or subsequent creditor may avoid a transfer or obligation for inadequate consideration when accompanied by a condition referred to in clause (1) or (2) above.

Reasonably equivalent value is required in order to constitute adequate consideration under the new Act. The new Act follows the Bankruptcy Code in eliminating good faith on the part of the transferee or obligee as an issue in the determination of whether adequate consideration is given by a transferee or obligee. The new Act, like the Bankruptcy Code, allows the transferee or obligee to show good faith in defense after a creditor establishes that a fraudulent transfer has been made or a fraudulent obligation has been incurred. Thus a showing by a defendant that a reasonable equivalent has been given in good faith for a transfer or obligation is a complete defense although the debtor is shown to have intended to hinder, delay, or defraud creditors.

A good-faith transferee or obligee that has given less than a reasonable equivalent is nevertheless allowed a reduction in liability to the extent of the value given. The new Act, like the Bankruptcy Code, eliminates the provision of the Uniform Fraudulent Conveyance Act that enables a creditor to attack a security transfer on the ground that the value of the property transferred is disproportionate to the debt secured. The premise of the new Act is that the value of the interest transferred for security is measured by and thus corresponds exactly to the debt secured. Foreclosure of a debtor's interest by a regularly conducted, noncollusive sale on default under a mortgage or other security agreement may not be avoided under the new Act as a transfer for less than a reasonably equivalent value.

The definition of insolvency under the new 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.

UNIFORM VOIDABLE TRANSACTIONS ACT (2014)

In 2014 the Uniform Law Commission approved a set of amendments to the Uniform Fraudulent Transfer Act. The amendments changed the title of the Act to the Uniform Voidable Transactions Act. The amendment project was instituted to address a small number of narrowly defined issues, and was not a comprehensive revision. The principal features of the amendments are listed below. Further explanation of provisions added or revised by the amendments may be found in the comments to those provisions.

Choice of Law. The amendments add a new § 10, which sets forth a choice of law rule applicable to claims for relief of the nature governed by the Act.

Deletion of the Special Definition of "Insolvency" for Partnerships. Section 2(c) of the Act as originally written set forth a special definition of "insolvency" applicable to partnerships. The amendments delete original § 2(c), with the result that the general definition of "insolvency" in § 2(a) now applies to partnerships. One reason for this change is that original § 2(c) gave a partnership full credit for the net worth of each of its general partners. That makes sense only if each general partner is liable for all debts of the partnership, but such is not necessarily the case under modern partnership statutes. A more fundamental reason is that the general definition of "insolvency" in § 2(a) does not credit a non-partnership debtor with any part of the net worth of its guarantors. To the extent that a general partner is liable for the debts of the partnership, that liability is analogous to that of a guarantor. There is no good reason to define "insolvency" differently for a partnership debtor than for a non-partnership debtor whose debts are guaranteed by contract.

Defenses. The amendments refine in relatively minor respects several provisions relating to defenses available to a transferee or obligee, as follows:

(1) As originally written, § 8(a) created a complete defense to an action under § 4(a)(I) (which renders voidable a transfer made or obligation incurred with actual intent to hinder, delay, or defraud any creditor of the debtor) if the transferee or obligee takes in good faith and for a reasonably equivalent value. The amendments add to § 8(a) the further requirement that the reasonably equivalent value must be given to the debtor.

(2) Section 8(b), derived from Bankruptcy Code §§ 550(a), (b) (1984), creates a defense for a subsequent transferee (that is, a transferee other than the first transferee) that takes in good faith and for value, and for any subsequent good-faith transferee from such a person. The amendments clarify the meaning of § 8(b) by rewording it to follow more closely the wording of Bankruptcy Code §§ 550(a), (b) (which is substantially unchanged as of 2014). Among other things, the amendments make clear that the defense applies to recovery of or from the transferred property or its proceeds, by levy or otherwise, as well as to an action for a money judgment.

(3) Section 8(e)(2) as originally written created a defense to an action under § 4(a)(2) or § 5 to avoid a transfer if the transfer results from enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. The amendments exclude from that defense acceptance of collateral in full or partial satisfaction of the obligation it secures (a remedy

sometimes referred to as "strict foreclosure").

Series Organizations. A new § 1 1 provides that each "protected series" of a "series organization" is to be treated as a person for purposes of the Act, even if it is not treated as a person for other purposes. This change responds to the emergence of the "series organization" as a significant form of business organization

Medium Neutrality. In order to accommodate modern technology, the references in the Act to a "writing" have been replaced with "record," and related changes made.

