

- A. "Claim" - § 726.102(3) - means "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."
- B. "Property" - § 726.102(10) - means "anything that may be subject to ownership."
- C. "Transfer" - § 726.102(12) - means "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance."

III. Definitional Sections

In addition to the definitions contained in § 726.102, the UFTA contains sections that set forth detailed definitions of "Insolvency" and "Value" as follows:

A. Insolvency - § 726.103

This section sets forth the normal definitions of insolvency (i.e. debtor's debts are greater than assets and/or debtor is unable to pay debts as they become due). Additionally, subparagraph (4) of this section excludes as an "asset" of the debtor property that has been transferred, concealed, or removed with the intent to hinder, delay, or defraud creditors.

B. Value - § 726.104

§ 726.104 (1) provides that value is given for a transfer if, in exchange, property is transferred or an antecedent debt is secured or satisfied.

In defining value, subparagraph (1) excludes as value "an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person."

Further, subparagraph (2) of this section provides that reasonably equivalent value will be deemed given where an interest of the debtor in an asset is acquired in a regularly conducted, noncollusive foreclosure sale upon default by the debtor under a mortgage or security agreement.

Note that, because "transfer" includes both the voluntary and involuntary deposition of assets, acquisition of property by an oversecured creditor who enters a nominal bid at a foreclosure sale is open to challenge as a fraudulent transfer, even in a non-bankruptcy setting, if the foreclosure sale is found not to have been regularly conducted or to have been collusive. See Scott, *Dealing with Durrett; Mortgage Foreclosures as Fraudulent Transfers*, 65 Fla B.J. 13, (November 1991).

IV. Transfers Fraudulent as to Present and Future Debtors

The heart of Florida's fraudulent transfer statute is found in § 726.105. This section provides that a transfer of assets made by a debtor, whether the creditor's claim arose before or after the transfer, is fraudulent if the transfer is made with an actual intent to hinder, delay or defraud creditors. A transfer is also fraudulent as to present and future creditors if the debtor does not receive

reasonably equivalent value for the transfer and the debtor is engaged (or about to engage) in a business for which the remaining assets are unreasonably small in relation to the business or the debtor knows he/she will be unable to meet his/her debts.

§ 726.105 F.S. specifies the factors, among others, to be consider in determining the actual intent of a debtor to hinder, delay or defraud a creditor by means of a fraudulent transfer. Among the factors to be considered are whether: (1) the transfer 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 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 assets transferred; (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; (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

For transfers occurring prior January 1, 1988, the effective date of the UFTA, a similar analysis would be performed under former § 726.01 F.S., Florida's predecessor fraudulent conveyances statute. Accordingly, the debtor's actual intent to hinder, delay or defraud his/her creditors would be found by the existence of certain indicia or badges of fraud at the time of the transfer, including lack of consideration for the transfer, a close family relationship between transferor and transferee, pending or threatened litigation against transferor and insolvency or substantial indebtedness of transferor. See U.S. v. Fernon, C.A., 640 F.2d. 609, 613 (1981). See also U.S. v. Ressler, D.C. 433 F.Supp. 459, 464 (1977).

A. Common Indicia of Fraud

Some of the more common indicia of fraud which are set forth in § 726.105 F.S. and cited by courts in finding the requisite intent of a debtor to transfer property to delay, hinder or defraud his/her creditors include:

1. Relationship between the debtor and transferee
2. Financial condition of the debtor at the time of the transfer
3. Threatened or anticipated litigation
4. Retention of control over the property
5. Insufficient consideration paid for the transfer

See U.S. v. Fernon, supra; U.S. v. Ressler, supra; In re Total Acquisition Corp., Bkrtcy., 29 B.R. 836 (1983).

6. Relationship between debtor and transferees

A conveyance of property between husband and wife or between the debtor and a close family member is presumed to be fraudulent as to creditors and will be set aside unless the good faith of the transaction is established by a preponderance of the evidence. See e.g. Harper v. U.S., 769 F. Supp. 362, 367 (M.D. Fla. 1991), U.S. v. Fernon, supra.

7. Financial condition of debtor at time of transfer

When a debtor in failing financial circumstances voluntarily conveys property of value to a close relative, a presumption arises that the conveyance is fraudulent. A transfer made when a debtor is insolvent or unable to manage indebtedness is a powerful "badge" of intent to hinder, delay, or defraud creditors. See U.S. v. Ressler, supra. Further, to create a presumption that debtor's voluntary conveyance was fraudulent, the judgment creditor does not need to establish that the debtor was actually insolvent at time he made the conveyance. See McKeown v. Allen, 20 So. 556, 557 (1896).

8. Threatened or anticipated litigation

Transfers made by a debtor without consideration when an action is pending against the judgment debtor are presumed to be fraudulent. See e.g. Matter of Kassuba, D.C., 10 B.R. 309, 311 (1981); Harper v. U.S., supra.

9. Retention of control over the property

The ability of a debtor to freely use the assets he/she supposedly transferred demonstrates his/her intent to hinder, delay and defraud a creditor. See Temple Terrace Assets Co. v. Wason, 120 Fla. 638, 163 So. 72, 75 (1935); In re MacQuown, 717 F.2d 859, 863 (3rd Cir. 1983).

