14 Litigating the Suit to Set Aside a Fraudulent Transfer

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I. INTRODUCTION

A. [14.1] What Is a "Fraudulent Transfer"?

The terms "fraudulent transfer" and "fraudulent conveyance" refer to a debtor's dissipation of assets to thwart a creditor's ability to collect on a debt. For example, consider the following scenario: On day one, Debtor has a net worth of $100,000, which he holds in a bank account. On day two, Creditor takes a judgment against Debtor for $75,000. On day three, Debtor gives his wife the $100,000 cash. Having given away all of his valuable property, Debtor subsequently testifies at a citation hearing that he cannot afford to pay Creditor's judgment because he has insufficient assets. Illinois considers such dissipation by a debtor a fraud on the debtor's creditors. In *Birney v. Solomon,* 348 Ill. 410, 181 N.E. 318, 320 (1932), the Illinois Supreme Court stated the proposition somewhat more eloquently: "The doctrine is firmly declared to be that one must be just before he is generous." *Accord Falcon v. Thomas,* 258 Ill.App.3d 900, 629 N.E.2d 789, 796 – 797, 196 Ill.Dec. 244 (4th Dist. 1994).

A claim under the Uniform Fraudulent Transfer Act (UFTA), 740 ILCS 160/1, *et seq.*, depends on a "transfer" of property having occurred. *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber,* 403 Ill.App.3d 179, 935 N.E.2d 963, 971, 343 Ill.Dec. 735 (1st Dist. 2010) ("The gravamen of the fraudulent transfer counts in this case is the transfer of proceeds."). Under the Bankruptcy Code, 11 U.S.C. §101, *et seq.*, a "transfer" is a prerequisite to an action to avoid a fraudulent conveyance. If no transfer has taken place, there is nothing to avoid or recover. *Edgewater Medical Center v. Edgewater Property Co. (In re Edgewater Medical Center),* 373 B.R. 845, 852 (Bankr. N.D.Ill. 2007). Section 2(*l*) of the UFTA defines the term "transfer" broadly, to include

> **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.**

The basis of any suit to set aside a fraudulent transfer is the debtor's voluntary depletion of his or her own net worth to a point at which he or she cannot fully repay the claims of creditors. Therefore, whenever a debtor claims insolvency as a basis for nonpayment of a judgment or other claim, the alert creditor's attorney should use discovery to determine (1) whether the debtor has recently transferred any valuable assets and/or incurred a large debt, (2) the identity of the transferee and/or holder of that recent debt, and (3) the consideration, if any, received for that transfer and/or debt. If the debtor recently divested himself or herself of property without receiving adequate value by conveying it into a trust, giving it away to relatives, paying a suspicious large debt, etc., the creditor's attorney should immediately investigate whether the transfer can be set aside as a fraud on the creditor.

The creditor's attorney must not lose sight of the "dissipation" concept when analyzing a debtor's purportedly fraudulent transactions. A general rule of thumb is that if the debtor received fair value for the divested asset, the transfer probably does not constitute a fraud. For instance, a debtor's sale of valuable property for adequate consideration does not constitute a fraudulent conveyance, as it does not deplete the net worth of the debtor; the debtor has merely exchanged one form of value for another (usually cash). Likewise, the repayment of a legitimate debt does not deplete the debtor's net worth; the use of an asset to extinguish an existing liability has no

effect on the debtor's net worth. However, a transfer for no compensation probably is fraudulent if it leaves the debtor without sufficient assets to repay creditors. Likewise, a debtor's agreement to obligate himself or herself to pay a liability is probably fraudulent if the debtor derives no benefit from that agreement.

Fraudulent transfers can occur in many different types of transactions. For example, in *Boyer v. Crown Stock Distribution, Inc.*, 587 F.3d 787 (7th Cir. 2009), the Seventh Circuit explained that the UFTA may invalidate a leveraged buyout as a fraudulent transfer. Writing for the court, Judge Posner offered the following observations:

> **But the critical difference between the LBO in this case and a bona fide LBO is that this LBO was *highly* likely to plunge the company into bankruptcy. There was scant probability that the transaction would increase the firm's value; on the contrary, it left the firm with so few assets that it would have had to be extremely lucky to survive.**
>
> **The transaction differed, however, in two formal respects from a conventional overleveraged LBO: the buyer bought the assets of the corporation, rather than stock in the corporation; and despite a load of debt and a dearth of cash, the corporation limped along for three-and-a-half years before collapsing into the arms of the bankruptcy court. The defendants urge these as grounds for not reclassifying the asset purchase as an LBO.**
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> **Now whether one calls it an LBO or not is not critical, although both the bankruptcy court and the defendants have called it that. Some LBOs are legitimate; others are fraudulent conveyances. "[F]raudulent conveyance doctrine . . . is a flexible principle that looks to substance, rather than form, and protects creditors from any transactions the debtor engages in that have the effect of impairing their rights, while ensuring that the debtor can continue to do business and assuring third parties that transactions done with the debtor at arm's length will not be second-guessed." [**Emphasis in original.**]** 587 F.3d at 793.

B. [14.2] Parties to the Fraudulent Transfer Action

Naturally, the original creditor and its heirs or assigns are the proper plaintiffs in a suit to set aside a fraudulent transfer. However, the debtor is not the target defendant. The "real" defendant in a suit to set aside a fraudulent transfer is the recipient of the property. A suit to set aside a fraudulent transfer seeks to divest the transferee of some or all of the property it has received. Once the debtor divests itself of the asset, the debtor no longer has it, so the court cannot order the original debtor to turn the asset over to the creditor. Of course, the creditor should also name the debtor as a nominal defendant in the lawsuit. As noted in §§14.12 – 14.13 below, the issue of fraudulent transfer often turns on the solvency of the debtor after the transfer; moreover, as a practical matter, usually only the debtor possesses the information necessary to prove or disprove this issue.

Two threshold questions in any fraudulent transfer case are whether the party seeking relief qualifies as a creditor and whether the transferor qualifies as a debtor who owes a debt to the creditor. *A.P. Properties, Inc. v. Goshinsky*, 186 Ill.2d 524, 714 N.E.2d 519, 239 Ill.Dec. 600 (1999) (requiring debtor-creditor relationship in fraudulent transfer lawsuit). *Accord Judson*

Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 383 (7th Cir. 2008) ("Under Illinois law, a fraudulent transfer claim requires a debtor/creditor relationship."). *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill.App.3d 179, 935 N.E.2d 963, 970, 343 Ill.Dec. 735 (1st Dist. 2010); *Sequel Capital, LLC v. Pearson*, No. 07-CV-2642, 2010 WL 4008161 at *11 (N.D.Ill. Oct. 13, 1010).

To resolve these questions, the creditor's attorney must look for guidance to the language of the Uniform Fraudulent Transfer Act, especially the definitions provided in §2 of that statute. In particular, the UFTA defines a "creditor" as a person who has a claim, including a claim for past-due child support. 740 ILCS 160/2(d). A "debt" is defined as liability on a claim, and a "debtor" is a person who is liable on a claim. 740 ILCS 160/2(e), 160/2(f).

The existence of a debtor-creditor relationship may generate litigation in state court actions when a plaintiff wishes to enforce its rights under the UFTA before the plaintiff can take a judgment against the transferor who contests the underlying liability. In such a case, the transferee may challenge the plaintiff's right to relief. The issue does not usually arise in federal court because Federal Rule of Civil Procedure 18(b) specifically permits the joinder of claims for money and to set aside a fraudulent transfer.

All three definitions — "creditor," "debt," and "debtor" — depend on the definition of the term "claim," which the UFTA defines as "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." 740 ILCS 160/2(c).

This language is deliberately broad; it includes rights to payment that have not been reduced to a judgment, as well as potential rights. Indeed, the UFTA's definition encompasses virtually every current and potential right to payment. *Goshinsky, supra*, 714 N.E.2d at 522 (describing UFTA's definition of claim as "expansive").

The fact that the debtor may dispute liability does not defeat a claim for UFTA purposes; it merely makes the claim "disputed." Likewise, the fact that the disputed liability has not yet been adjudicated simply makes it a "right not reduced to judgment." Therefore, these types of potential rights may support UFTA lawsuits.

In addition to the Supreme Court's decision in *Goshinsky*, the history of the UFTA supports the expansive definition of the concepts of "creditors," "debtors," and "claims." Section 2(c) of the UFTA, which defines "claim," adopts §1(3) of the National Conference of Commissioners on Uniform State Laws' Uniform Fraudulent Transfer Act (Uniform Act) verbatim. Likewise, the definition of "creditor" in §2(d) of the UFTA as a "person who has a claim" mirrors §1(4) of the Uniform Act. The Comments to the Uniform Act contain the following discussion about the meaning of the terms "creditor" and "claim":

> **The definition of "creditor" in combination with the definition of "claim" has substantially the same effect as the definition of "creditor" under §1 of the Uniform Fraudulent Conveyance Act. As under that Act, *the holder of an unliquidated tort claim or a contingent claim may be a creditor protected by this Act.* [**Emphasis added.**]** Uniform Act §1, cmt. 4.

The UFTA is a uniform statute, and the decisions of other states enacting it are entitled to precedential weight. 740 ILCS 160/12. Courts in at least two other states that have adopted the Uniform Act (Florida and Alabama) consider plaintiffs in unliquidated tort actions "creditors" holding UFTA "claims."

In *Friedman v. Heart Institute of Port St. Lucie, Inc.,* 863 So.2d 189 (Fla. 2003), the Florida Supreme Court held that a malpractice plaintiff could pursue fraudulent transfer claims against the defendant even though the malpractice claims had not been reduced to judgment. Florida UFTA claimants could "effect the progression of their cases to judgment at the same time their substantive underlying claims are also being litigated and resolved." 863 F.2d at 193.

In *Cook v. Pompano Shopper, Inc.,* 582 So.2d 37 (Fla.App. 1991), the court reversed a summary judgment against plaintiffs who had not yet obtained a judgment on their underlying tort claims. The court held: "A tort claimant or contingent claimant is as fully protected under the Fraudulent Transfer Act as a holder of an absolute claim." 582 So.2d at 40.

Similarly, in *Prescott v. Baker,* 644 So.2d 877, 880 – 881 (Ala. 1994), the Alabama Supreme Court held that the plaintiffs' lack of a malpractice judgment against a defendant doctor did not "substantially prejudice the plaintiffs in any effort to avail themselves of the remedies afforded by the Fraudulent Transfer Act."

C. The Uniform Fraudulent Transfer Act

1. [14.3] Legislative Intent

The Illinois legislature adopted the Uniform Fraudulent Transfer Act in 1989 without official comment to the Illinois statute. However, the Prefatory Note to the Uniform Act evinces an intent to provide a consistent set of laws throughout the country regarding fraudulent transfers. Anyone who intends to litigate a suit to set aside a fraudulent transfer should read the National Conference of Commissioners on Uniform State Law's official comments.

Practitioners also should be aware of the parallel between the UFTA and the fraudulent transfer provision of the U.S. Bankruptcy Code, 11 U.S.C. §548. "Because the UFTA parallels Section 548 of the Bankruptcy Code, findings made under the Code are applicable to actions under the UFTA." *Daley v. Chang (In re Joy Recovery Technology Corp.),* 257 B.R. 253, 268 (Bankr. N.D.Ill. 2001), quoting *Levit v. Spatz (In re Spatz),* 222 B.R. 157, 164 (N.D.Ill. 1998). The *Joy Recovery* court noted that the material distinction between the Bankruptcy Code and the UFTA is the statute of limitations. 257 B.R. at 268 n.29. Moreover, because the UFTA is a Uniform Act that derived its terminology from §548, practitioners and courts in Illinois may look to §548 and court cases interpreting other states' versions of the Uniform Act for assistance. *In re Image Worldwide, Ltd.,* 139 F.3d 574, 577 (7th Cir. 1998).

2. [14.4] Prior Law

The concept of fraudulent transfers is hardly new, as debtors have hidden assets from their creditors for centuries. Illinois' fraudulent transfer law derives from the English Statute of Elizabeth, 13 Eliz., ch. 5 (1570). *See Wieboldt Stores, Inc. v. Schottenstein,* 94 B.R. 488, 499 (N.D.Ill. 1988). In fact, §2 of the Uniform Fraudulent Transfer Act, 740 ILCS 160/2, derives its

definitions from the Elizabethan concept of "badges of fraud." Prior to the adoption of the current UFTA, Illinois' fraudulent transfer law was codified at Ill.Rev.Stat. (1989), c. 59, ¶4.

II. [14.5] TYPES OF FRAUDULENT TRANSFERS

Illinois recognizes two categories of fraudulent transfers. A debtor commits "fraud in fact" by intentionally engaging in a transaction for which the debtor does not receive reasonable value and either (a) transferring assets with the actual intent to hinder, delay, or defraud any creditor or (b) engaging in a business or transaction for which the remaining assets of the debtor are unreasonably small in relation to the business or transaction. A debtor commits "fraud in law" when the transfer of assets has the effect of hindering, delaying, or defrauding any creditor, irrespective of whether the debtor actually intended to hinder, delay, or defraud the creditor. *Falcon v. Thomas,* 258 Ill.App.3d 900, 629 N.E.2d 789, 796 – 797, 196 Ill.Dec. 244 (4th Dist. 1994) (test is whether conveyance directly tended to or did impair rights of creditors).

A. [14.6] Fraud in Fact

Section 5 of the Uniform Fraudulent Transfer Act states:

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's 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 actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

(b) In determining actual intent under paragraph (1) of subsection (a), 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 who transferred the assets to an insider of the debtor. 740 ILCS 160/5.

A claim based on fraud in fact asks the court to find that the debtor committed an actual fraud by intentionally disturbing, delaying, hindering, or defrauding any creditor. *Regan v. Ivanelli,* 246 Ill.App.3d 798, 617 N.E.2d 808, 814, 187 Ill.Dec. 351 (2d Dist. 1993); *Bowman v. Dixon Theatre Renovation, Inc.,* 221 Ill.App.3d 35, 581 N.E.2d 804, 807, 163 Ill.Dec. 650 (2d Dist. 1991). In order to prove its case, the plaintiff must present evidence that the debtor specifically intended to disturb, delay, hinder, or defraud a creditor by the conveyance. *Regan, supra. Accord Tcherepnin v. Franz,* 457 F.Supp. 832, 836 (N.D.Ill. 1978). Moreover, actual fraud is not presumed, but rather must be proved by clear and convincing evidence. *Hofmann v. Hofmann,* 94 Ill.2d 205, 222, 446 N.E.2d 499, 506, 68 Ill.Dec. 593 (1983).

When faced with a suit to set aside a fraudulent transfer, debtors commonly deny the element of scienter, recognizing the difficulties involved in proving it. Section 5(b) of the UFTA provides some relief. In the absence of an outright admission by the debtor of an actual intent to thwart creditors, the court may consider a list of objective facts from which the trial court may infer fraudulent intent. *Harris v. Aimco, Inc.,* 66 Ill.App.3d 60, 383 N.E.2d 631, 632 – 633, 22 Ill.Dec. 823 (5th Dist. 1978). *Accord Alan Drey Co. v. Generation, Inc.,* 22 Ill.App.3d 611, 317 N.E.2d 673, 679 (1st Dist. 1974). However, the legislature also recognizes that fraud may encompass a wide variety of potential activities; the statutory list specifically leaves open the possibility of "other factors." 740 ILCS 160/5(b). Even after more than 500 years of jurisprudence, courts continue to describe these factors as "badges of fraud." *E.g., Schneider v. Schneider (In re Schneider),* 417 B.R. 907, 914 – 915 (Bankr. N.D.Ill. 2009); *In re CF Graphics, Inc.,* No. 06 B 00459, 2009 WL 2215089 at *6 (Bankr. N.D.Ill. July 21, 2009).

B. [14.7] Fraud in Law

The Uniform Fraudulent Transfer Act recognizes two sub-categories of fraud in law. *Creditors' Committee of Jumer's Castle Lodge, Inc. v. Jumer (In re Jumer's Castle Lodge, Inc.)*, 329 B.R. 837 (Bankr. C.D.Ill. 2005).

Section 5(a)(2) of the UFTA permits claims whether or not the creditor's claim arose prior to the transfer when the debtor did not receive reasonable value for the transfer and the debtor either (1) was engaged in or about to engage in a business or transaction for which his or her remaining assets were unreasonably small in relation to the business or transaction or (2) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to repay. Section 6(a) permits claims when (1) the creditor's claim arose prior to the transfer, (2) the debtor did not receive reasonably equivalent value for the transfer, and (3) the debtor was either insolvent at the time of the transfer or became insolvent as a result. See 740 ILCS 160/5(a)(2), 160/6(a).

Note that a §5(a)(2) fraud in law action may be brought whether the creditor's claim arose before or after the transfer was made or the obligation was incurred. By contrast, a §6(a) action applies only when the creditor's claim preceded the purportedly fraudulent transfer/obligation. *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill.App.3d 179, 935 N.E.2d 963, 970, 343 Ill.Dec. 735 (1st Dist. 2010); *In re CF Graphics, Inc.*, No. 06 B 00459, 2009 WL 2215089 at *10 (Bankr. N.D.Ill. July 21, 2009).