Style. The amendments make a number of stylistic changes that are not intended to change the meaning of the Act. For example, the amended Act consistently uses the word "voidable" to denote a transfer or obligation for which the Act provides a remedy. As originally written the Act sometimes inconsistently used the word "fraudulent." No change in meaning is intended. See § 15, Comment 4. Likewise, the retitling of the Act is not intended to change its meaning. See § 15, Comment 1.

II. ACTUAL VERSUS CONSTRUCTIVE FRAUD.

A. SECTION 4(A) ACTUAL FRAUD

Transfers are voidable as to a creditor whether the Creditors claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With the actual intent to hinder, delay or defraud any creditor of the debtor.

In determining actual intent under Section 4 subsection (a)(1), consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) ***the transfer was of substantially all the debtor's assets***;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) ***the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred***;

(9) ***the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred***;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

B. SECTION 4(A)(2) CONSTRUCTIVE FRAUD Claim arises *before or after* transfer

Transfers are voidable as to a creditor *whether the Creditors claim arose before or after the transfer was made or the obligation was incurred*, if the debtor made the transfer or incurred the obligation:

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation:

(i) was engaged in or about to be engaged in a business or transaction where remaining assets were unreasonably small in relation to the business or transaction;

(ii) intended to incur or believed or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as they became due.

C. SECTION 5(A), (B) & (C) CONSTRUCTIVE FRAUD Claim arises *before* transfer

a) A transfer made or obligation incurred by a debtor *is voidable as to a creditor whose claim arose before 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 and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor *is voidable as to a creditor whose claim arose before the transfer was made* if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

IV. BURDEN OF PROOF

FRAUD BY ANY OTHER NAME IS STILL FRAUD... MAYBE BUT NOT QUITE.

The Uniform Voidable Transactions Act added new sections dealing with Evidentiary Matters missing from the prior act. New §§ 4(c), 5(c), concerning claims and sections 8(g), and 8(h) relating to defenses. The commissioners sought to add uniformities allocating the burden of proof and defining the standard of proof with respect to claims for relief and defenses under the

Act.

Under the Uniform Voidable Transactions Act burden of proof is by a preponderance of the evidence.

Because of the heightened pleading scrutiny for traditional “fraud” claims... jurisdictions... in particular New Jersey State and Federal Courts found that not only must the “fraud” must be plead with particularity,(See, <u>MSKP Oak Grove, LLC v. Venuto</u>, 875 F. Supp. 2d 426 (D.N.J. 2012) it needed to be proven by “clear and convincing evidence.” See <u>Bears v. Wallace</u>, 59 N.J. 444, 450, 283 A.2d 740 (1971).

<u>CLEAR AND CONVINCING PROOF v. PREPONDERANCE OF THE EVIDENCE</u>:

Model Jury Charge 1.19 provides in relevant part:

Clear and convincing standard of proof is higher standard of proof than by proof by a preponderance of the evidence but a lower standard than proof by a reasonable doubt.

<u>Preponderance of the Evidence</u>

Under the preponderance standard, "a litigant must establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met." Biunno, Current N.J. Rules of Evidence, comment 5a on N.J.R.E. 101(b)(1) (2005); see also McCormick on Evidence, supra, § 339 ("The most acceptable meaning to be given to the expression, proof [***16] by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence."). Application of the preponderance standard reflects a societal judgment that both parties should "share the risk of error in roughly equal fashion."

<u>Clear and Convincing Evidence</u>.

With regard to (state here the factual issue(s) to be proved) it is the obligation of (state here the party or parties upon whom the burden of proof rests) to prove those allegations by clear and convincing evidence. Clear and convincing evidence is evidence that produces in your minds a firm belief or conviction that the allegations sought to be proved by the evidence are true. It is evidence so clear, direct, weighty in terms of quality, and convincing as to cause you to come to a clear conviction of the truth of the precise facts in issue.

The clear and convincing standard of proof requires that the result shall not be reached by a mere balancing of doubts or probabilities, but rather by clear evidence which causes you to be convinced that the allegations sought to be proved are true. N.J.M.C.J.C. 1.19

V.   PROVING A VOIDABLE TRANSACTIONS CASE ON MOTION OR AT TRIAL.

Under New Jersey's statute, a debtor commits intentional fraud by making a transfer "with actual intent to hinder, delay, or defraud any creditor of the debtor." N.J. Stat. Ann. §25:2-25(a). To set aside the transfers, creditors bear the burden of showing "actual intent" and previously by clear and convincing evidence. Gilchinsky v. Nat'l Westminster Bank NJ, 732 A.2d 482, 489 (N.J.1999).