10. Insufficient consideration paid for the transfer

Another key factor in determining if a transfer is fraudulent is the consideration paid for the property conveyed. Insufficient consideration is a badge of fraud. In re Blitstein, Bkrcty, S.D. Fla. 1989, 105 B.R. 133, 136; McKeown v. Allen, 37 Fla. 490, 20 So. 556, 558 (1896).

B. Burden of Proof

Once the badges of fraud set forth above have been established by the creditor, the burden of proof shifts to the debtor to show that the transfers were made in good faith and for value. See U.S. v. Ressler, supra; Sample v. Natalby, 120 Fla. 161, 162 So. 493, 495 (1935).

V. Transfers Fraudulent as to Present Creditors

§ 726.106 provides two basis upon which a transfer by a debtor will be deemed

fraudulent as to his/her present creditors.

Under § 726.106(1), a transfer is fraudulent if the debtor did not receive reasonably equivalent value and the debtor was insolvent at the time or became solvent as a result of the transfer. This section "disregards intent, and provides that a conveyance is per se fraudulent where the creditor's claim arose prior to the transfer, the transfer lacks valid consideration and the debtor was insolvent prior to the transfer." Advest, Inc. v. Rader, 743 F.Supp. 851, 855 (1990).

Under § 726.106(2), a transfer is fraudulent if made to an insider for an antecedent debt, the debtor was insolvent at the time and the insider had reasonable cause to believe that the debtor was insolvent.

VI. Remedies

A. Avoidance of Transfer/Attachment of Asset

§ 726.108 provides the creditor with ample remedies to recover against fraudulently transferred assets. Under §726.108(1)(a) and (b), the creditor may obtain an avoidance of the transfer or an attachment against the asset. These remedies were granted creditors under Florida case law prior to the adoption of UFTA. See Punta Gorda State Bank v. Wilder, 93 Fla. 301, 112 So. 569 (1927); Money v. Powell, App., 139 So.2d. 702 (1962); Cowdery v. Herring, 106 Fla. 567, So. 433 (1932) rehearing denied 106 Fla. 567, 144 So. 348.

B. Injunction/Appointment of Receiver

Under § 726.108(1)(c), the creditor can obtain an injunction against further dispositions by either the debtor or the transferee, the appointment of receiver or any other relief the circumstances may require, subject to applicable principles of equity. Again, these remedies are consistent with Florida case law prior to the UFTA. See Martinez v. Balbin, 76 So.2d 488 (1955); Logan v. Slade, 28 Fla. 699, 10 So. 25 (1891); Fleming v. Otis Elevator Co., 107 Fla. 557, 145 So. 201, 202 (1933).

Injunctions and the appointment of receivers have been very effectively utilized to freeze the assets of debtors by both the Federal Deposit Insurance Corporation and the Resolution Trust Corporation under the Crime Control Act, 12 U.S.C. §§ 1821(d)(18) and (19). The Crime Control Act is a federal statute that provides the FDIC and RTC with specific authority to seek the issuance of injunctions and the appointment of receivers as well as the avoidance of fraudulent transfers. In contrast to the usual standard required to obtain a temporary injunction, 12 U.S.C. § 1821(d)(19) eliminates the requirement that FDIC and the RTC show that the threatened injury which is to be avoided by a temporary injunction is either irreparable or immediate. See RTC v. Cruce, 972 F.2d 1195 (10th Cir. 1992); FDIC v. Owen, 1991 W.L. 173325 (D. Conn. September 3, 1991); FDIC v. Cafritz, 762 F.Supp. 1503 (D.D.C. 1991).

C. Judgment Creditor

§ 726.108(2) allows the creditor who has obtained a judgment on a claim against the debtor to levy execution on the asset transferred or its proceeds.

VII. Defenses of Transferee

The defenses available to a transferee who has received assets alleged to have been fraudulently transferred are set forth in § 726.109. A transferee who takes in good faith for a reasonably equivalent value can defeat an action to set aside the transfer. Likewise, under the case law decided prior to the adoption of the UFTA, such a showing was a defense to an action to void a transfer claimed to be fraudulent. See Parts Depot, Inc. v. Bullock (1989, Fla.App.D) 545 So.2d. 468, 14 FLW 1523; George E. Sebring Co. v. O'Rourke, 101 Fla. 885, 134 So. 556 (1931); Vickers v. Glenn, 102 Fla. 535, 136 So. 326 (1931).

VIII. Statute of Limitations

The UFTA sets forth, in § 726.110, time limits within which specific actions must be commenced.

For transfers made with actual intent to defraud, hinder or delay creditors, the action must be commenced within four years of the transfer or, if later, within 1 year of discovery.

Action must be brought within 4 years of the transfer if the debtor does not receive reasonably equivalent value for the transfer and (1) the debtor is engaged (or about to engage) in a business for which the remaining assets are unreasonably small in relation to the business or the debtor knows he/she will be unable to meet his/her debts, or (2) the debtor was insolvent at the time or became solvent as a result of the transfer.

Action must be brought within 1 year for transfers made to an insider for an antecedent debt at a time when the debtor was insolvent and the insider had reasonable cause to believe that the debtor was insolvent.

(July 1994)

© 1997 McCaffrey & Raimi, P.A.