A case based on fraud in law is substantially easier for the creditor to prove, and more difficult for the debtor to defend, than one based on fraud in fact. A creditor states a prima facie case of fraud in law simply by alleging facts demonstrating that (1) the debtor either made a transfer or incurred an obligation (2) without receiving a reasonably equivalent value in exchange for the transfer/obligation and (3) the debtor either was insolvent at the time of the transfer/obligation or became insolvent as a result of the transfer/obligation. To defend the claim, the debtor must disprove at least one of these allegations. If the debtor fails to do so, the presumption of fraud becomes conclusive and the debtor loses. *First Security Bank of Glendale Heights v. Bawoll*, 120 Ill.App.3d 787, 458 N.E.2d 193, 197, 76 Ill.Dec. 54 (2d Dist. 1983).

A "fraud in law" claim does not require proof of intent. In *Apollo Real Estate Investment Fund*, 935 N.E.2d at 976, *supra*, the First District held:

> **A donor may make a conveyance with the most upright intentions, and yet, if the transfer hinders, delays, or defrauds his creditors, it may be set aside as fraudulent.**

C. [14.8] Preferential Fraudulent Transfers to Insiders

Section 6(b) of the Uniform Fraudulent Transfer Act states:

> **A transfer made by a debtor is fraudulent 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.** 740 ILCS 160/6(b).

The authors could not find any Illinois cases applying this section. However, the Bankruptcy Court for the Northern District of Illinois provided the following discussion of a §6(b) action in *Grochocinski v. Schlossberg (In re Eckert)*, 388 B.R. 813, 842 (Bankr. N.D.Ill. 2008):

> **Lastly, a fraudulent transfer claim brought under [**§6(b)**] of the UFTA is commonly referred to as an insider preference claim. . . . This cause of action must be filed within one year after the transfer was made. . . . Under [**§6(b)**], the elements of the cause of action are: (1) the creditor's claim arose before the transfer; (2) the debtor made the transfer to an insider for an antecedent debt; (3) the debtor was insolvent at the time of the transfer; and (4) the insider had reasonable cause to believe that the debtor was insolvent. [**Citations omitted.**]**

Accord Grochocinski v. Knippen (In re Knippen), 355 B.R. 710, 736 (Bankr. N.D.Ill. 2006); *In re CF Graphics, Inc.*, No. 06 B 00459, 2009 WL 2215089 at *11 (Bankr. N.D.Ill. July 21, 2009).

Courts in other jurisdictions adopting the Uniform Act have also addressed the "insider preference" type of fraudulent transfer claim. In *Prairie Lakes Health Care System, Inc. v. Wookey*, 583 N.W.2d 405, 413 (S.D. 1998), the South Dakota Supreme Court held:

> **One of the innovations in the UFTA is its adoption of a bankruptcy concept to create a novel category of fraudulent transaction, the preferential transfer. It has been characterized as constructive fraud or fraud in law. SDCL 54-8A-5(b) states:**
>
> > **A transfer made by a debtor is fraudulent 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.**
>
> **Even though it has been held that debtors may generally prefer one creditor over another in applying assets to discharge their obligations, §5(b) curtails this privilege if the debtor is insolvent at the time and the preference is to an insider. *See Textron Fin. Corp. v. Kruger*, 545 N.W.2d 880 (Iowa Ct.App. 1995) (generally debtors may prefer one creditor over another). The rationale behind §5(b) "is that an insolvent debtor is obliged to pay debts to creditors not related to [the debtor] before paying those who are insiders." UFTA, Prefatory Note.**
>
> Section 2(g) of the UFTA defines an "insider" to include the following:
>
> **(1) if the debtor is an individual,**
>
> > **(A) a relative of the debtor or of a general partner of the debtor;**
> >
> > **(B) a partnership in which the debtor is a general partner;**
> >
> > **(C) a general partner in a partnership described in clause (B); or**
> >
> > **(D) a corporation of which the debtor is a director, officer, or person in control;**

(2) if the debtor is a corporation,

(A) a director of the debtor;

(B) an officer of the debtor;

(C) a person in control of the debtor;

(D) a partnership in which the debtor is a general partner;

(E) a general partner in a partnership described in clause (D); or

(F) a relative of a general partner, director, officer, or person in control of the debtor. 740 ILCS 160/2(g).

For a very interesting treatment of the "insider" concept, the authors recommend a look at *Grochocinski v. Schlossberg,* 402 B.R. 825 (N.D.Ill. 2009). Also worth a look is *CLC Creditors' Grantor Trust v. Howard Savings Bank (In re Commercial Loan Corp.),* No. 04 B 18946, 2010 WL 1730860 at *10 (Bankr. N.D.Ill. Apr. 29, 2010), which states:

> **It is true, as the Trust notes, that LSB was a CLC shareholder, Ohlinger was a CLC director, and LSB's counsel, Kemp, was a CLC officer. But none of this necessarily makes the sale less than arms-length. *See Anstine v. Carl Zeiss Meditec AG (In re U.S. Medical, Inc.),* 531 F.3d 1272, 1274 (10th Cir. 2008) (holding that a transferee was not an "insider" of the debtor, although the transferee was a shareholder and its CEO a director, where all transactions between the transferee and the debtor were arms-length).**

III. [14.9] DEFENSES TO FRAUDULENT TRANSFER CLAIMS

The defendants in a suit to set aside a fraudulent transfer may present a number of defenses, which are discussed in detail in §§14.10 – 14.34 below. Some of these defenses apply to all fraudulent transfer claims, while others may not apply in a given situation depending on the type of fraud alleged.

A. Intent

1. [14.10] Fraud in Fact

The lack of scienter constitutes a valid defense to fraudulent transfer claims based on the debtor's alleged actual fraud or fraud in fact. In *People ex rel. Hartigan v. Gaby's Apparel, Ltd.,* 133 Ill.App.3d 343, 478 N.E.2d 1043, 1046, 88 Ill.Dec. 435 (1st Dist. 1985), the First District held that "a specific intent to defraud must be proved in fraud-in-fact cases." However, as noted in §14.6 above, the court need not hear the debtor's admission of that intent; pursuant to §5(b) of the Uniform Fraudulent Transfer Act, 740 ILCS 160/5(b), the court may infer intent from the circumstances surrounding the allegedly fraudulent transaction. *Harris v. Aimco, Inc.,* 66 Ill.App.3d 60, 383 N.E.2d 631, 632, 22 Ill.Dec. 823 (5th Dist. 1978).

A recent line of federal cases in the Seventh Circuit also has created a question about the need to prove the transferee's fraudulent intent. For example, in *Fidelity National Title Insurance Company of New York v. Howard Savings Bank*, 436 F.3d 836, 841 (7th Cir. 2006), the court said that "to be a fraudulent transferee, you must know or suspect that you are not giving any return value to the owner." Likewise, in *Fidelity National Title Insurance Company of New York v. Intercounty National Title Insurance Co.*, No. 00 C 5658, 2008 U.S.Dist. LEXIS 24927 at *28 (N.D.Ill. Mar. 26, 2008), the Northern District followed the Seventh Circuit, holding: "To be a fraudulent transferee, one must know or suspect that the owner is not receiving any return value for the transfer of his funds, otherwise the transferee takes in good faith." The Seventh Circuit in *Fidelity National Title Insurance Company of New York v. Howard Savings Bank* identified *Kennedy v. Four Boys Labor Service, Inc.*, 279 Ill.App.3d 361, 664 N.E.2d 1088, 1093, 216 Ill.Dec. 160 (2d Dist. 1996), as the basis for its focus on the transferee's lack of fraudulent intent.

The authors respectfully submit that the Seventh Circuit has cited *Kennedy* incorrectly and overstated its holding; we disagree that the elements of a fraudulent transfer claim require analysis of the transferee's intent. The issue presented by *Kennedy* was whether transferees were bona fide purchasers of the debtor's assets. While the transferees' intentions were certainly relevant to the existence of a bona fide purchaser defense, intent is not an element of the underlying UFTA claim. 664 N.E.2d at 1093.

Section 5(a)(1) of the UFTA speaks in terms of the debtor's intent to "hinder, delay, or defraud." Section 5(a)(2)(B) discusses the debtor's intent to incur debts beyond his or her ability to repay. *E.g., CLC Creditors' Grantor Trust v. Howard Savings Bank (In re Commercial Loan Corp.),* 396 B.R. 730, 746 (Bankr. N.D.Ill. 2008) ("To succeed in proving that a transfer was fraud in fact or actual fraud (as opposed to fraud in law or constructive fraud under section 5(a)(2) [citation omitted], a plaintiff must demonstrate that the transferor made the transfer with a specific intent to defraud creditors."). Likewise, the §5(b) "badges of fraud" all focus on actions by the debtor from which the trial court may infer the debtor's fraudulent intent.

The authors believe this distinction is important because a bona fide purchaser defense pursuant to UFTA §9(a) requires more than proof of good faith; the transferee must also prove that he or she gave reasonably equivalent value for the transferred asset.

2. [14.11] Fraud in Law

Lack of scienter or fraudulent intent is no defense to a claim of fraud in law; the lack of fraudulent intent is immaterial. *People ex rel. Hartigan v. Gaby's Apparel, Ltd.*, 133 Ill.App.3d 343, 478 N.E.2d 1043, 88 Ill.Dec. 435 (1st Dist. 1985); *Stoller v. Exchange National Bank of Chicago,* 199 Ill.App.3d 674, 557 N.E.2d 438, 444, 145 Ill.Dec. 668 (1st Dist. 1990). *See also Stone v. Ottawa Plant Food, Inc. (In re Hennings Feed & Crop Care, Inc.),* 365 B.R. 868, 874 (Bankr. C.D.Ill. 2007) ("As with a §5(a)(2) claim, no proof of actual intent to defraud is required to establish fraud in law under §6(a) [of the Uniform Fraudulent Transfer Act].").

B. Solvency

1. [14.12] Fraud in Fact

Section 5 of the Uniform Fraudulent Transfer Act defines a "fraudulent transfer" as one that caused the debtor to become insolvent. 740 ILCS 160/5. Therefore, a defendant in a suit brought pursuant to §5 may contest it by denying that the transaction rendered the debtor insolvent.

Section 3 of the UFTA defines the term "insolvency":

> **(a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.**
>
> **(b) A debtor who is generally not paying his debts as they become due is presumed to be insolvent.**
>
> **(c) A partnership is insolvent under subsection (a) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.**
>
> **(d) Assets under this Section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this Act.**
>
> **(e) Debts under this Section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.**

In *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill.App.3d 1019, 864 N.E.2d 927, 938, 309 Ill.Dec. 686 (1st Dist. 2007), the First District Appellate Court cited to UFTA §3 to explain whether an entity is insolvent. In *Baldi v. Samuel Son & Co.*, 548 F.3d 579, 583 (7th Cir. 2008), Judge Posner nicely summarized the analysis of "balance-sheet" solvency/insolvency by quoting Judge Easterbrook:

> **To decide whether a firm is insolvent within the meaning of §548(a)(2)(B)(i) [**of the Bankruptcy Code**], a court should ask: What would a buyer be willing to pay for the debtor's entire package of assets and liabilities? If the price is positive, the firm is solvent; if negative, insolvent.** Quoting *Covey v. Commercial National Bank of Peoria*, 960 F.2d 657, 660 (7th Cir. 1992).

Under §3(a), the court need not consider the nominal or "paper" value of assets when determining the solvency of a debtor. In *Falcon v. Thomas*, 258 Ill.App.3d 900, 629 N.E.2d 789, 796 – 797, 196 Ill.Dec. 244 (4th Dist. 1994), the Fourth District quoted the following passage from the Supreme Court's opinion in *Birney v. Solomon*, 348 Ill. 410, 181 N.E. 318, 320 (1932):

> **It is of no moment that the property remaining in the grantor's hands after the conveyance was in nominal value more than equal to the amount of his indebtedness if subsequent events show that the property retained was not sufficient to discharge all his liability.**

2. [14.13] Fraud in Law

Although §6(a) of the Uniform Fraudulent Transfer Act, 740 ILCS 160/6(a), defines a "fraudulent transfer" as one that causes the debtor to become insolvent, the authors do not recommend a "solvency" defense to a claim for fraud in law unless the debtor can prove it with some degree of certainty. Caselaw focuses more on the effect of the debtor's allegedly fraudulent transaction on the ability of the debtor's creditors to collect. If the transaction tends to impair the creditors' rights, the court will likely find it fraudulent. For example, *Falcon v. Thomas*, 258 Ill.App.3d 900, 629 N.E.2d 789, 796, 196 Ill.Dec. 244 (4th Dist. 1994), contains the following dicta: "Actual insolvency is not required. The test is whether the conveyance directly tended to or did impair the rights of creditors."

C. [14.14] Bona Fide Purchaser/Good-Faith Transferee

Section 9 of the Uniform Fraudulent Transfer Act states:

(a) A transfer or obligation is not voidable under paragraph (1) of subsection (a) of Section 5 against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this Section, to the extent a transfer is voidable in an action by a creditor under paragraph (1) of subsection (a) of Section 8, the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) the first transferee of the asset or the person for whose benefit the transfer was made; or

(2) any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

(c) If the judgment under subsection (b) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this Act, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to

(1) a lien on or a right to retain any interest in the asset transferred;

(2) enforcement of any obligation incurred; or

(3) a reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under paragraph (2) of subsection (a) of Section 5 or Section 6 if the transfer results from:

(1) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

(f) A transfer is not voidable under subsection (b) of Section 6:

(1) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor. 740 ILCS 160/9(a).

Section 9(a) does not define the term "in good faith" as it applies to the bona fide purchaser defense. However, the authors suggest that it should be interpreted as the transferee's lack of knowledge about the voidability of the transaction. In *For Your Ease Only, Inc. v. Calgon Carbon Corp.*, No. 07-4034, 2009 U.S.App. LEXIS 6994 at **10 – 13 (7th Cir. Mar. 31, 2009), the Seventh Circuit provided guidance on that issue, holding:

It is somewhat easier to identify situations in which good faith is lacking. Thus, for example, good faith will probably be lacking if the transferee knows that the transfer may be voidable because he knows of an outstanding judgment against the transferor. The Illinois Court of Appeals has found a lack of good faith where the transferee knew of a pending lawsuit against the transferor and accepted the transfer without informing the plaintiff. *Kennedy v. Four Boys Labor Servs.*, 279 Ill.App.3d 361, 664 N.E.2d 1088, 1093, 216 Ill.Dec. 160 (Ill.App.Ct. 1996). Similarly, in a case decided before the enactment of UFTA, the Illinois Court of Appeals found a lack of good faith where the transferee knew of an outstanding judgment and sought protection should any claim to the transferred property arise from that judgment. *Alan Drey Co. v. Generation, Inc.*, 22 Ill.App.3d 611, 317 N.E.2d 673, 680 (Ill.App.Ct. 1974). In the closely related area of bankruptcy, this court defined good faith for purposes of §550(b) of the bankruptcy code as a state of mind in which the person is "without knowledge of voidability." *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 897 (7th Cir. 1988). We commented that knowledge does not require a "complete understanding of the facts . . . some lesser knowledge will do." *Id.* at 898.

[For Your Ease Only (FYEO)**] argues that the district court applied the wrong legal standard for good faith and improperly focused on the financial and legal relationship between Schneider and Fournier after the transfer. It is unclear what standard of good faith the district court applied. If what the court meant to say, however, was that good faith exists as a matter of law as long as there is no continuing legal or financial relationship between Schneider and Fournier after the**

transfer, then we must disagree with it. Whether the transferor receives benefits from the asset after the transfer or retains control over the asset after the transfer is relevant to whether the transfer is fraudulent under 740 ILCS 160/5(b), but it is not the only pertinent fact. Even though the existence of a continuing legal or financial relationship after the transfer may indicate bad faith, the lack of such a relationship does not establish good faith.

Most importantly, the Illinois cases we cited earlier show that a transferee who knows about a judgment against the transferor does not take the asset in good faith. Here, the facts show that Fournier knew of the judgment against Schneider and [Product Concepts Company (PCC)**] before he accepted the transfer of the [**Home Shopping Network (HSN)**] business. Like the transferee in *Kennedy*, he knew about not only the pending lawsuit, but also the actual judgment against Schneider and PCC. He knew from the subpoena that FYEO was seeking information about the HSN business. In fact, Fournier flew to Costa Rica immediately after learning of the judgment in order to protect "his" HSN business from the judgment.**

The district court erred by focusing on the continuing relationship between Fournier and Schneider after the transfer, rather than Fournier's knowledge of the judgment against Schneider at the time he flew to Costa Rica to start the process of transferring the business from Sevenquest to Anewco (a transfer that was not completed until after his trip). Since Fournier knew that the judgment had been entered and that FYEO was pursuing the HSN payments, Fournier did not accept the transfer in good faith. The transfer is therefore voidable under 740 ILCS 160/9.