When looking for badges of fraud, courts ask not whether some of the eleven are absent, but whether some are present. Gilchinsky, 732 A.2d at 489-90. Even one badge of fraud can suffice to "cast suspicion on the transferor's intent." Id. at 490. ***If there are several badges, that creates a strong presumption of intent to defraud***. Id. at 493; see id. at 490. The debtor must then "clearly rebut[]" that inference. Id. at 493.

Given the now Statutory Standard of Preponderance of the Evidence, practitioners need not be concerned with making and proving a fraudulent transfer by the heightened standard of fraud. All they need now do is prove it by preponderance of the evidence.

Bankruptcy “Strong Arm” Rights and the UVTA

CLLA Northeast Conference

New York, New York

November 10, 2022

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Panelists:

Beverly Weiss Manne

Tucker Arensberg, P.C.

Hon. Joan Feeney (Ret.)

Jams ADR

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UVTA Generally

- UVTA amends the Uniform Fraudulent Transfer Act ("UFTA").
- UVTA like the UFTA and the UFCA* before that, addresses voidable transactions.
- UVTA drafters felt not all transactions were "fraudulent" and not all voidable transactions were "transfers" – thus the name change.

*Uniform Fraudulent Conveyance Act

UVTA

- Permits creditors to void a debtor's transaction: (1) when a debtor engages in a transaction with the actual intent to hinder, delay or defraud any creditor, or (2) when an insolvent debtor makes a transfer without receiving "reasonably equivalent value".

UVTA & Bankruptcy

- A trustee or DIP in a bankruptcy may seek to void voidable or fraudulent transfers under both bankruptcy law (11 U.S.C. § 548) or state laws like the UVTA (11 U.S.C. § 544).
- §544 of the Bankruptcy Code is known as the "strong arm" clause.

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Bankruptcy Code §548

- Fraudulent conveyance under section 548:
  - Incurred or brought within 2 years of the petition date
  - Actual intent to defraud hinder or delay
  - or constructive fraud (insolvent, less than reasonably equivalent value)
- Safe Harbor defense: *Merritt Management v FTI Consulting* U.S. S.Ct. 2022

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11 U.S.C.A. § 544

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

Section 544 - Strong Arm Clause

Strong Arm "Rights" - a Trustee gets the rights of 3 hypothetical persons who might compete with those holding less than perfect liens on a debtor's property per §544(a):

1. The Judicial Lien Creditor

"(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;"

Section 544 Strong Arm Clause

11 U.S.C. §544 (a)

2. The Creditor with an Execution Return Unsatisfied

"(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or"

Section 544 Strong Arm Clause

§544 (a)

3. The Bona Fide Purchaser of Real Property

"(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists."

Section 544 Strong Arm Clause

- When applying §544(a) a bankruptcy court looks at the rights of the lien creditor under applicable state law, so Bankruptcy Court decisions differ depending upon applicable state law

Section 544

- § 544(b)(1) allows a trustee, outside the §548 two-year window, to use state law to avoid transfers window *that would be avoidable by a creditor holding an allowable unsecured claim*.
- Whether a transfer is avoidable under the UVTA is a question of state law. *In Re Fox Ortega Enterprises, Inc*., 631 B.R. 425(Bkcy. Cal.N.D. 2021), citing *Wolkowitz v. Beverly (In re Beverly)*, 374 B.R. 221, 232 (B.A.P. 9th Cir. 2007).

Actual Creditor Requirement

- Actual-creditor requirement: whether trustee's claims concern obligations or transfers that are "voidable under applicable law" by a proper creditor within the meaning of 11 U.S.C. § 544(b)(1).
- Existence of a "triggering creditor" under section 544(b) gives the trustee an unlimited right to invoke state-law avoidance powers. *In re Acequia, Inc.,* 34 F.3d 800, 809 (9th Cir. 1994)
- Where a proper creditor would be able to render void an obligation or transfer "under applicable law" (like the UVTA), the actual-creditor requirement has been satisfied, and the bankruptcy trustee can avoid the obligation or transfer under 11 U.S.C. § 544(b)(1).

Actual Creditor Requirement

- If a proper creditor could not void the obligation or transfer, the § 544(b)(1) action fails. *See In re Equip. Acquisition Res., Inc.*, 742 F.3d 743, 746 (7th Cir. 2014)
- If the actual creditor could not succeed for any reason—whether due to the statute of limitations, estoppel, res judicata, waiver, or any other defense—then the trustee is similarly barred and cannot avoid the transfer."). *Cook, Tr. for Yahweh Ctr., Inc. v. United States*, 637 B.R. 802, 807 (E.D.N.C. 2020), *aff'd sub nom. In re Yahweh Ctr., Inc.,* 27 F.4th 960 (4th Cir. 2022)

Section 544(b)

Section 544(b) places "the trustee … in the overshoes of the debtor corporation's unsecured creditors." *In re Acequia, Inc.,* 34 F.3d 800, 809 (9th Cir. 1994), citing *Agricultural Research,* 916 F.2d at 534.