1. [14.15] Fraud in Fact

Section 9(a) of the Uniform Fraudulent Transfer Act, 740 ILCS 160/9(a), provides a bona fide purchaser defense to claims under §5(a)(1); the law does not permit the creditor-plaintiff to set aside a fraudulent transfer against an innocent third party who acquires an asset from the debtor in good faith and for fair value. Moreover, under §9(a) a bona fide transfer precludes the creditor-plaintiff from setting aside transfers to subsequent transferees. However, the court may set aside a transfer when the transferee either knows or should have known about the debtor's fraudulent intent. In *Alan Drey Co. v. Generation, Inc.*, 22 Ill.App.3d 611, 317 N.E.2d 673, 680 (1st Dist. 1974), the court held:

Merely showing a fraudulent intent on the part of the transferor is insufficient, however, to impose liability on the transferee. The transferee must be a participant in the fraud rather than a *bona fide* purchaser. To constitute a *bona fide* purchaser from a fraudulent transferor, he must have purchased the property for valuable consideration, without notice of the fraud, and he must be innocent of any purpose to further the fraud, even to protect himself. . . . To be regarded as a participator in the fraud, it is not necessary that the purchaser have actual knowledge of the debtor's fraudulent intent, but merely a knowledge of facts and circumstances sufficient to excite the suspicions of a prudent man and be put on inquiry, or to lead a person of ordinary perception to infer fraud. [Citations omitted.**]**

The fraudulent transfer litigator should note that §9(a) does not afford any remedies against claims based on fraud in law.

Section 9(d) of the UFTA also provides a limited defense. Notwithstanding the voidability of a transfer, §9(d) gives a good-faith transferee the right to relief to the extent the good-faith transferee paid value for the transferred asset.

2. [14.16] Fraud in Law

Section 9(e) of the Uniform Fraudulent Transfer Act, 740 ILCS 160/9(e), provides two defenses to claims based on fraud in law. The plaintiff-creditor cannot set aside a transfer if it involves (a) the termination of certain leases or (b) the enforcement of security interests under Article 9 of the Uniform Commercial Code, 810 ILCS 5/9-101, *et seq.* Likewise, UFTA §9(f) affords two defenses to claims of fraudulent-in-law transfers involving insiders.

D. [14.17] Transfers for Value

Under §§5(a)(2) and 6 of the Uniform Fraudulent Transfer Act, a transfer is voidable as fraudulent if the debtor made it without receiving a reasonably equivalent value in exchange for the transfer and the debtor was either insolvent at that time or became insolvent as a result of the transfer. 740 ILCS 160/5(a)(2), 160/6(a). Therefore, receipt of reasonably equivalent value is a defense to a claim for fraud in law.

The concept of "reasonably equivalent value" under the UFTA is not well defined and may become the subject of dispute. Section 4 reads:

> **(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person;**
>
> **(b) . . . [**A**] person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement;**
>
> **(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.**

Other than for foreclosure sales, the UFTA does not define "reasonably equivalent value." However, consideration and reasonably equivalent value are not synonymous:

> **Consideration and adequate (full, fair, commensurate) consideration are not synonyms. Although some Illinois cases . . . suggest that a transfer not intended to deceive creditors is fraudulent only if the consideration for it is nonexistent or**

> **"grossly" inadequate, the state's highest court has said that inadequacy is enough. [**Citations omitted.**]** *Scholes v. Lehmann*, 56 F.3d 750, 756 (7th Cir. 1995), citing *Gendron v. Chicago & North Western Transportation Co.*, 139 Ill.2d 422, 564 N.E.2d 1207, 1215, 151 Ill.Dec. 545 (1990).

The plain language of §4(a) defines "value" for a transfer as only (1) a transfer of property or (2) the satisfaction or security of an antecedent debt; therefore, the alert creditor's attorney will challenge other types of purported consideration given by the transferee as "value," especially if it provides no benefit to the creditor.

The authors could find no Illinois appellate decisions defining "value" or "reasonably equivalent value" under §4(a). Therefore, a review of the corresponding section of the Uniform Act is instructive (§4(a) of the UFTA is identical to §3(a) of the Uniform Act). The drafters of the Uniform Act include a Comment to §3(a) that contains the following discussion:

> **"Value" is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition.** Uniform Act §3, cmt. 2.

Two 2005 bankruptcy court decisions have looked to the Bankruptcy Code to help define "reasonably equivalent value" under the UFTA. In *Creditors' Committee of Jumer's Castle Lodge, Inc. v. Jumer (In re Jumer's Castle Lodge, Inc.)*, 329 B.R. 837, 843 – 844 (Bankr. C.D.Ill. 2005), the court held:

> **The Illinois Courts have not conclusively defined *reasonably equivalent value* under the Illinois UFTA. [***Helms v. Roti (In re Roti)*, 271 B.R. 281, 303 (Bankr. N.D.Ill. 2002)**]; *In re Image Worldwide, Ltd.*, 139 F.3d 574, 577 (7th Cir. 1998). Since the Illinois UFTA is analogous to Section 548 of the Bankruptcy Code, 11 U.S.C. §548, courts analyzing the Illinois UFTA have relied on cases addressing Section 548 in their analysis of the Illinois Statute. *In re Roti*, 271 B.R. at 301 (stating that Section 548 is analogous to the Illinois UFTA; thus, the court can look at Section 548 cases in analyzing cases under 740 ILCS 160/1 *et seq.*); [***Official Committee of Unsecured Creditors of Crystal Medical Products, Inc. v. Pedersen & Houpt (In re Crystal Medical Products, Inc.)*, 240 B.R. 290, 299 (Bankr. N.D.Ill. 1999)**] (stating that "reasonably equivalent value" is interpreted in the same way under both Section 548 and the Illinois UFTA.); *In re Image Worldwide Ltd.*, 139 F.3d at 577 ("as its title indicates, the UFTA is a uniform act, and it derived the phrase 'reasonably equivalent value' from 11 U.S.C. § 548(a)(2). Thus, we can look to interpretations of 'reasonably equivalent value' from § 548 cases. . . .").**
>
> **In general, Illinois state and Bankruptcy Courts have not set forth specific requirements or factors they consider in determining whether a debtor received reasonably equivalent value for the transfer in question. However, in *In re Roti*, an Illinois state court decision, the court referred to four factors in determining whether reasonably equivalent value was received.**

> **The factors utilized to determine reasonably equivalent value are: (1) whether the value of what was transferred is equal to the value of what was received; (2) the market value of what was transferred and received; (3) whether the transaction took place at an arm's length; and (4) the good faith of the transferee.** Quoting *Roti*, 271 B.R. at 295.

Likewise, the bankruptcy court reached the same conclusion in *Grochocinski v. Zeigler (In re Zeigler)*, 320 B.R. 362, 374 (Bankr. N.D.Ill. 2005) ("In determining whether reasonably equivalent value was received under the UFTA, courts should consider how that phrase has been construed under the Bankruptcy Code.").

Section 4(c) of the UFTA makes it clear that the exchange of value must be a present exchange, *i.e.*, at the time of the transfer. Reasonably equivalent value is measured at the time of the transfer. *Berland v. Mussa (In re Mussa)*, 215 B.R. 158, 172 (Bankr. N.D.Ill. 1997). Accordingly, a promise to pay another's expenses in the future is not equivalent value. *Id.* (at time of transfer to son, son's "promise to support his mother was an unperformed promise to furnish support and cannot constitute value").

Courts are "particularly insistent upon proof of commensurability when they are dealing with intrafamilial transfers attacked as fraudulent conveyances." *Scholes, supra*, 56 F.3d at 758.

A question of value may arise when the transferee gives an indirect benefit to the debtor in exchange for the debtor's transfer of property. A creditor will properly view such indirect benefits with suspicion and should challenge the adequacy of "value" unless the transferee can show some real benefit to the debtor.

A small number of bankruptcy cases construing the UFTA have addressed this issue. The bankruptcy courts in these cases generally acknowledge that a debtor does not receive reasonably equivalent value if it made a transfer in exchange for a benefit to a third party. However, the cases also recognize an increasing willingness by courts to consider the benefits more holistically and look at the overall effect on the entity making the transfer. In doing so, these bankruptcy courts give consideration to whether the debtor received an indirect benefit, as long as that indirect benefit was "fairly concrete." *E.g., Crystal Medical Products, supra*, 240 B.R. at 300; *In re Jumer's Castle Lodge, supra*, 329 B.R. at 844 – 845.

In *Creditor's Committee of Jumer's Castle Lodge, Inc. v. Jumer*, 472 F.3d 943, 947 (7th Cir. 2007), the Seventh Circuit discussed the question of "reasonably equivalent value":

> **Illinois courts have not elaborated on the meaning of "reasonably equivalent value," except to note that a transfer lacks reasonably equivalent value if there is no or inadequate consideration. *Regan v. Ivanelli*, 246 Ill.App.3d 798, 804, 617 N.E.2d 808, 814, 187 Ill.Dec. 351 (1993). This Court has recognized, however, that because the IUFTA is a uniform act, we may look to cases decided under 11 U.S.C. § 548, as well as cases interpreting other states' versions of the Uniform Fraudulent Transfer Act . . . to determine the meaning of the phrase. *See In re Image Worldwide, Ltd.*, 139 F.3d 574, 577 (7th Cir.1998). In one § 548 case, we said that "[t]he test used to determine reasonably equivalent value in the context of a fraudulent conveyance requires the [C]ourt to determine the value of what was transferred and to compare**

> **it to what was received." *Barber v. Golden Seed Co., Inc.*, 129 F.3d 382, 387 (7th Cir. 1997). The parties agree that this definition of reasonably equivalent value provides the correct method for evaluating whether a transfer is fraudulent under Illinois law.**

One interesting facet of *Creditor's Committee of Jumer's* was the Seventh Circuit's placement of the burden of proof on a plaintiff alleging transfers between a corporation and its shareholders:

> **As a last ditch argument, the Committee contends that the lower courts erred by ruling that it had the burden of proving that JCL made a fraudulent transfer. In support of this argument, the Committee cites *Falcon v. Thomas*, 258 Ill.App.3d 900, 629 N.E.2d 789, 196 Ill.Dec. 244 (1994), *Hartigan v. Anderson*, 232 Ill.App.3d 273, 597 N.E.2d 826, 173 Ill.Dec. 852 (1992), and *Kardynalski v. Fisher*, 135 Ill.App.3d 643, 482 N.E.2d 117, 90 Ill.Dec. 410 (1985). These cases, however, are not controlling. They hold that when a debtor makes a transfer to a family member, receives inadequate consideration in return, and then becomes insolvent, the defendant has the burden of rebutting a presumption of fraud by clear and convincing proof. In this case, the Committee has offered no evidence that the transactions in question involved inadequate consideration or family members. As a result, the Committee correctly shouldered the burden of proof.**
>
> **The Committee also contends that Jumer should bear the burden of proving the fairness of the transaction, because in a breach of fiduciary duty case, the fiduciary bears the burden of proving the fairness of an insider transaction. *See Ciolek v. Jaskiewicz*, 38 Ill.App.3d 822, 829, 349 N.E.2d 914, 920 (1976). The Court rejects this argument as well. First, the Committee did not allege a breach of fiduciary duty claim in its complaint. Second, the Committee has not cited — and we have not found — any case brought under the IUFTA in which a court has shifted the burden of proof to an interested shareholder or director to prove that a transfer was not fraudulent. To the contrary, the plaintiff ordinarily bears the burden of proving a fraudulent transfer. *See, e.g., Casey Nat'l Bank v. Roan*, 282 Ill.App.3d 55, 59, 668 N.E.2d 608, 611, 218 Ill.Dec. 124 (1996).** 472 F.3d at 948-49.

The Seventh Circuit has held that the UFTA's concept of "value" is not restricted to money or its equivalent. Most recently, in *For Your Ease Only, Inc. v. Calgon Carbon Corp.*, No. 07-4034, 2009 U.S.App. LEXIS 6994 at *13 (7th Cir. Mar. 31, 2009), the Seventh Circuit held that the "UFTA does not limit reasonably equivalent value to money nor to value transferred pursuant to a valid contract."

The question of "reasonably equivalent value" may arise within the context of a release of claims (*i.e.*, a transferee releases a claim in return for the debtor's transfer of an asset). In *Independent Trust Corp. v. Fidelity National Title Insurance Company of New York*, 577 F.Supp.2d 1023, 1044 (N.D.Ill. 2008), the U.S. District Court for the Northern District of Illinois addressed that issue:

> **Fidelity cites several cases that it argues require a different result; according to Fidelity, these cases show that a release of corresponding legal obligations in exchange for a transfer of assets always constitutes reasonably equivalent value. The**

> **cases cited by Fidelity, however, all involve situations in which the released claim has both a clear dollar amount and a high probability of success. *See Scholes v. Lehmann*, 56 F.3d 750, 758 (7th Cir.1995) (stating that release of a valid claim of equal value to the released collateral constitutes adequate consideration); *In re AFI Holding, Inc.*, 525 F.3d 700, 708 (9th Cir.2008) (finding reasonably equivalent value where defendant had received a release in exchange for a valid restitution claim); [***Solow v. Reinhardt (In re First Commercial Management Group, Inc.,*** 279 B.R. 230, 239 (Bankr. N.D.Ill. 2002)**] (finding reasonably equivalent value when defendant was paid already-owed commissions in exchange for a release of those commissions, and noting that absent the release, the defendant would have had a valid claim for the same sum). Thus, if the claims against Hargrove were dubious, the fact that the release was for an equal sum as the value of the collateral would not shield Fidelity.**

In *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.,* 371 Ill.App.3d 1019, 864 N.E.2d 927, 938, 309 Ill.Dec. 686 (1st Dist. 2007), the First District also discussed the fact that an agreement to forbear from suing an insolvent entity does not constitute a legal detriment.

1. [14.18] Fraud in Fact

Consideration for a transfer does not necessarily defeat a claim of actual fraud. *Levit v. Spatz (In re Spatz),* 222 B.R. 157, 168 (N.D.Ill. 1998). It is only one of the eleven indicia considered under §5(b) of the Uniform Fraudulent Transfer Act, 740 ILCS 160/5(b). The court in *Spatz, supra,* stated:

> **The defendants cannot explain why, if the drafters [**of the UFTA**] intended that full consideration should operate to negate fraudulent intent under the fraud in fact provision, they chose to include inadequate consideration as only one of eleven factors weighed in determining intent.**

2. [14.19] Fraud in Law

In cases alleging constructive fraud in which an alleged fraudulent transfer was to an immediate family member, the defendant has the burden to show that he or she received reasonably equivalent value. *Berland v. Mussa (In re Mussa),* 215 B.R. 158, 172 (Bankr. N.D.Ill. 1997). *See also Anderson v. Ferris,* 128 Ill.App.3d 149, 470 N.E.2d 518, 522, 83 Ill.Dec. 392 (2d Dist. 1984) ("Where the conveyance is made by the debtor to his wife and the debtor is thereby rendered insolvent, the burden of dispelling the implications of fraud as against pre-existing creditors is upon the debtor and his wife."). Quoting commentary under §3 of the Uniform Fraudulent Transfer Act, 740 ILCS 160/3. the *Mussa* court noted:

> **"Value" is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. The definition does not specify all the kinds of consideration that do not constitute value for purposes of this Act — *e.g.*, love and affection.** 215 B.R. at 172.

In *Daley v. Chang (In re Joy Recovery Technology Corp.),* 257 B.R. 253, 268 (Bankr. N.D.Ill. 2001), the court stated:

> **The measurement of reasonably equivalent value is a question of fact. . . . The test used by the court to determine whether reasonably equivalent value was received is to compare the value transferred to what was received. . . . There is no fixed formula for determining reasonable equivalence, but will depend on all the facts of each case, an important element being fair market value. [**Citations omitted.**]**

Accord Dixon v. Ruth (In re Gluth Bros. Construction, Inc.), 424 B.R. 368, 376 (Bankr. N.D.Ill. 2009) ("Whether 'reasonably equivalent value' has been given is generally a question of fact.").

Notwithstanding the general rule that "redemptions in general fail to supply reasonably equivalent value . . . [t]here may be instances where the facts prove that a stock redemption does constitute reasonably equivalent value." [Citations omitted.] 257 B.R. at 270. In *Joy Recovery*, although the corporate debtor's financial statements tended to show that it was not insolvent before the sale, the evidence was unclear whether the corporation became insolvent as a result of the sale. The court found genuine issues of material fact as to the characterization of the sale (*i.e.*, whether the defendant had sold his stock to the debtor as part of a leveraged buyout or to the other 50-percent shareholder personally) and whether this transaction rendered the debtor insolvent. Based on those findings, the court denied the defendant's motion for summary judgment. *But see Reaves v. Comerica Bank-California (In re GTI Capital Holdings, LLC)*, 373 B.R. 671 (Bankr. D.Ariz. 2007) (court unable to conclude as matter of law whether value received from debtor's son was disproportionate to value of property transferred by debtor).

E. [14.20] Statute of Limitations

Section 10 of the Uniform Fraudulent Transfer Act states:

> **A cause of action with respect to a fraudulent transfer or obligation under this Act is extinguished unless action is brought:**
>
> **(a) under paragraph (1) of subsection (a) of Section 5, within 4 years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;**
>
> **(b) under paragraph (2) of subsection (a) of Section 5 or subsection (a) of Section 6, within 4 years after the transfer was made or the obligation was incurred; or**
>
> **(c) under subsection (b) of Section 6, within one year after the transfer was made or the obligation was incurred.** 740 ILCS 160/10.

1. [14.21] Fraud in Fact

Under §10(a) of the Uniform Fraudulent Transfer Act, 740 ILCS 160/10, claims to set aside fraudulent transfers based on fraud in fact expire within four years after the date of the allegedly fraudulent transaction. However, the limitations period may be tolled if the debtor conceals the fraudulent transaction; in that case, the creditor has an additional year to file suit. *Id. Accord*

Gilbert Bros., Inc. v. Gilbert, 258 Ill.App.3d 395, 630 N.E.2d 189, 196 Ill.Dec. 492 (4th Dist. 1994).

2. [14.22] Fraud in Law

Under §10(b) of the Uniform Fraudulent Transfer Act, most fraud-in-law claims expire within four years after the date of the allegedly fraudulent transaction. However, fraudulent transfers made to insiders of the debtor expire only one year after the date of the allegedly fraudulent transaction if (a) the transfer was made to an insider for an antecedent debt, (b) the debtor was insolvent at that time, and (c) the insider had reasonable cause to believe that the debtor was insolvent. 740 ILCS 160/10(c), 160/6. Moreover, §10 of the UFTA does not permit the tolling of fraud-in-law claims.

F. Tenancy by the Entirety

1. [14.23] Statutory Background

In 1989 the Illinois General Assembly enacted 765 ILCS 1005/1c, which gives married couples additional protection from creditors. It currently reads, in pertinent part:

> **Whenever a devise, conveyance, assignment, or other transfer of property, including a beneficial interest in a land trust, maintained or intended for maintenance as a homestead by both husband and wife together during coverture shall be made and the instrument of devise, conveyance, assignment, or transfer expressly declares that the devise or conveyance is made to tenants by the entirety, or if the beneficial interest in a land trust is to be held as tenants by the entirety, the estate created shall be deemed to be in tenancy by the entirety.**

Prior to August 22, 1997, 735 ILCS 5/12-112 read, in pertinent part:

> **Any real property, or any beneficial interest in a land trust, held in tenancy by the entirety shall not be liable to be sold upon judgment entered on or after October 1, 1990 against only one of the tenants. However, any income from such property shall be subject to garnishment as provided in Part 7 of this Article XII, whether judgment has been entered against one or both of the tenants.**

Construed together, these two statutes prevented a creditor with a judgment against only one spouse from levying on the home held by the judgment debtor and his or her spouse as tenants by the entirety.

While the Uniform Fraudulent Transfer Act seeks to protect creditors from certain types of transfers by debtors, the tenancy by the entirety statutes prevent creditors from executing on the marital residence of certain debtors. Given these conflicting statutory objectives, the question arose whether the tenancy by the entirety statutes present a defense to actions under the UFTA. As the discussion in §§14.24 – 14.26 below demonstrates, the courts and legislature wrestled with this issue for some time.

2. [14.24] Initial Caselaw

In *E.J. McKernan Co. v. Gregory*, 268 Ill.App.3d 383, 643 N.E.2d 1370, 205 Ill.Dec. 763 (2d Dist. 1994), the Second District considered the interplay between the fraudulent transfer statutes and the tenancy by the entirety statutes. In that case the plaintiff, McKernan, took a judgment against the defendant, Mr. Gregory. At that time Mr. Gregory owned his home in joint tenancy with his wife, who was not a party to the McKernan lawsuit. Shortly after McKernan took its judgment, Mr. and Mrs. Gregory executed a deed from themselves as joint tenants to themselves as tenants by the entirety. Citing the two tenancy by the entirety statutes discussed in §14.23 above, Mr. Gregory argued that his house was not subject to levy and moved to quash the levy and to restrain McKernan from forcing the sale of that home. For its part, McKernan argued that Mr. Gregory committed a fraudulent transfer when he placed the property into tenancy by the entirety after McKernan had taken its judgment.

The trial court denied the motion to quash, ruling in favor of McKernan. The appellate court reversed, holding:

> **The [**Uniform Fraudulent**] Transfer Act forbids transfers made with the "actual intent" to hinder, delay, or defraud. However, *intent is irrelevant in a tenancy by the entirety conveyance because it simply cannot be fraudulent to engage in conduct that is specifically and unambiguously sanctioned by statute.* A plain reading of the tenancy by the entirety statutes makes it clear that no mental state is required to use the tenancy's protection. There are no limitations or qualifications on the use of the tenancy, other than that the real property be held by a married couple during coverture and that the property be the couple's "homestead." Additionally, the statute provides that only those judgments entered against a debtor on or after October 1, 1990, are subject to the exemption. [**Emphasis added.**]** 643 N.E.2d at 1374 – 1375.

In short, the Second District ruled that the tenancy by the entirety statute defeats the right of a creditor of only one spouse to levy against the marital homestead regardless of the couple's fraudulent intentions. McKernan appealed to the Illinois Supreme Court, but that appeal was subsequently dismissed, apparently because the parties settled.

The creditor's bar fiercely criticized *McKernan* in various articles. See, *e.g.*, Timothy J. Howard, *Transfers into Tenancy by the Entirety and the UFTA*, 42 ISBA Real Prop.Newsl., No. 2, 3 (Sept. 1996). Most of the criticism focused on two issues. First, the commentators argued for an expansive reading of "fraudulent transfers," citing the "one must be just before he is generous" language of cases such as *Birney v. Solomon*, 348 Ill. 410, 181 N.E. 318, 320 (1932). Second, the commentators argued that Illinois' fraudulent transfer laws should follow those of other states adopting both tenancy by the entirety and the UFTA, such as Ohio, which hold that a transfer of nonexempt property into exempt property may constitute a fraud on creditors.

In *In re Marriage of Del Giudice*, 287 Ill.App.3d 215, 678 N.E.2d 47, 222 Ill.Dec. 640 (1st Dist. 1997), the First District rejected the Second District's decision in *McKernan*, holding that the retitling of a marital home into tenancy by the entirety can run afoul of the UFTA. In that case the debtor, Mr. Del Giudice, guaranteed the payment of attorneys' fees for his son. The son defaulted, and the creditors took a judgment against Del Giudice. The creditors then filed a direction to levy against Del Giudice's marital home, which he held in joint tenancy with his

wife, and sent notice of a sheriff's sale on the home. Shortly after the notice of sheriff's sale issued, Mr. and Mrs. Del Giudice deeded their home to themselves as tenants by the entirety. Del Giudice filed an emergency petition to restrain the levy sale of the home, and the creditors moved to strike Del Giudice's petition. Citing *McKernan*, the trial court denied the creditors' motion and granted Del Giudice's emergency petition.

In March 1997, the First District reversed and remanded. Rejecting the holding in *McKernan*, the court held:

> **[**W**]e find that even though the tenancy by the entirety statute permits married couples to convey marital property to that estate, such transfers may still be fraudulent. We acknowledge that the legislature found it appropriate to enable married couples to shield their marital home from the creditors of one spouse. However, there is no indication from either the plain language of the statute nor the legislative history that the legislature intended to include fraudulent conduct within the scope of the afforded protections.** 678 N.E.2d at 49.

3. [14.25] August 1997 Amendment to 735 ILCS 5/12-112

In response to *E.J. McKernan Co. v. Gregory*, 268 Ill.App.3d 383, 643 N.E.2d 1370, 205 Ill.Dec. 763 (2d Dist. 1994), the legislature passed a bill amending 735 ILCS 5/12-112, which was signed into law August 22, 1997. The revised statute reads, in pertinent part:

> **Any real property, or any beneficial interest in a land trust, held in tenancy by the entirety shall not be liable to be sold upon judgment entered on or after October 1, 1990 against only one of the tenants*, except if the property was transferred into tenancy by the entirety with the sole intent to avoid the payment of debts existing at the time of the transfer beyond the transferor's ability to pay those debts as they become due.* However, any income from such property shall be subject to garnishment as provided in Part 7 of this Article XII, whether judgment has been entered against one or both of the tenants.**
>
> *** * ***
>
> **This amendatory Act of 1997 (P.A. 90-514) is intended as a clarification of existing law and not as a new enactment. [**Emphasis added.**]**

4. [14.26] Decisions Construing the 1997 Amendment to 735 ILCS 5/12-112

Two 1998 cases addressed the 1997 amendment to 735 ILCS 5/12-112: *Brown v. Stacy (In re Stacy)*, 223 B.R. 132 (N.D.Ill. 1998); and *Harris Bank St. Charles v. Weber*, 298 Ill.App.3d 1072, 700 N.E.2d 722, 233 Ill.Dec. 194 (2d Dist. 1998). In these cases, the Northern District and the Second District both held that the Uniform Fraudulent Transfer Act no longer applies when a debtor has transferred the marital residence into tenancy by the entirety. Both cases discussed the fact that the 1997 amendment to §12-112 does not refer to the UFTA. Likewise, both cases held that the "sole intent" language creates a different standard of proof from those employed by the UFTA. Both cases ruled that the 1997 amendment created a new cause of action based on §12-112. According to the court in *Stacy*, the elements of this cause of action are

> **(1) that the debtor was unable to pay existing debts as they became due, and (2) that the debtor transferred the property to a tenancy by the entirety for the sole, exclusive purpose of avoiding those debts.** 223 B.R. at 136.

Likewise, the *Harris Bank St. Charles* court held:

> [W]**e believe the language of the amendment clearly sets forth the standard that trial courts must apply when a creditor challenges a transfer into tenancy by the entirety: the property is not liable to be sold to satisfy a judgment against only one spouse unless the property was transferred with "the sole intent to avoid the payment of debts existing at the time of the transfer beyond the transferor's ability to pay those debts as they become due."** 700 N.E.2d at 729, quoting 735 ILCS 5/12-112.

In *Premier Property Management, Inc. v. Chavez,* 191 Ill.2d 101, 728 N.E.2d 476, 245 Ill.Dec. 394 (2000), the Illinois Supreme Court adopted the reasoning of *Harris Bank St. Charles* and abrogated the conflicting decisions in *E.J. McKernan Co. v. Gregory,* 268 Ill.App.3d 383, 643 N.E.2d 1370, 205 Ill.Dec. 763 (2d Dist. 1994), and *In re Marriage of Del Giudice,* 287 Ill.App.3d 215, 678 N.E.2d 47, 222 Ill.Dec. 640 (1st Dist. 1997). Citing the legislature's 1997 amendment of §12-112, in *Premier,* 728 N.E.2d at 482, the Supreme Court held that the standard of actual intent to defraud under the UFTA may not be used to set aside a transfer of property to tenancy by the entirety.

In *Premier,* a judgment creditor sought to set aside as fraudulent the judgment debtor's conveyance of his personal residence to himself and his spouse as tenants by the entirety. That conveyance took place while the underlying action, which resulted in the entry of judgment against the judgment debtor, was pending. The trial court applied *McKernan* and dismissed the creditor's complaint. 728 N.E.2d at 479. The First District reversed. On appeal to the Supreme Court, the judgment creditor urged the court to follow *Del Giudice* and set aside the transfer pursuant to the UFTA. 728 N.E.2d at 478 – 479. Conversely, the judgment debtor and his wife asked the court to apply *McKernan.* 728 N.E.2d at 479.

The Supreme Court examined the conflict between *McKernan* and *Del Giudice,* finding both cases moot in light of the 1997 amendment to §12-112. The court ruled that the statute, as amended, prohibits the execution upon property held in tenancy by the entirety to satisfy the debt of only one spouse, unless the property was transferred into tenancy by the entirety "*with the sole intent to avoid the payment of debts existing at the time of the transfer beyond the transferor's ability to pay those debts as they become due.*" [Emphasis added by *Premier* court.] 728 N.E.2d at 480, quoting 735 ILCS 5/12-112.

The *Premier* court found that the sole intent standard differs substantially from the UFTA's actual intent standard and provides greater protection from creditors. 728 N.E.2d at 482. For example, if property is transferred to tenancy by the entirety to place it beyond the reach of the creditors of one spouse and to accomplish some other legitimate purpose, the transfer is not avoidable. *Id.* By contrast, such a transfer would be avoidable under the actual intent standard, which requires only any actual intent to defraud a creditor. *Id.*

The Second District applied the "sole intent" standard in *LaSalle Bank, N.A. v. DeCarlo,* 336 Ill.App.3d 280, 783 N.E.2d 211, 270 Ill.Dec. 636 (2d Dist. 2003). In *DeCarlo,* 783 N.E.2d at 216, a judgment creditor moved to set aside a debtor's transfer of his home into tenancy by the entirety within days after a judgment against him was affirmed. Notwithstanding testimony by the debtor's wife that she had no intent to defraud any creditor and that her husband had never disclosed to her that a judgment had been obtained against him, the trial court set aside the transfer based on its finding that the debtor's sole intent was to defraud his creditors. 783 N.E.2d at 213. On appeal, the defendants argued that the trial court erred in finding that §12-112 applied to the debtor and not to the debtor's spouse since, they claimed, "the legislature clearly intended to protect . . . the unsuspecting wife from the improper actions of her spouse." *Id.* In making that argument, the defendants relied on the holding in *Premier, supra,* that the sole intent standard of §12-112 requires that "if property is transferred to tenancy by the entirety to place it beyond the reach of creditors of one spouse *and* to accomplish some other legitimate purpose, the transfer is not avoidable." [Emphasis in original.] 783 N.E.2d at 215, quoting *Premier,* 728 N.E.2d at 481. *Accord Harris Bank, N.A. v. Werner (In re Werner),* 410 B.R. 797 (Bankr. N.D.Ill. 2009).

The appellate court affirmed, holding that the sole intent standard in §12-112 applied to the intent of the debtor, not to the intent of the debtor's spouse, for purposes of determining whether a legitimate purpose existed for the transfer. 783 N.E.2d at 215 (limiting *Premier*). The court reasoned that the "ignorance of one spouse should not shield a transfer made to avoid the payment of a legal obligation. Defendants' misinterpretation of the statute would allow the debtor, however fraudulent his or her intent, to shield a transfer of an asset behind an uninformed spouse. This could not be the legislature's intent." 783 N.E.2d at 215 – 216.

G. Family Expenses

1. [14.27] Spousal Support Obligations

Illinois requires spouses to support one another. See 750 ILCS 16/15(a) ("A person commits the offense of failure to support when he or she . . . willfully, without any lawful excuse, refuses to provide for the support or maintenance of his or her spouse."). *See also Walters v. Walters,* 341 Ill.App. 561, 94 N.E.2d 726, 729 (1st Dist. 1950) ("Payments of alimony from husband to wife are not based upon any consideration moving from wife to husband, but are based upon the common-law duty of the husband to support his wife."). Thus, because spouses are already legally obligated to support one another, there is no consideration for one spouse who transfers assets to the other, based on the other's promise to support the transferor.

Several Illinois courts have rejected the argument that the payment of family expenses constitutes adequate consideration for transfers from an insolvent debtor to a family member. In *Ryan v. Kontrick,* No. 00 CV 5736, 2001 U.S.Dist. LEXIS 7473 (N.D.Ill. May 30, 2001), for example, the bankruptcy court denied discharge based on the facts that (a) the defendant and his wife had a joint checking account into which the defendant deposited his salary checks and (b) in the midst of litigation against the defendant, he removed his name from the checking account but continued to deposit his salary checks into the account and his wife continued to pay the family expenses from the account. Several years later, the defendant filed for bankruptcy.

When the bankruptcy court denied a discharge, the defendant argued that the court erred because the deposits to the account were used for family expenses and did not reduce the assets

available to creditors and because there was no intent to hinder, delay, or defraud his creditors. *Id.* Regardless of the defendant's claim that the money in his wife's account was being used for family expenses, the bankruptcy court found the transfer of the defendant's salary into this account fraudulent "because at the time of the transfer she gave no consideration." 2001 U.S.Dist. LEXIS 7473 at *15. On reconsideration, the bankruptcy court stated that "there can be no question that the Debtor acted in a manner which violated the statute. . . . Although he may have had the means to pay [the judgment creditor], he chose to take his name off of the account and began to pay his earnings into an account over which he had no control." 2001 U.S.Dist. LEXIS 7473 at *17.

In upholding the bankruptcy court's decision, the district court stated that because the defendant "deposited his salary into an account that he could not access," there was "no question that this transfer reduced the assets [that] were available to his creditors." 2001 U.S.Dist. LEXIS 7473 at *19.