– "Like Prometheus bound, the trustee is chained to the rights of creditors [when invoking section 544(b)]."

Sections 544(b) and 550

After demonstrating the *right* to recover conveyances under section 544(b), a trustee must then establish the *amount* of recovery under § 550(a) of the Bankruptcy Code, which provides that, "to the extent that a transfer is avoided under section 544 ..., the trustee may recover, *for the benefit of the estate,* the property transferred."

Procedural Issues

- UVTA/UFTA rights belong to trustee (or DIP)
- A 544 UTVA action will be an “adversary proceeding” governed by the 7000 Rules of the Rules of Bankruptcy Procedure
- Courts in many jurisdictions will refer matter to mediation
- Deadlines to file avoidance actions

Sections 544(b) and 550

The extent of the trustee's ability to exercise the right to recover a voided transfer is governed by § 550(a).

Example:

Debtor makes four transfers of $10, each of which is avoidable under state law, and then files for bankruptcy, listing one unsecured creditor with a claim of $5. The unsecured creditor could recover any one of the four $10 avoidable transfers prior to bankruptcy and, as a result, each transfer is “voidable under applicable law by a creditor holding an unsecured claim.” § 544(b).

Sections 544(b) and 550

- After the debtor files bankruptcy, §544(b) gives the trustee the right to avoid any of the four transfers (which total $40) despite the fact that only $5 of unsecured claims exist.
- Section 550(a) governs the extent to which the trustee may exercise that right, specifically permitting recovery "for the benefit of the estate." Id. § 550(a).
- *In re Acequia, Inc.*, 34 F.3d 800, 809 (9th Cir. 1994)

In re Tronox Inc., 464 B.R. 606, 616 (Bankr. S.D.N.Y. 2012)

Section 544(b) of the Bankruptcy Code adopts the ruling of the Supreme Court in *Moore v. Bay,* 284 U.S. 4, 52 S.Ct. 3, 76 L.Ed. 133 (1931), where the Court allowed a trustee to avoid a fraudulent transfer without regard to the size of the claim of the creditor whose rights and powers the trustee was asserting, with the rights of the trustee "to be enforced for the benefit of the estate." *Id.* at 5, 52 S.Ct. 3; …Because a trustee's recovery under § 544(b) is governed by § 550, it follows that Congress intended to incorporate *Moore's* rule of complete avoidance into § 550. *Cita.*

Estate Representative's Extended Reach Back Period Using IRS Claim

- ***MAJORITY RULE:*** Section 544(b) allows trustee to use an IRS claim to step into its shoes to take advantage of the 10 year collection period under 26 U.S.C. § 6502 even though applicable law transfer action would be time barred under state law
- *Amount* of IRS claim irrelevant

Ponzi Scheme Issues

- Ponzi scheme existence leads to presumption of actual fraudulent transfer
- Recovery of fictitious profits as constructive fraudulent transfer
- Net winners vs. net losers
- Pre-judgment and post-judgment interest

Bankruptcy Court Jurisdiction and Venue In UVTA Actions

- UVTA under § 544
- Bankruptcy Courts have nationwide personal jurisdiction
- Subject matter jurisdiction: is it core?
  - Yes: the bankruptcy court can hear the matter.
  - No: Bankruptcy court only issues findings of fact and conclusions of law to be confirmed by District Court

Bankruptcy Court Jurisdiction and Venue In UVTA Actions

- Bankruptcy Court subject matter jurisdiction arises under 28 U.S.C. § 1334.
- Venue is determined by 28 U.S.C. §1409.
- Plaintiff bears the burden of showing a bankruptcy court has jurisdiction over a defendant.
- Bankruptcy Rule 7004(f) defines personal jurisdiction over defendants in an adversary proceeding pending before a bankruptcy court and authorizes personal jurisdiction to the extent allowed by the Fifth Amendment Due Process clause. See e.g., Enron Corp. v. Arora (In re Enron Corp.), 316 B.R. 434, 440, 442, 444–46 and n. 8 (Bankr. S.D. N.Y. 2004.
- A bankruptcy court's personal jurisdiction is not affected by a state's long-arm statute or constitution.