Likewise, in *Bohn v. Weeks,* 50 Ill.App. 236 (1st Dist. 1893), a husband debtor gave money to his wife, who deposited it into her checking account and used it, from time to time, to pay family expenses. In finding the transfers fraudulent as to the husband's creditors, the *Bohn* court held: "[A]s to personal property, it is only that of a debtor which is exempt. There is no provision allowing a debtor to claim as exempt the property of another." 50 Ill.App. at 241. *But see Michelson v. Schor,* No. 93 C 5124, 1996 U.S.Dist. LEXIS 16928 at *15 (N.D.Ill. Nov. 14, 1996) (transfers from debtor husband to wife were supported by consideration because husband owed those amounts to wife, who earned substantial income on her own, as his contribution for family expenses).

Courts in other states have also held that transfers for family expenses were not supported by consideration. *See, e.g., Carneal v. Leighton,* 237 F.Supp.2d 104, 110 (D.Me. 2002) (debtor's transfers to wife for household expenses did not constitute reasonably equivalent value for transfers); *Stinner v. Stinner,* 300 Pa.Super. 351, 446 A.2d 651, 653 (1982) (wife's performance of domestic services not adequate consideration for transfers from debtor husband). *Contra, e.g., United States v. Goforth,* 465 F.3d 730, 736 (6th Cir. 2006) ("debtor does indeed receive 'reasonably equivalent value' when he/she makes payments to his/her spouse (or co-habitant) that are used for household expenses") (collecting cases).

2. [14.28] Family Expense Statute

The family expense statute, §15(a)(1) of the Rights of Married Persons Act, 750 ILCS 65/0.01, *et seq.,* does not "create" consideration under the Uniform Fraudulent Transfer Act. This statute is used by creditors to make one spouse liable for the debts of the other spouse if the debt is considered one of family expenses. *See, e.g., North Shore Community Bank & Trust Co. v. Kollar,* 304 Ill.App.3d 838, 710 N.E.2d 106, 237 Ill.Dec. 683 (1st Dist. 1999). Section 15(a)(1) creates a right in favor of the creditor, and a liability against the husband and wife. *Walker v. Houghteling,* 107 F. 619, 621 (7th Cir. 1901). It does not create a common-law or statutory cause of action by one spouse against the other spouse to pay for family expenses. *See, e.g., Setinc v. Masny,* 185 Ill.App.3d 15, 540 N.E.2d 937, 940, 133 Ill.Dec. 71 (3d Dist. 1989) (mother could not recover son's medical expenses from son's father under family expense statute, which "makes no provision for the liability of one spouse to another"). *See also In re Estate of Weisskopf,* 39 Ill.App.2d 380, 188 N.E.2d 726, 730 (1st Dist. 1963) (when mother has ample assets to support

her children, and does in fact support them, she has no right to reimbursement from family member).

"Statutes of this kind, having for their purpose the fixing of status relative to the obligations of man and wife to third parties, be they public or private, have nothing to do with the obligations that may run from man to wife." *Bennett v. Bennett*, 27 Ill.App.2d 24, 169 N.E.2d 172, 175 (2d Dist. 1960), *abrogated on other grounds, In re Estate of McGloon*, 191 Ill.App.3d 968, 598 N.E.2d 438, 139 Ill.Dec. 53 (1st Dist. 1989). "All this statute does is give to third parties for expenses of the family a remedy against [both husband and wife], and that is all. To ascribe a larger import is to deny the meaning of plain words and accepted canons of construction." *Bennett*, 169 N.E.2d at 174.

H. [14.29] Wages

Transfers of earnings are not excluded from recovery if they were transferred in violation of the Uniform Fraudulent Transfer Act. No Illinois statutory or caselaw supports the proposition that a person cannot, as a matter of law, make a fraudulent transfer of wages he or she receives.

1. [14.30] Wages Are Not Exempt in Illinois

Illinois does not exempt wages from judgment or attachment. 735 ILCS 5/12-1001 (wages not included among personal property that may be exempted by debtor). Indeed, the Illinois legislature has created various kinds of statutory exemptions. See, *e.g.*, 735 ILCS 5/12-1006 (retirement plans); 735 ILCS 5/12-901 (homestead exemption); 215 ILCS 5/238(a) (life insurance proceeds); 735 ILCS 5/2-1716 (periodic installments of future damages for loss of earnings in healing art malpractice claims); 820 ILCS 305/21 (awards under Workers' Compensation Act). Likewise, when the legislature wants to trace funds that originated in an exempt asset and keep them exempt, it specifically does so. See, *e.g.*, 735 ILCS 5/12-1001(j) ("Money due the debtor from the sale of any personal property that was exempt from judgment, attachment, or distress for rent at the time of the sale is exempt from attachment and garnishment to the same extent that the property would be exempt had the same not been sold by the debtor."). Notably absent from these exemption statutes is any exemption for wages or their proceeds.

Illinois follows the inclusio unius est exclusio alterius rule of statutory construction, which means "the inclusion of one is the exclusion of the other." *See, e.g., In re D.D.*, 312 Ill.App.3d 806, 728 N.E.2d 119, 122, 245 Ill.Dec. 388 (2d Dist. 2000). *Accord People v. Hill*, 333 Ill.App.3d 783, 776 N.E.2d 828, 835, 267 Ill.Dec. 456 (2d Dist. 2002) (defining "inclusio unius est exclusio alterius" as "the mention of one implies the exclusion of another"). Under the inclusio unius doctrine, the express mention of certain classes of personal property in 735 ILCS 5/12-1001 implies the exclusion of all classes of property not mentioned. In particular, the Illinois legislature's failure to include wages among the categories of exempt personal property suggests that it did not intend to make wages exempt from collection.

2. [14.31] Wage Garnishment Limitations

Wage garnishment is covered under §§12-801 through 12-819 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.* Section 12-803 limits the amount that can be withheld by an employer subject to a wage garnishment:

The wages, salary, commissions and bonuses subject to collection under a deduction order, for any work week shall not exceed the lesser of (1) 15% of such gross amount paid for that week or (2) the amount by which disposable earnings for a week exceed 45 times the Federal Minimum Hourly Wage.

Practitioners should be careful not to confuse this prohibition against garnishing more than 15 percent of a debtor's wages with the general question of whether wages are exempt. Section 12-803 does not exempt wages; it merely limits the amount an employer can withhold from a debtor's paycheck under a wage deduction order. Nor does the Illinois statute governing supplementary proceedings, 735 ILCS 5/2-1402, change that result. The language in §2-1402(c)(2) — that a "judgment debtor shall not be compelled to pay income which would be considered exempt as wages under the Wage Deduction Statute" — refers to the limited amount an employer may deduct, not to the debtor's wages generally. As such, §2-1402 does not "create" an exemption for wages.

Nothing in 735 ILCS 5/12-803 precludes wages paid over to a debtor from being fraudulently transferred by that debtor and subsequently recovered. In other words, the wages, once transferred to another, either with intentional fraud or constructive fraud, are no longer the debtor's wages. Once transferred, the funds are the property of another. *See Dunn v. First National Bank of Decatur (In re Jenkins Enterprises, Inc.),* 289 B.R. 702, 706 (Bankr. C.D.Ill. 2003) (balance in person's bank account is "debt owed by the bank" to that person); *In re Estate of Ferdinand E. Marcos Human Rights Litigation,* No. 97 C 0477, 1997 U.S.Dist. LEXIS 10958 (N.D.Ill. July 22, 1997) (bank account is debt). Once transferred, earnings are no longer wages. Instead, the transferee holds an asset in the form of a debt receivable from the bank.

Courts in other states interpreting statutes similar to §12-803 have uniformly held that earnings, once in the hands of a debtor or his or her bank account, are not exempt from execution notwithstanding the existence of a garnishment limitation statute. These courts have noted that state and federal wage garnishment restrictions are meant to govern and stabilize the relationship between employees and employers; they are not meant to apply once funds are in the employee's possession. *See, e.g., Brown v. Commonwealth of Kentucky, Natural Resources & Environmental Protection Cabinet,* 40 S.W.3d 873, 877 (Ky.App. 1999) ("protection consisted of a limitation on the portion of earnings subject to the employer's garnishment and a prohibition against discharging employees because their earnings had been garnished for any one indebtedness"); *Kokoszka v. Belford,* 417 U.S. 642, 41 L.Ed.2d 374, 94 S.Ct. 2431, 2435 (1974) ("Just because some property interest had its source in wages . . . does not give it special protection, for to do so would exempt from the bankrupt estate most of the property owned by many bankrupts, such as savings accounts and automobiles which had their origin in wages." Quoting *In re Kokoszka,* 479 F.2d 990, 995 (2d Cir. 1973).); *Usery v. First National Bank of Arizona,* 586 F.2d 107, 110 (9th Cir. 1978) ("Like a lump sum tax return, a bank account has neither an element of periodicity nor the critical relationship to a person's subsistence that a paycheck does."). Virtually all of the courts that have considered whether the federal statute limiting garnishment "applies to wages deposited into bank accounts or otherwise removed from the employer's control have found that it does not." *Brown, supra,* 40 S.W.3d at 877. *See also Lawrence v. Jahn (In re Lawrence),* 219 B.R. 786, 793 (E.D.Tenn. 1998); *In re Adcock,* 264 B.R. 708, 711 (D.Kan. 2000); *In re Doughman,* 263 B.R. 905, 908 (Bankr. D.Kan. 1999); *Carbaugh v. Carbaugh (In re Carbaugh),*

278 B.R. 512, 523 – 524 (B.A.P. 10th Cir. 2002); *Dunlop v. First National Bank of Arizona*, 399 F.Supp. 855, 856 (D.Ariz. 1975).

3. [14.32] *Wienco* and *California-Peterson*

In *Wienco, Inc. v. Scene Three, Inc.*, 29 F.3d 329, 330 (7th Cir. 1994), the Seventh Circuit held that 735 ILCS 5/12-803, while permitting a judgment creditor to obtain an order requiring a judgment debtor's employer to pay directly to the creditor up to 15 percent of the debtor's income, did not limit the percentage of income that the debtor could be ordered to turn over to the creditor by an order directed solely to the debtor. See also Jerold S. Solovy et al., ILLINOIS CIVIL LITIGATION GUIDE §6:133, p. 747 (2004) ("The garnishment limits of [735 ILCS 5/12-803] apply only to a wage deduction summons and order directed at an employer. Thus, a judgment debtor can be directly ordered by a court to turn over a greater amount than provided for by this section." Citing *Wienco*.). In *Wienco*, the defendant argued that 85 percent of his earned income was exempt from the enforcement of a judgment. Calling that argument "absurd" and "spurious," the court held 735 ILCS 5/12-803 inapplicable because the order was directed to the debtor himself and to no one else. *Wienco, supra.*

California-Peterson Currency Exchange, Inc. v. Friedman, 316 Ill.App.3d 610, 736 N.E.2d 616, 249 Ill.Dec. 422 (1st Dist. 2000), illustrates the opposite point. In that case, the First District upheld the trial court's action in discharging the judgment creditor's citation to discover assets and denying the creditor's motion for turnover of 85 percent of the debtor's monthly earnings from his employer (both of which were directed to the debtor's employer, not the debtor himself).

4. [14.33] Statutorily Exempt Property Is Never Automatically Exempted

Even if wages had been deemed exempt property by the legislature, and even if the legislature had provided for tracing of wages once transformed, exempt property is never automatically exempted from the reach of a creditor. Rather, a debtor must take judicial steps to claim property as exempt and have that election upheld by the court before the property is "exempted" from judgment. *See, e.g., In re Lush*, 213 B.R. 152, 155 (Bankr. C.D.Ill. 1997). Exemption protection does "not extend to property which is 'exempt' by statutory definition." *Id.* A debtor must first assert his or her right to claim an exemption and have that election sustained. *See also Bohn v. Weeks*, 50 Ill.App. 236, 241 (1st Dist. 1893) (defendant "did not, in his answer, nor has he at any time, claimed this money as exempt" and "having failed so to claim and also failed to claim the same in his answer, he must be held to have waived any right he might have had to have it treated as exempt").

I. [14.34] Bankruptcy

A fraudulent transferor who is considering filing a bankruptcy petition to defend against a fraudulent transfer suit should think twice before doing so. The purpose of the Bankruptcy Code is to provide relief to debtors from the claims of their creditors; although a bankruptcy discharge may render a debt unenforceable against the debtor, Bankruptcy Code §524 provides that a discharge of a debt of the debtor generally does not affect the liability of any other entity on, or the property of any other entity for, that debt. 11 U.S.C. §524(e). In other words, a bankruptcy discharge conveys a personal benefit on the debtor and does not furnish any protection to others.

By contrast, as noted in §14.2 above, a suit to set aside a fraudulent transfer involves a claim by the creditor against the transferee. Accordingly, the transferee derives no benefit from the transferor's discharge, and the creditor can proceed unimpaired against that transferee. This is precisely what happened in *Casey National Bank v. Roan,* 282 Ill.App.3d 55, 668 N.E.2d 608, 218 Ill.Dec. 124 (4th Dist. 1996).

IV. LITIGATING THE FRAUDULENT TRANSFER CASE

A. Separate Action

1. [14.35] Brought as a Separate Suit

A suit to set aside a fraudulent transfer is separate and distinct from the underlying claim against the debtor. As noted in §14.2 above, the fraudulent transfer suit involves different parties as well as different issues. Accordingly, the plaintiff-judgment creditor may elect to bring it as a separate suit.

Where should the plaintiff-judgment creditor file its suit? In chancery. Fraudulent transfer litigation is considered an issue of "creditors' rights." The sophisticated commercial litigator will undoubtedly recognize a similarity between lawsuits to set aside fraudulent transfers and suits to impose constructive trusts. Both types of cases apply equitable principles to prevent unjust enrichment at the expense of a more deserving party. Indeed, §8(a)(3) of the Uniform Fraudulent Transfer Act, 740 ILCS 160/8(a)(3), expressly empowers the court to use equitable remedies to grant the appropriate relief. Certain judicial circuits in Illinois hear chancery cases in a specially designated division. For example, in Cook County, litigation involving creditors' rights is a matter for the Chancery Division. Cook County General Order No. 1.2, §2.1(b)(1).

2. [14.36] Continuation of the Underlying Suit

Some circuits also allow the creditor to bring a supplemental suit to set aside fraudulent transfers as part of its underlying case pursuant to 735 ILCS 5/2-1402(c)(6). The use of this procedure does not confer any substantive or procedural benefit; it is technically a separate action requiring payment of a separate filing fee and service of process on all parties. However, it confers a practical benefit by litigating all matters before one judge, who can become familiar with the parties and the case.

B. [14.37] Practical Considerations Involving Fraud in Fact vs. Fraud in Law

The concepts of fraud in fact and fraud in law are not mutually exclusive, and many, if not most, suits to set aside fraudulent transfers could proceed under either theory. Given that choice, how should the creditor's attorney proceed? The creditor's attorney should consider the issues in §§14.38 – 14.39 below.

1. [14.38] When Did the Creditor's Claim Arise?

Section 5 of the Uniform Fraudulent Transfer Act provides relief to creditors whose claims arose either before or after the allegedly fraudulent transfer. 740 ILCS 160/5. By contrast, §6 applies only to creditors whose claims arose before the transfer. Therefore, prior to filing any

pleadings, the creditor's attorney should take a citation to discover assets to determine (a) the date the claim arose and (b) the date of the fraudulent transfer. If the creditor cannot determine that information from a citation, the attorney should plead both fraud in fact and fraud in law in alternative counts.

2. [14.39] Burden of Proof

When representing a creditor, a claim for fraud in law, as opposed to fraud in fact, should be pursued whenever possible. Fraud in law is far easier to prove, takes substantially less work, and costs less money to the client.

A claim based on fraud in law presents a rare opportunity for a plaintiff's lawyer to force the defendant to disprove the plaintiff's case. As noted in §14.7 above, once the creditor establishes a prima facie case, the burden shifts to the defendant to rebut it; the defendant's failure to meet that burden entitles the creditor to a judgment in its favor. *First Security Bank of Glendale Heights v. Bawoll,* 120 Ill.App.3d 787, 458 N.E.2d 193, 76 Ill.Dec. 54 (2d Dist. 1983). Moreover, the defendant has a very limited repertoire of defenses to a fraud-in-law claim. In order to defeat the creditor's claim, the defendant must prove that either (a) after the allegedly fraudulent transfer the debtor retained ample assets to cover its debts or (b) the debtor received adequate consideration for the transfer. *Anderson v. Ferris,* 128 Ill.App.3d 149, 470 N.E.2d 518, 522, 83 Ill.Dec. 392 (2d Dist. 1984).

By contrast, a claim based on fraud in fact imposes a much heavier burden of proof on the creditor. As noted in §§14.6 and 14.10 above, the creditor must prove each and every element of its case, including the debtor's intent to defraud the creditor. *Regan v. Ivanelli,* 246 Ill.App.3d 798, 617 N.E.2d 808, 187 Ill.Dec. 351 (2d Dist. 1993); *Tcherepnin v. Franz,* 457 F.Supp. 832 (N.D.Ill. 1978). The creditor must do so by clear and convincing evidence. *Hofmann v. Hofmann,* 94 Ill.2d 205, 446 N.E.2d 499, 68 Ill.Dec. 593 (1983).

C. Pleadings

1. [14.40] Complaint

Illinois is a fact-pleading jurisdiction and the attorney pleading an UFTA complaint in an Illinois court must allege facts. In federal courts located in Illinois, the heightened pleading requirements that apply to fraud cases under Federal Rule of Civil Procedure 9(b) apply to UFTA cases. *E.g., Allstate Insurance Co. v. St. Anthony's Spine & Joint Institute,* No. 06 C 7010, 2010 WL 3274283 at *2 (N.D.Ill. Aug. 17, 2010). The *Allstate Insurance* court stated:

> **In the Seventh Circuit, a plaintiff who provides a "general outline of the fraud scheme" sufficient to "reasonably notify the defendants of their purported role" in the fraud satisfies Rule 9(b).** *Id.*

It is preferable to plead a complaint in exhaustive detail and to sequence each fact in chronological order. A properly pleaded complaint serves a number of useful purposes. It presents a persuasive statement of the plaintiff's case to the court and may force damaging admissions by the defendant in the answer; these admissions may, in turn, set the stage for a successful motion for judgment on the pleadings or motion for summary judgment. The properly

pleaded complaint also may intimidate the defendant and thereby encourage a negotiated settlement before the answer. In either case, it aids the creditor's attorney by effecting a speedy resolution. See §14.63 below for a sample complaint.

2. [14.41] Answer

Defense counsel should try to avoid specificity in an answer whenever it is ethically permitted. Knowledge is power in litigation, and defense counsel should not volunteer information if it can be avoided. See §14.64 below for a sample answer.

3. [14.42] Other Pleadings

If a defendant wishes to raise affirmative defenses, such as laches, statute of limitations, etc., the defendant must comply with the pleading rules set forth in the Code of Civil Procedure.

D. [14.43] Discovery

Discovery in fraudulent transfer suits is subject to the usual requirements as set forth in S.Ct. Rule 201, *et seq.*

1. [14.44] Citation To Discover Assets

A citation to discover assets is not directly related to the suit to set aside a fraudulent transfer; it is part of the original suit against the debtor and usually occurs prior to the filing of the fraudulent transfer suit. However, the citation plays a critical role in fraudulent transfer litigation. Essentially, it gives the creditor an opportunity to take a deposition of anyone with knowledge of the debtor's assets and any asset transfers made by the debtor within the recent past. A properly taken citation will provide the creditor's attorney with a road map of how to proceed with the fraudulent transfer suit. Moreover, the citation does not preclude the creditor from taking subsequent discovery, including depositions of the same deponents. Given the Supreme Court Rules limiting the length of discovery depositions, this ability to re-depose witnesses may prove helpful to the creditor's counsel.

Citations to discover assets are governed by 735 ILCS 5/2-1402 and S.Ct. Rule 277.

2. Regular Discovery

a. [14.45] Interrogatories

Interrogatories under S.Ct. Rule 213 in a fraudulent transfer suit should focus on any assets owned by the debtor within five years of the commencement of the litigation as well as any transfers of significant assets by the debtor during that time. If the debtor has transferred any assets during that time, the interrogatories should ask when the transfer occurred, to whom it was made, and what, if anything, the debtor received in exchange. The interrogatories also should inquire into any debts incurred by the debtor within that time. The creditor may find it useful to determine the identity of the debtor's accountant. The authors find interrogatories to be the most cost-efficient form of discovery; the use of comprehensive, detailed interrogatories often limits the length of subsequent discovery depositions. See §14.66 below for sample interrogatories.

b. [14.46] Request To Produce

A request to produce under S.Ct. Rule 214 should focus on the assets, debts, and income of the debtor during the five-year period preceding the litigation. To determine the debtor's income, the creditor's attorney should request the debtor's federal and state income tax returns for that period. To determine the debtor's assets, the attorney also should request copies of any and all bank statements, position statements from investment firms, deeds, stock certificates, bonds, certificates of deposit, treasury notes, certificates of automobile title, and the like. Any financial statements and loan applications, which generally contain information on the debtor's assets as well as its debts, also should be requested. See §14.67 below for a sample request to produce.

c. [14.47] Request To Admit

A request to admit under S.Ct. Rule 216 is extremely useful in most civil suits and particularly in fraudulent transfer litigation. Once the opposing party admits a fact or document, by either outright admission or failure to deny, the truth of that fact or the genuineness of that document is no longer at issue. Effective use of a request to admit often provides the opportunity to move for summary judgment and to streamline the trial by eliminating foundational requirements for documentary evidence. Moreover, the use of a request to admit early in the litigation may streamline the discovery process.

Making a request to admit presupposes that the requesting party has some information about the opponent. It is advisable to issue two requests to admit. One request should ask for the admission of facts to establish liability, which are used in support of a motion for summary judgment. If summary judgment is unavailable, a second request should be sent that asks the opponent to admit the genuineness of documents as well as foundation questions regarding those documents. See §14.68 below for a sample request to admit.

d. [14.48] Deposition

If the creditor's attorney takes a thorough citation to discover assets, a deposition is often unnecessary. However, the deposition (see S.Ct. Rules 202 – 207) can be very useful for follow-up questions. See §14.65 below for a sample notice of deposition.

e. [14.49] Subpoenas

Subpoenas and subpoenas duces tecum under S.Ct. Rule 204 can be very effective at keeping the debtor honest. If the creditor's attorney knows that a third party has information about the debtor's assets and suspects the debtor has not fully disclosed those assets, a subpoena is proper. S.Ct. Rule 204(a)(4) recognizes the practice of sending document-only deposition notices. See §14.69 below regarding form subpoenas.

E. Motion Practice

1. [14.50] Motions Directed at the Pleadings

Motions pursuant to 735 ILCS 5/2-615 and 5/2-619 are subject to the usual requirements of the Code of Civil Procedure.

2. Summary Judgment

a. [14.51] By the Plaintiff-Creditor

Summary judgment offers a devastating weapon for the creditor prosecuting a claim based on fraud in law. The creditor need furnish the court only with sufficient evidence to support a prima facie case. At that point, as discussed in §14.7 above, the burden then shifts to the defendant to disprove the fraudulent transfer claim. And, as noted in §14.11, the debtor cannot raise its lack of fraudulent intent as a defense. *People ex rel. Hartigan v. Gaby's Apparel, Ltd.,* 133 Ill.App.3d 343, 478 N.E.2d 1043, 88 Ill.Dec. 435 (1st Dist. 1985); *Stoller v. Exchange National Bank of Chicago,* 199 Ill.App.3d 674, 557 N.E.2d 438, 145 Ill.Dec. 668 (1st Dist. 1990). For an example of the successful use of summary judgment in a fraud in law case, *see In re Estates of Markert,* 385 Ill.App.3d 232, 898 N.E.2d 715, 325 Ill.Dec. 668 (4th Dist. 2008).

Summary judgment generally is not available to a creditor in a claim based on fraud in fact when the debtor claims a lack of fraudulent intent. A number of Illinois appellate court decisions have ruled that questions of intent are particularly inappropriate for summary judgment. *See, e.g., Schwartz v. Great Central Insurance Co.,* 188 Ill.App.3d 264, 544 N.E.2d 131, 135, 135 Ill.Dec. 774 (5th Dist. 1989). For the same reasons, summary judgment generally is not available to a creditor in a claim based on the "sole intent" standard under the tenancy by the entirety statute.

b. [14.52] By the Defendant

The defense counsel in a fraudulent transfer suit should think twice before bringing a summary judgment motion. Knowledge is power, and the defendant generally wants to avoid educating the creditor, if possible. Therefore, it is not advisable for the defendant to move for summary judgment unless the defense counsel perceives a strong likelihood of success or a benefit from the motion as a discovery tool.

c. [14.53] As a Discovery Device

A motion for summary judgment often serves as a valuable discovery method, especially when dealing with an obstreperous opponent. While (unfortunately) many litigants and attorneys feel free to disregard the discovery process, a potentially dispositive motion for summary judgment often gets an opponent's attention like nothing else. Important documents often miraculously appear in a response, and the movant can avoid unpleasant surprises at trial.

F. [14.54] Remedies

Section 8 of the Uniform Fraudulent Transfer Act, 740 ILCS 160/8, sets forth various remedies in a fraudulent transfer action.

Section 8(a)(1) empowers the court to award traditional creditors' remedies provisionally in an appropriate circumstance. These include, inter alia, prejudgment orders of attachment pursuant to 735 ILCS 5/4-101, *et seq.* Section 8(a)(1) also sets forth the basic remedy available in

fraudulent transfer litigation — the court may set aside the transfer as a sham transaction and permit the creditor to use the transferred assets to satisfy its claim against the debtor.

Likewise, §8(a)(3) specifically invests the court with the power to fashion an appropriate temporary or permanent equitable remedy. When used properly, §8(a)(3) confers powerful avenues of relief for creditors and their counsel. However, the creditor's attorney should take the opportunity to review the applicable statutes and caselaw before requesting extraordinary relief. For example, prejudgment attachment requires an elaborate procedure to ensure against abuse of the debtor's due-process rights; the party seeking attachment must file an affidavit and post a bond with the court. *See, e.g.*, 735 ILCS 5/4-104, 5/4-107. Likewise, numerous appellate decisions limit the court's ability to grant equitable relief, such as temporary injunctions, except in the most compelling circumstances.

Under §8(b), the court may levy execution on the transferred asset or its proceeds if the creditor has obtained a judgment against the debtor.

V. [14.55] OTHER ILLINOIS STATUTES PERTAINING TO FRAUDULENT TRANSFERS

A number of Illinois statutes other than the Uniform Fraudulent Transfer Act address different types of "fraudulent transfers." Some of these are discussed in §§14.56 – 14.57 below.

A. [14.56] Illinois Marriage and Dissolution of Marriage Act

Section 505(b) of the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/101, *et seq.*, provides a remedy against noncustodial parents who owe child support payments and who seek to conceal their property by putting it in the name of another. The statute states, in pertinent part:

> **If there is a unity of interest and ownership sufficient to render no financial separation between a non-custodial parent and another person or persons or business entity, the court may pierce the ownership veil of the person, persons, or business entity to discover assets of the non-custodial parent held in the name of that person, those persons, or that business entity. The following circumstances are sufficient to authorize a court to order discovery of the assets of a person, persons, or business entity and to compel the application of any discovered assets toward payment on the judgment for support:**
>
> **(1) the non-custodial parent and the person, persons, or business entity maintain records together.**
>
> **(2) the non-custodial parent and the person, persons, or business entity fail to maintain an arms length relationship between themselves with regard to any assets.**
>
> **(3) the non-custodial parent transfers assets to the person, persons, or business entity with the intent to perpetrate a fraud on the custodial parent.**

> **With respect to assets which are real property, no order entered under this paragraph shall affect the rights of bona fide purchasers, mortgagees, judgment creditors, or other lien holders who acquire their interests in the property prior to the time a notice of lis pendens pursuant to the Code of Civil Procedure or a copy of the order is placed of record in the office of the recorder of deeds for the county in which the real property is located.**

The authors have not found any appellate cases construing §505(b).

B. [14.57] Transfers in Fraud of Marital Inheritance Rights

A completely unrelated variety of litigation involves transfers in fraud of marital inheritance rights. Although this type of claim is sometimes called a "fraudulent transfer," it is actually quite different.

Transfers in fraud of marital inheritance rights generally involve actions by one spouse to defeat or frustrate the inheritance rights of the other. The essence of the claim is that the transferring spouse "intended to defraud" the other spouse.

For example, consider a situation in which a married couple owns a valuable piece of real estate as tenants in common. Ordinarily, the wife would expect to inherit a portion of the value of that property, either by will or by intestacy. Moreover, even if the husband expressly disinherits the wife by drafting a new will, the wife could renounce the will pursuant to §2-8 of the Probate Act of 1975, 755 ILCS 5/1-1, *et seq.*, and claim either one third or one half of its value (depending on whether the husband has any descendants).

However, suppose that, unbeknownst to the wife, the husband transfers the realty into a land trust naming himself as the beneficiary and holder of the sole power of direction, but naming someone other than the wife as the remainder beneficiary. The husband then dies. Once the wife learns of the transfer, she sues the remainder beneficiary, claiming that her status as wife gave her an expectation of inheriting at least a portion of the husband's interest in the real estate. Moreover, the wife says the husband intended to defraud her and that his transfer to the land trust was not a real "transfer" because the husband never gave up the effective ownership of the property.

In *In re Estate of Mocny*, 257 Ill.App.3d 291, 630 N.E.2d 87, 196 Ill.Dec. 390 (1st Dist. 1993), the First District identified the statute that defines the surviving spouse's "marital right" to inherit as 755 ILCS 5/2-8, which enables the surviving spouse to renounce her deceased spouse's will. However, the *Mocny* court further held that

> **prior to the testator's death, the spouse possesses absolutely no claim with respect to this statute against any of the testator's individually held assets. Prior to the death of the testator, the spouse's interest exists only as an expectancy.** 630 N.E.2d at 91.

In *Payne v. River Forest State Bank & Trust Co.*, 81 Ill.App.3d 1128, 401 N.E.2d 1229, 1231, 37 Ill.Dec. 136 (1st Dist. 1980), the First District affirmed a spouse's right to dispose of her property to the detriment of her surviving spouse's inheritance rights, holding:

> **[**I**]n general, under Illinois law, an owner of property has an absolute right to dispose of his property during his lifetime in any manner he sees fit. *He may do so even though the transfer is for the precise purpose of minimizing or defeating the statutory marital interest of his spouse in the property transferred or conveyed.* [**]**Emphasis added.**]** 401 N.E.2d at 1231.

Such transfers generally are permitted, even though they might destroy a joint tenancy with the other spouse. *See, e.g., Olney Trust Bank v. Pitts,* 200 Ill.App.3d 917, 558 N.E.2d 398, 400 – 401, 146 Ill.Dec. 435 (5th Dist. 1990). *Accord Minonk State Bank v. Grassman,* 95 Ill.2d 392, 447 N.E.2d 822, 69 Ill.Dec. 387 (1983); *Johnson v. Johnson,* 11 Ill.App.3d 681, 297 N.E.2d 285 (1st Dist. 1973).

The term "fraud," as applied to inter vivos transfers that defeat the rights of an heir, has a different meaning than it does at common law. The *Mocny* court explained the issue as follows:

> **Fraud in this context, however, bears little resemblance to the traditional common law fraud, which requires a material misstatement, inducement and reliance. . . . Unfortunately, this misleading nomenclature, which was a product of common law, found its way into the statutory language when the Illinois General Assembly enacted the statute which to a large extent codified existing case law. Furthermore, as seen below, the cause of action focuses not on fraud, but on present donative intent. Properly stated, the cause of action before us is not one for fraud, but one for illegally defeating a marital right.**
>
> **In the present context, intent to defraud as interpreted by the Illinois Supreme Court refers to a transfer that is illusory or colorable. . . . A transfer which is illusory is one which takes back all that it gives. . . . A transfer which is colorable is one which appears absolute on its face but due to some tacit or secret understanding between the transferor and the transferee, is in fact not a transfer because the parties intended that ownership be retained by the transferor. . . . In either case, the question is really whether there was present donative intent, or instead the intent to retain complete ownership.**
>
> **Where present donative intent exists, the transfer is valid and effective to defeat the marital interest. . . . Where present donative intent is absent, the transfer is treated as a disposition by will and is not effective to defeat the marital interest.** [**]**Citations omitted.**]** 630 N.E.2d at 92.

Under Illinois law, the party seeking to challenge an inter vivos transfer must show an "intent to defraud" by the transferring spouse. Turning back to our example, the wife argues that the husband's transfer to the land trust is "colorable" and "illusory" because it takes back all that it gives. However, without additional facts, the wife likely will lose. The mere fact that the husband retains some interest in the transferred property, by itself, does not establish fraudulent intent. For example, §1 of the Lifetime Transfer of Property Act, 755 ILCS 25/0.01, *et seq.,* reads:

> **An otherwise valid transfer of property, in trust or otherwise, by a decedent during his or her lifetime, shall not, in the absence of an intent to defraud, be**

invalid, in whole or in part, on the ground that it is illusory because the decedent retained any power or right with respect to the property.

Accord Payne, supra; Mocny, supra.

In *Johnson v. La Grange State Bank,* 73 Ill.2d 342, 383 N.E.2d 185, 195, 22 Ill.Dec. 709 (1978), the Illinois Supreme Court recognized that the execution of a trust instrument gave the remainder beneficiaries a vested interest, subject to divestment by the settlor. *La Grange State Bank* involved a settlor who created an inter vivos trust, into which she transferred numerous valuable assets, and named herself as the income beneficiary during her lifetime. The settlor reserved the power to invade the principal of the trust "as she in her discretion saw fit." 383 N.E.2d at 188. She also retained the "power to alter, amend or modify the trust provisions in any manner." 383 N.E.2d at 188 – 189. Upon her death, the successor trustee was required to distribute trust assets to certain of the settlor's family members, as well as certain named charities. The Supreme Court found the conveyance of this vested interest sufficient to overcome its characterization as a "sham" transaction. 383 N.E.2d at 197. *Accord In re Estate of Nemecek,* 85 Ill.App.3d 881, 407 N.E.2d 655, 657, 41 Ill.Dec. 157 (1st Dist. 1980).