Bankruptcy Rule 7004(f)

(f) PERSONAL JURISDICTION. If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules *is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code*. (emphasis added).

Personal Jurisdiction – Service of Process

- Personal jurisdiction over a defendant is established if the summons is served in accordance with Bankruptcy Rule 7004
- A plaint must serve defendant with the summons and a copy of the complaint. FRCP. 4(c)(1); FBR 7004(a)(1).
- During the bankruptcy case, a debtor may be served by mailing a copy of the summons and complaint to debtor's address listed on the petition. FBR 7004(b)(9). Debtor's attorney must also be served. FBR 7004(g).

Personal Jurisdiction – Service of Process

- Service may be by mail and the summons and complaint must be deposited in the mail within 10 days after the summons is issued. Fed. R. Bankr. P. 7004(e).
- If the summons is not timely mailed, another summons may be issued. Id.
- If service is not completed within 120 days after the complaint is filed, the court may dismiss the action or order that service be made within a specified period of time. FRCP 4(m); FBR 7004(a)(1).

Bankruptcy Courts Jury Trial

- 1989: U.S. Supreme Court holds a defendant that had not filed a claim against a debtor's estate had a right to a jury trial when sued by the trustee in bankruptcy to recover an alleged fraudulent transfer.

  "We hold that the Seventh Amendment entitles such a person to a trial by jury, notwithstanding Congress' designation of fraudulent conveyance actions as "core proceedings" in 28 U.S.C. § 157(b)(2)(H) (1982 ed., Supp. V)."
- *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 36, 109 S. Ct. 2782, 2787, 106 L. Ed. 2d 26 (1989)

Bankruptcy Courts Jury Trial

- *Official Committee v. Schwartzman* (*In re Stansbury Poplar Place, Inc.*), 13 F.3d 122, 127–28 (4th Cir.1993) (construing BAFJA as not empowering bankruptcy judges to hold jury trials, to avoid constitutional issue).
- *In re Clay,* 35 F.3d 190, 196–97 (5th Cir. 1994) bankruptcy court lacks authority to conduct a jury trial.
- *In re United Missouri Bank, N.A.,* 901 F.2d 1449, 1456–57 (8th Cir.1990) (same).
- *Matter of Grabill Corp.* 967 F.2d 1152 at 1153–55 (7^{th} Circuit) (same).
- *Rafoth v. National *197 Union Fire Ins. Co.* (*In re Baker & Getty Financial Servs., Inc.*), 954 F.2d 1169, 1173 (6th Cir.1992) (resting only on statutory argument).
- *Kaiser Steel Corp. v. Frates* (*In re Kaiser Steel Corp.*), 911 F.2d 380, 391–92 (10th Cir.1990) (same).

Bankruptcy Courts Jury Trial

- The 2^{nd} Circuit in *Germain v. Connecticut Nat. Bank*, 988 F.2d 1323, 1333 (2d Cir. 1993) rev'd on other grounds 503 U.S. 249 (1992) followed its prior ruling that neither the Constitution nor any statute bars a bankruptcy court from conducting a jury trial.
- *See also Ben Cooper, Inc. v. Insurance Co.* (*In re Ben Cooper, Inc.*), 896 F.2d 1394 (2d Cir.), *cert.granted,* 497 U.S. 1023, 110 S.Ct. 3269, 111 L.Ed.2d 779 *vacated and remanded,* 498 U.S. 964, 111 S.Ct. 425, 112 L.Ed.2d 408 (1990), *previous op. reinstated,* 924 F.2d 36 (2d Cir.), *and cert. denied,* 500 U.S. 928, 111 S.Ct. 2041, 114 L.Ed.2d 126 (1991).

What Court will Hear the Section 544 Bankruptcy UVTA Suit

- Bankruptcy Court?
  - Consent of parties
  - Waiver of right to jury trial
  - No jury trial request
  - Waiver by claim filing
  - Bankruptcy Court order/opinion may still be FOF/COL to District Court

What Court will Hear the UVTA Suit

- <u>District Court?</u>

– Jury trial request?

– Withdrawal of reference (core vs. non-core, or jury trial).
  - Requires timely motion to withdraw reference.

What Court will Hear the UVTA Suit

- District Court?
  - *Stern v. Marshall* – U.S. S.Ct. held bankruptcy court lacked authority to enter final judgment on certain matters identified as "core" under 28 U.S.C. § 157(b), including fraudulent transfers and state law counterclaims
  - 28 U.S.C. 157(c)(1) "non-core" matters "related to" a bankruptcy case, the bankruptcy courts may submit proposed findings of fact and conclusions of law to the district court for *de novo* review.