In *In re Estate of Shea,* 364 Ill.App.3d 963, 848 N.E.2d 185, 192, 302 Ill.Dec. 185 (2d Dist. 2006), the Second District called *La Grange State Bank* into question. However, *La Grange State Bank* is a Supreme Court decision and remains the law in Illinois.

VI. FRAUDULENT TRANSFER LAW AND ITS RELATIONSHIP TO THE ETHICAL AND PROFESSIONAL RESPONSIBILITIES OF LAWYERS

A. [14.58] *Dowling* and Advance Payment Retainers in Illinois

In *Dowling v. Chicago Options Associates, Inc.*, 226 Ill.2d 277, 875 N.E.2d 1012, 314 Ill.Dec. 725 (2007), the Illinois Supreme Court discussed different types of attorney-client retainer agreements, including "advance payment" retainers. The authors include this discussion because the treatment of advance payment retainers may prove important in Uniform Fraudulent Transfer Act cases; indeed, the type of retainer may, in some circumstances, determine whether a debtor's attorney may — or may not — keep a retainer paid by the debtor.

Dowling involved a suit for breach of contract; the plaintiff took two judgments against the debtor totaling over $817,000. The debtor subsequently set out to shield his assets by (1) hiring DLA Piper Rudnick Gray Cary (US), LLP (Piper) to represent him in connection with the purchase of a Florida home and (2) depositing a large sum of money into a trust account held by Piper. The debtor completed the purchase of the Florida home, using funds paid from the trust account, and the debtor and his wife subsequently authorized Piper to allocate $100,000 of the funds from the trust account as a retainer, based on an "engagement letter." Piper transferred that money to its general account and applied it to monthly bills attributable to work performed for the debtor and his wife in connection with the purchase of their Florida home and, subsequently, in connection with the plaintiff's litigation to collect the debt.

The plaintiff subsequently caused a citation to discover assets to be issued to "Piper Rudnick LLP Trust" based on the transfer of money from the debtor's Chicago bank account to Piper for the purchase of his Florida home. The plaintiff filed a motion to require Piper to turn over all

money belonging to the debtor and held in Piper's trust account or, in the alternative, to enjoin Piper from distributing from its trust account any monies received from the debtor. At a subsequent hearing, one of Piper's partners represented to the trial court that Piper was not holding any funds for the debtor in its trust account. Based on this information, the trial court denied the plaintiff's motion. Both citations were dismissed June 8, 2004, and leave was granted to file a second citation. The debtor's wife subsequently drew a $50,000 check on a Florida account belonging to her and the debtor and gave it to Piper, which applied that money to its monthly bills relating to the plaintiff's collection efforts.

Plaintiff's counsel subsequently learned that Piper had, in fact, received funds from the debtor. A second citation to discover assets was issued and served on Piper, which produced records showing the payments from the debtor and his wife and Piper's application of those payments. The plaintiff then filed a motion to turn over assets, requesting that Piper be ordered to pay him $137,576.53 of the funds paid to Piper by the debtor and his wife. The trial court granted that motion and ordered Piper to pay $137,576.53 to the plaintiff. Piper appealed, seeking vacatur of the turnover order, and the First District affirmed the trial court.

The Supreme Court reversed. In so ruling, the Supreme Court distinguished among the following types of attorney retainer agreements:

1. The "true," "general," or "classic" retainer is paid by a client to the lawyer to secure the lawyer's availability during a specified period of time or for a specified matter. The attorney earns this type of retainer when paid; it immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client.

2. The "security" retainer represents funds paid into a trust held by the lawyer for future services. The security retainer remains the property of the client until the lawyer applies it to charges for services actually rendered. Any unearned funds must be refunded to the client. The security retainer secures payment of fees for future services that the lawyer is expected to perform. Pursuant to Rule of Professional Conduct 1.15(a), a security retainer must be deposited in a trust account and kept separate from the lawyer's own property (*i.e.*, in a clients' fund account).

3. The "advance payment" retainer consists of a present payment to the lawyer in exchange for the lawyer's commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment. Accordingly, the lawyer deposits the advance payment retainer into his or her general account; in fact, an advance payment retainer may not be deposited into a trust account.

Dowling is important to attorneys in the context of UFTA cases because the proper use of a "security" retainer may defeat claims by a creditor's attorney for the turnover of funds held by the debtor's attorney. Advance retainers, however, may be used only in appropriate circumstances:

> **The type of retainer that is appropriate will depend on the circumstances of each case. The guiding principle, however, should be the protection of the client's interests. In the vast majority of cases, this will dictate that funds paid to retain a lawyer will be considered a security retainer and placed in a client trust account. . . . Thus, advance payment retainers should be used only sparingly, when necessary to**

> **accomplish some purpose for the client that cannot be accomplished by using a security retainer.**
>
> **An appropriate use of advance payment retainers is illustrated by the circumstances of the instant case, where the client wishes to hire counsel to represent him or her against judgment creditors. Paying the lawyer a security retainer means the funds remain the property of the client and may therefore be subject to the claims of the client's creditors. This could make it difficult for the client to hire legal counsel. Similarly, a criminal defendant whose property may be subject to forfeiture may wish to use an advance payment retainer to ensure that he or she has sufficient funds to secure legal representation.** 875 N.E.2d at 1021 – 1022.

Dowling certainly authorizes judgment debtors to make advance payment retainers to their attorneys to fight creditors' collection efforts. However, *Dowling* also cautions that advance payment retainers

> **are subject to a lawyer's duty to refund any unearned fees, pursuant to [**RPC**] 1.16(e). A client has an unqualified right to discharge a lawyer and, if discharged, the lawyer may retain only a sum that is reasonable in light of the services the lawyer performed prior to being discharged.** 875 N.E.2d at 1022.

As the authors read this quote, an attorney who receives an excessive advance payment retainer and who subsequently is discharged may have to disgorge the excess advance payment retainer.

Dowling also imposes certain requirements about the language of retainer agreements:

> **Any written retainer agreement, regardless of the type of retainer contemplated, should clearly define the kind of retainer being paid. If the parties agree that the client will pay a security retainer, that term should be used in the agreement; it should also state that the funds remain the property of the client until used to pay for services rendered and that the funds will be deposited in a client trust account. If the parties determine that an advance payment retainer best meets the client's needs, the written agreement must use that term and clearly state that the funds become the property of the lawyer when paid and that they will not be held in a client trust account.**
>
> **Advance payment retainer agreements must be in writing and they must clearly disclose to the client the nature of the retainer, where it will be deposited, and how the lawyer or law firm will handle withdrawals from the retainer in payment for services rendered. . . .**
>
> **A written agreement providing for an advance payment retainer must contain language advising the client of the option to place his or her money into a security retainer. The agreement must clearly advise the client that the choice of the type of retainer to be used is the client's alone; provided, however, that if the attorney is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state, including the attorney's reasons therefor. In addition, an advance payment retainer agreement must set forth the special purpose behind the**

> **retainer and explain why an advance payment retainer is advantageous to the client.** 875 N.E.2d at 1022.

If the parties' intent about the type of retainer cannot be determined from the language of their retainer agreement, a court will construe it as providing for a security retainer.

"Split" retainers (*i.e.*, advance-security retainer hybrids) are impermissible under *Dowling*. *In re Central Illinois Energy, L.L.C.*, No. 07-82817, 2008 Bankr. LEXIS 3449 at *10 (Bankr. C.D.Ill. Dec. 18, 2008); *In re SVI Media, Inc.*, No. 07-82762, 2008 Bankr. LEXIS 3587 at *9 n.2 (Bankr. C.D.Ill. Oct. 31, 2008).

Finally, the authors advise caution about the use of "advance" payment retainers in any event, because of the temptation for a debtor's attorney to become "drawn in" as a defendant in a claim under the UFTA. The *Dowling* court acknowledged its awareness "of the potential for abuse of advance payment retainers, particularly in circumstances such as the instant case where a judgment debtor seeks to resist efforts of a judgment creditor to collect on a judgment." 875 N.E.2d at 1023.

B. [14.59] Secondary Liability Issues Affecting Attorneys

Illinois recognizes "secondary" liability torts, such as aiding and abetting, civil conspiracy, and "in-concert liability," which may allow Uniform Fraudulent Transfer Act plaintiffs to "cast a wider net" — and thereby catch additional participants. That wider net may include attorneys, accountants, investment bankers, and other financial professionals in fraudulent transfer litigation. In *Thornwood, Inc. v. Jenner & Block*, 344 Ill.App.3d 15, 799 N.E.2d 756, 278 Ill.Dec. 891 (1st Dist. 2003), the First District refused to dismiss a claim against a law firm for aiding and abetting a client's fraudulent scheme and breach of fiduciary duty. Although *Thornwood* does not involve a UFTA claim, it provides a cogent analysis of the law governing aiding and abetting, civil conspiracy, and "in-concert liability."

For a glimpse into the likely future of this developing body of law, the authors encourage attorneys involved in UFTA actions to review *In re Restaurant Development Group, Inc.*, 397 B.R. 891, 894 (Bankr. N.D.Ill. 2008), in which the bankruptcy court denied a motion to dismiss a claim against former attorneys of a restaurant company who allegedly engaged in a scheme to defraud the restaurant company's creditors.

The UFTA does not specifically govern "aider and abettor" liability, civil conspiracy, or in-concert liability. Rather, the UFTA supplements applicable state law. Nothing in the statute displaces or supersedes claims of aiding and abetting, civil conspiracy, or in-concert liability. Instead, §11 reads:

> **Unless displaced by the provisions of this Act, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.** 740 ILCS 160/11.

The authors believe the plain language of this section shows that the UFTA is a cumulative remedy, which adds to existing principles of law; unless specifically stated, the UFTA does not preempt or limit other causes of action. See §§14.60 – 14.62 below.

1. [14.60] Aider and Abettor Liability

Under Illinois law, aiding and abetting consists of the following elements: (a) the party whom the defendant aids must perform a wrongful act that causes an injury; (b) the defendant must be generally aware of his or her role as part of the overall or tortious activity at the time he or she provides the assistance; and (c) the defendant must knowingly and substantially assist the principal violation. *Wolf v. Liberis,* 153 Ill.App.3d 488, 505 N.E.2d 1202, 1208, 106 Ill.Dec. 411 (1st Dist. 1987); *Hefferman v. Bass,* 467 F.3d 596, 601 (7th Cir. 2006).

In *Colman v. Greenfield,* No. 05 C 3894, 2005 U.S.Dist. LEXIS 23498 (N.D.Ill. Oct. 11, 2005), the plaintiff filed a multi-count complaint, which included, inter alia, a claim for aiding and abetting actual fraudulent transfers. After a lengthy discussion of aiding and abetting claims under Illinois law, the district court denied the defendants' Fed.R.Civ.P. 12(b)(6) motion to dismiss the aiding and abetting claim. In reaching that decision, the court necessarily recognized the existence of a separate cause of action for aiding and abetting a fraudulent transfer.

In another case confirming the existence of this separate cause of action, the court in *Firstar Bank, N.A. v. Faul,* No. 00 C 4061, 2001 U.S.Dist. LEXIS 21294 at **20 – 21 (N.D.Ill. Dec. 19, 2001), analyzed the issue as follows:

> **Defendants contend that since Count IV charges that only the assets of Faul Chevrolet were transferred and not those of Faul himself, Firstar has failed to state a claim for fraudulent conveyance against Faul personally. Mot. to Dismiss ¶8. This is a clever argument, one that Firstar has completely failed to address in its response. Nonetheless, the argument is flawed. Firstar alleges that Faul owned a substantial if not majority stake in Faul Chevrolet. When Faul Chevrolet was liquidated, Faul presumably received money for his share of Faul Chevrolet's assets. Therefore, *to the extent that Faul participated in the decision to liquidate Faul Chevrolet, and to the extent that this participation was motivated by an intention to hinder collection of debts against Faul Chevrolet and thereby preserve the current value of his share in the company, Faul may be held liable for the fraudulent conveyance.* [**Emphasis added.**]**

These cases echo cases from 100 years ago that announced the viability of separate causes of action against participants in fraudulent transactions. In *Bell v. Felt,* 102 Ill.App. 218 (1st Dist. 1902), the court held that third parties who knowingly derive a benefit from a fraudulent transaction becomes particeps criminis in the transaction, however innocent of the fraud in its inception they may have been. These cases are all consistent with many other Illinois cases allowing claims against participants. *See In re Estate of Savage,* 259 Ill.App.3d 328, 631 N.E.2d 797, 800, 197 Ill.Dec. 575 (4th Dist. 1994) (holding that husband who knowingly received benefits from funds his wife wrongfully transferred into their joint accounts aided and abetted her in her activities and was thus legally responsible); *Illinois Minerals Co. v. McCarty,* 318 Ill.App. 423, 48 N.E.2d 424, 429 (4th Dist. 1943) ("One who adopts and ratifies another's fraudulent act, becomes liable therefor even though he was not a coconspirator. . . . Acts committed by another

or for his own advantage approved by another after it has been committed, renders such other liable as if he himself had performed the fraudulent act." [Citations omitted.]); *Moore v. Pinkert*, 28 Ill.App.2d 320, 171 N.E.2d 73, 78 (1st Dist. 1960) ("if one accepts the fruits of fraud knowing of the means by which they were obtained he is liable even though he did not personally participate in the fraud"); *Callner v. Greenberg*, 376 Ill. 212, 33 N.E.2d 437, 440 (1941) ("At law, it has been held that a knowing beneficiary of a fraud may be held liable with the perpetrator."); *Creighton v. Elgin*, 395 Ill. 87, 69 N.E.2d 501, 508 – 509 (1946) (law will not permit person in privity with person who deliberately put property out of his or her control for fraudulent purpose to have aid of court of equity to further hindering, delaying, or defrauding of creditors).

Other states have recognized actionable claims for aiding and abetting fraudulent conveyances, to which Illinois' courts may look for guidance. 740 ILCS 160/12. For example, in *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406 (3d Cir. 2003), the plaintiffs filed a multi-count complaint, Count II of which accused the debtor's attorneys (the debtor was John Z. DeLorean, whose company briefly manufactured the stainless steel sports cars used in the *Back to the Future* movies) of knowingly aiding and abetting the debtor's acts of fraud and concealment of assets to hinder efforts to collect a judgment. The Third Circuit reversed a lower court dismissal, holding that the claim for aiding and abetting the fraudulent conveyances was valid. In *Joel v. Weber*, 197 A.D.2d 396, 602 N.Y.S.2d 383 (1993), the New York Supreme Court, Appellate Division, also upheld a claim for aiding and abetting a fraudulent transfer under New York's Debtor and Creditor Law.

2. [14.61] Civil Conspiracy

The following quote from *In re Restaurant Development Group, Inc.*, 397 B.R. 891, 896 – 897 (Bankr. N.D.Ill. 2008), is worth a look:

> **First, Illinois allows for a cause of action for conspiracy to commit fraud. *Martinez v. Freedom Mortgage Team, Inc.*, 527 F.Supp.2d 827, 839 (N.D.Ill. 2007). The elements of a civil conspiracy include: i) an agreement between of two or more persons, ii) for the purpose of accomplishing, by some concerted action, either an unlawful purpose or a lawful purpose by unlawful means, and iii) in furtherance of which one of the conspirators committed an overt tortious or unlawful act. *Id.* (citing *Fritz v. Johnston*, 209 Ill.2d 302, 807 N.E.2d 461, 470, 282 Ill.Dec. 837 (Ill. 2004)).**
>
> **Moreover, Illinois courts recognize that claims for conspiracy may be maintained against attorneys where there is evidence that the attorneys participated in a conspiracy with their clients. *Thornwood, Inc. v. Jenner & Block*, 344 Ill.App.3d 15, 799 N.E.2d 756, 768, 278 Ill.Dec. 891 (Ill.App.Ct. 2003).**
>
> **Finally, Illinois courts permit civil conspiracy claims against non-transferee defendants when the transfers were made as part of a scheme to defraud, hinder or delay creditors. *Fortney v. Kuipers*, No. 98 C 5387, 2001 WL 1539143 (N.D.Ill. Dec. 3, 2001) (conspiracy claims against non-transferee attorneys who engineered fraudulent transfers sustained); *Firstar Bank, N.A. v. Faul*, No. 00 C 4061, 2001 U.S.Dist. LEXIS 21294, 2001 WL 1636430, *6-7 (N.D.Ill. Dec. 20, 2001) ("Illinois law**

permits a cause of action for fraud against any party who participates in a fraud . . . and we see no reason not to extend the rule to fraudulent conveyances" (citation omitted)).

3. [14.62] In-Concert Liability

Section 876 of the RESTATEMENT (SECOND) OF TORTS (1979) recognizes a cause of action for in-concert liability. RESTATEMENT §876 defines the tort as follows:

> **For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he**
>
> **(a) does a tortious act in concert with the other or pursuant to a common design with him, or**
>
> **(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or**
>
> **(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.**

As §876 reflects, the in-concert liability concept actually covers three separate forms of action.

Illinois law follows §876 and recognizes the three separate forms of in-concert liability. *See Fortae v. Holland,* 334 Ill.App.3d 705, 778 N.E.2d 159, 168 – 169, 268 Ill.Dec. 173 (5th Dist. 2002). In *Fortae,* the Fifth District held that a plaintiff who establishes in-concert liability under §876(b) need not also establish the elements of §876(a) or §876(c).

A similarity unquestionably exists between in-concert liability, civil conspiracy, and aiding and abetting. *Thornwood, Inc. v. Jenner & Block,* 344 Ill.App.3d 15, 799 N.E.2d 756, 768, 278 Ill.Dec. 891 (1st Dist. 2003). However, Illinois recognizes in-concert liability as a separate cause of action. *Fortae,* 778 N.E.2d at 169. Therefore, an in-concert liability claim may exist against a defendant who did not intend to commit an intentional tort. *Id.*

VII. APPENDIX — SAMPLE FORMS

A. Pleadings

1. [14.63] Complaint

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY,
COUNTY DEPARTMENT, CHANCERY DIVISION

CRUEL CREDITOR, INC., an Illinois corporation,	**)**	
Plaintiff,	**)**	
	)	
v.	**)**	**No. _____**
	)	
DEVIOUS DEBTOR and DASTARDLY DEBTOR,	**)**	**Judge Roy Bean presiding**
Defendants.	**)**	

COMPLAINT TO SET ASIDE FRAUDULENT TRANSFERS

NOW COMES Plaintiff, CRUEL CREDITOR, INC., an Illinois corporation, by its attorneys, _____, and states as follows as its Complaint To Set Aside Fraudulent Transfers:

1. In 2004 Defendant DEVIOUS DEBTOR (DEVIOUS) owned the following valuable assets:

a. A limited partnership interest in ABC, Ltd., an Illinois limited partnership; and

b. A 25-percent undivided beneficial interest in Goliath Bank Land Trust No. 512.

2. Plaintiff filed this suit in 2004, based on DEVIOUS' breach of a written indemnity agreement wherein DEVIOUS was the indemnitor and Plaintiff was the indemnitee.

3. DEVIOUS timely appeared through counsel.

4. Plaintiff moved for Judgment on the Pleadings April 27, 2006.

5. The parties submitted briefs in support of, and in opposition to, Plaintiff's Motion for Judgment on the Pleadings.

6. On June 5, 2006, this Court allowed Plaintiff's motion and entered a Judgment on the Pleadings in favor of Plaintiff and against DEVIOUS on the issue of liability alone. A true and correct copy of the Court's Order dated June 5, 2006, is attached hereto and incorporated herein as Plaintiff's Exhibit 1.

7. DEVIOUS, through his counsel, immediately moved to reconsider the entry of Judgment on the Pleadings.

8. The parties submitted briefs in support of, and in opposition to, DEVIOUS' motion to reconsider.

9. On September 18, 2006, the Court denied the motion to reconsider and let stand the Judgment on the Pleadings. A true and correct copy of the Court's Order is attached hereto and incorporated herein as Plaintiff's Exhibit 2.

10. On October 20, 2006, DEVIOUS created the DEVIOUS DEBTOR Irrevocable Life Insurance Trust No. 2 (TRUST) naming his son DASTARDLY DEBTOR (DASTARDLY) as trustee. A true and correct copy of the declaration of trust is attached hereto and incorporated herein as Plaintiff's Exhibit 3.

11. On January 4, 2007, DEVIOUS transferred his interest in ABC, Ltd., to the TRUST, which paid no consideration therefor. A true and correct copy of that assignment is attached hereto and incorporated herein as Plaintiff's Exhibit 4.

12. On March 28, 2008, Plaintiff filed a Motion for Summary Judgment on the issue of damages.

13. On April 13, 2008, DEVIOUS transferred his interest in the Goliath Bank Land Trust No. 512 to the TRUST, which paid no consideration therefor. A true and correct copy of that assignment is attached hereto and incorporated herein as Plaintiff's Exhibit 5.

14. On June 8, 2008, the Court allowed Plaintiff's Motion for Summary Judgment. A true and correct copy of that Summary Judgment Order is attached hereto and incorporated herein as Plaintiff's Exhibit 6.

15. On July 12, 2008, Plaintiff served DEVIOUS with a Citation To Discover Assets.

16. On September 27, 2008, Plaintiff took the citation of DEVIOUS, at which time he testified that he had no assets with which to satisfy the Judgment in favor of Plaintiff.

17. 740 ILCS 160/5 states, in pertinent part:

> **(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's 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 actual intent to hinder, delay, or defraud any creditor of the debtor.**
>
> *** * ***
>
> **(b) In determining actual intent under paragraph (1) of subsection (a), 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;**
>
> *** * ***
>
> **(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;

*** * ***

(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 incurred;

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

18. 740 ILCS 160/6(a) states:

(a) A transfer made or obligation incurred by a debtor is fraudulent 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.

19. 740 ILCS 160/8 states:

(a) In an action for relief against a transfer or obligation under this Act, a creditor, subject to the limitations in Section 9, may obtain:

(1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by the Code of Civil Procedure;

(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure,

(A) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(B) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(C) any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

20. The transfers of assets by DEVIOUS to the TRUST constitute a pattern of fraudulent conveyances under the statutes because

a. they were made with actual intent to hinder, delay, or defraud his creditors, namely Plaintiff;

b. they were made to "insiders" as defined in 740 ILCS 160/2(g)(1)(A), namely his son as trustee for the benefit of his wife and children;

c. the provisions of the trust agreement permit DEVIOUS to maintain effective possession and/or control of the property transferred;

d. prior to the transfers by DEVIOUS to the TRUST, Plaintiff not only had sued DEVIOUS, but actually had taken a judgment against him on the issue of liability;

e. the transfers to the TRUST were of substantially all DEVIOUS' assets, leaving him unable to pay his debt to Plaintiff;

f. the value of the consideration received by DEVIOUS in exchange for his transfers to the TRUST was not reasonably equivalent to the value of the assets transferred; in fact, these transfers were made without any consideration and were voluntary gifts to his wife and children;

g. DEVIOUS became insolvent shortly after making the final transfer of his interest in the Goliath Bank Land Trust; and

h. the final transfer (of the Goliath Bank Land Trust interest) occurred shortly before the Court entered its final judgment against DEVIOUS.

WHEREFORE, Plaintiff respectfully requests that this honorable Court enter an order in its favor and against DEVIOUS, the TRUST, and DASTARDLY as Trustee of the TRUST:

A. Avoiding the transfers of DEVIOUS' limited partnership interest in ABC, Ltd., and the Goliath Bank Land Trust No. 512, to the extent necessary to satisfy Plaintiff's Judgment;

B. Permitting an attachment or other provisional remedy against the transferred limited partnership interest in ABC, Ltd., and the Goliath Bank Land Trust No. 512 or other property of the TRUST in accordance with the procedure prescribed by the Code of Civil Procedure;

C. Granting temporary injunctive relief against DEVIOUS, the TRUST, and DASTARDLY as Trustee of the TRUST against further disposition of the assets transferred by DEVIOUS to the TRUST, as well as other property of the TRUST;

D. Appointing a receiver to take charge of the TRUST;

E. For immediate execution on the assets transferred by DEVIOUS to the TRUST, or their proceeds; and

F. For such other and further relief as the Court deems necessary.

Respectfully submitted,
CRUEL CREDITOR, INC.

By: _____
one of its attorneys of record

[attorney information**]**

2. [14.64] Answer

[Caption**]**

ANSWER TO COMPLAINT TO SET ASIDE FRAUDULENT TRANSFERS

NOW COME Defendants, DEVIOUS DEBTOR and DASTARDLY DEBTOR, by their attorneys, _____, and state as follows as their Answer to Complaint To Set Aside Fraudulent Transfers:

1 – 10. Defendants admit Allegations 1 – 10 of Plaintiff's Complaint.

11. Defendants admit that DEVIOUS transferred his interest in ABC, Ltd., to the TRUST. Defendants deny the balance of this allegation.

12. Admitted.

13. Defendants admit that DEVIOUS transferred his interest in the Goliath Bank Land Trust No. 512 to the TRUST. Defendants deny the balance of this allegation.

14 – 19. Defendants admit Allegations 14 – 19 of Plaintiff's Complaint.

20. Defendants deny that the transfers of assets by DEVIOUS to the TRUST constitute a pattern of fraudulent conveyances. In response to the individual sub-allegations, Defendants plead as follows:

a. Denied;

b. Admitted;

c. **Defendants object to Plaintiff's characterization of the TRUST agreement and state that the document speaks for itself;**

d. **Admitted;**

e. **Denied;**

f. **Denied;**

g. **Denied;**

h. **Denied.**

WHEREFORE, Defendants respectfully request that this honorable Court enter Judgment in their favor and against Plaintiff and further award Defendants their costs of suit.

Respectfully submitted,

DEVIOUS DEBTOR and DASTARDLY DEBTOR

By: _____
one of their counsel

[attorney information]

B. Discovery

1. [14.65] Notice of Deposition

[Caption]

NOTICE OF DEPOSITION

To: [defendant's attorneys]

YOU ARE HEREBY NOTIFIED that, pursuant to the provisions of §2-1003 of the Code of Civil Procedure and Supreme Court Rule 202, the deposition of DASTARDLY DEBTOR will be taken for the purposes of discovery, before a notary public in and for the County of Cook and State of Illinois, at the hour of 9:30 a.m., on May 12, 2004, at [location]**, upon interrogatories to be propounded to the deponent orally. This is a request on you to produce the named deponent and the items described on the attached Exhibit A.**

[signature and attorney information]

2. [14.66] Interrogatories

Since S.Ct. Rule 213 limits the number of interrogatories that can be served on another party to 30, including sub-parts, except upon agreement of the parties or upon leave of court granted upon a showing of good cause, the reader will need to select only the most relevant of the following interrogatories.

[Caption**]**

INTERROGATORIES TO BE ANSWERED UNDER OATH

To: [defendants' attorneys**]**

Pursuant to Supreme Court Rule 213, Plaintiff hereby propounds the following Interrogatories to Defendant DEVIOUS DEBTOR to be answered under oath within 28 days:

DEFINITIONS

The following definitions, except when specifically stated to the contrary, will apply to these Interrogatories:

1. "Document" or "written record" shall mean, without limitation, any written, recorded, reproduced, or graphic matter, whether printed, recorded, or reproduced by mechanical process or by hand, including, but not limited to, contracts, agreements, invoices, statements, statements of account, purchase orders, return authorizations, requests for return authorization, credit memos, credit authorizations, delivery receipts, canceled checks, money orders, cash receipts, drafts, check ledgers, account ledgers, work records, payroll records, time cards, time sheets, audits, audit reports, accounting records, stock lists, computer printouts, interoffice memoranda, intra-office memoranda, summaries or records of personal conversations or interviews, summaries or records of personal statements, summaries or records of meetings or conferences, summaries or reports of investigations, bills of lading, shipping reports, transit reports, shipping instructions, inspection reports, standard claims for loss and damage, police reports (vandalism, fire, theft, etc.), insurance claim forms, price estimates, repair estimates, damage reports, damage evaluations, service reports, service complaints, fax transmittal forms, correspondence, letters, telegrams, telexes, notebooks, schedules, films, photographs, reports, summaries, any marginal comment or notation appearing on any document or record, and all other written matter.

2. For the purposes of responding to these Interrogatories, the words "you," "your," and/or "yours" shall mean DEVIOUS DEBTOR and any agents, employees, or other persons or entities acting on behalf of DEVIOUS DEBTOR.

3. "Identify" or "identification," when used in reference to an individual person, means to state, as to each individual, his or her full name and present or last known

a. home address;

b. place of employment or business affiliation;

c. business address; and

d. job title or business capacity.

4. "Describe," "identify," or "specify," when used in reference to a "document" or "written record," means to state the following as to each "document" or "written record":

a. the title thereof;

b. the nature and type thereof (in the alternative, you may attach a copy of each such document requested, pursuant to Supreme Court Rule 213(e));

c. the date prepared;

d. the present location thereof; and

e. the name, business address, and position of the person or persons having present custody or control thereof.

INTERROGATORIES

Interrogatory No. 1. **Please identify the person(s) answering these Interrogatories and, if different, the person(s) verifying or certifying the accuracy of these Interrogatories.**

Interrogatory No. 2. **As to each of your businesses, occupations, or employers from January 1, 2004, to present, please state:**

a. The name and address of each business, occupation, or employer;

b. The date each business or occupation was started;

c. The title in each business or occupation that you hold and your ownership and interest in each;

d. The income and expenses derived from each business, occupation, or employer that you receive;

e. The annual income of each business, occupation, or employer;

f. The location where the stocks and/or agreements as to each business, occupation, or employer are kept and the name and address of the holder of such records or documents;

g. The pension received or earned, including the nature of the pension and the dates and amounts of all distributions made to you since January 1, 2004; and

h. Any other deferred compensation or wage supplements.

Interrogatory No. 3. **Do you now own or have, or have you, since January 1, 2004, owned or had, the authority to sign on any bank accounts, solely or jointly, whether savings, checking, certificate of deposit, IRA, or otherwise, and whether business or personal?**

Interrogatory No. 4. **If your answer to the previous Interrogatory is affirmative, as to each such account please state:**

a. The name and address of each bank or savings and loan association;

b. The name of the depositor;

c. The number of the account, certificate of deposit, or IRA;

d. The names and addresses of anyone else who has the power to sign on any named account, certificate of deposit, or IRA;

e. The account balance as of January 1 of each year from January 2004 to the present; and

f. The present balance for each account, certificate of deposit, or IRA.

Interrogatory No. 5. **Have you had a key to, control of, or authority to enter any safe-deposit box or other similar secured storage facility containing any property from January 1, 2004, to the present?**

Interrogatory No. 6. **If your answer to the previous Interrogatory is affirmative, for each such safe-deposit box or similar secured storage facility please state:**

a. The name of the individual or company maintaining it;

b. The street address of the safe-deposit box or similar secured storage facility;

c. The identifying number of the safe-deposit box or similar secured storage facility; and

d. The identity of all other persons, if any, using it.

Interrogatory No. 7. **Other than employment, list the sources and amounts of all income you have received from any source, from January 1, 2004, to the present, on a month-to-month basis.**

Interrogatory No. 8. **Did you own any interest in real estate, either individually, jointly, through a corporation or other business entity, or by virtue of ownership of a beneficial interest in a trust, on January 1, 2004?**

Interrogatory No. 9. **If your answer to the previous Interrogatory is affirmative, please state:**

a. The common address of each such property;

b. The legal description of each such property;

c. The date of purchase and purchase price;

d. How title to each property was held;

e. Your interest in each parcel of real property; and

f. The identity of the persons or entities holding title thereto.

Interrogatory No. 10. **Have you owned any interest in real estate, either individually, jointly, through a corporation or other business entity, or by virtue of ownership of a beneficial interest in a trust, from January 1, 2004, to the present?**

Interrogatory No. 11. **If your answer to the previous Interrogatory is affirmative, please state:**

a. The common address of each such property;

b. The legal description of each such parcel;

c. The date of purchase and purchase price;

d. The sources of funds used to acquire each such parcel;

e. How title to each property was held;

f. Your interest in each parcel of real property; and

g. The identity of the persons or entities holding title thereto.

Interrogatory No. 12. **Did you own any shares of corporate stock, either individually or held in the name of another person or entity, on January 1, 2004?**

Interrogatory No. 13. **If your answer to the previous Interrogatory is affirmative, please state:**

a. The name of each such stock;

b. The date of purchase;

c. The quantity of shares purchased of each such stock;

d. The price per share at time of purchase;

e. The value of each such stock as of the date these Interrogatories were filed; and

f. The identities of the persons and/or entities holding these stocks.

Interrogatory No. 14. **Have you acquired any shares of stock in any corporation from January 1, 2004, to the present?**

Interrogatory No. 15. **If your answer to the previous Interrogatory is affirmative, please state:**

a. The name of each stock in which shares or options are or have been held;

b. The date of acquisition;

c. How the stock was acquired (*e.g.*, by purchase, gift, inheritance, etc.);

d. The amount of stock acquired;

e. The price per share at the time of purchase;

f. The value of the stock as of the date these Interrogatories were filed; and

g. The identities of the persons and/or entities holding these stocks.

Interrogatory No. 16. **Did you own any corporate, governmental, municipal, or individual bonds on January 1, 2004?**

Interrogatory No. 17. **If your answer to the previous Interrogatory is affirmative, please state:**

a. The date of purchase;

b. The amount paid for each bond;

c. The value of each bond as of the date these Interrogatories were filed; and

d. The name and address of the person holding these bonds.

Interrogatory No. 18. **Have you acquired any corporate, governmental, municipal, or individual bonds from January 1, 2004, to the present?**

Interrogatory No. 19. **If your answer to the previous Interrogatory is affirmative, please state:**

a. The date of purchase;

b. The amount paid for each bond;

c. The value of each bond as of the date these Interrogatories were filed;

d. The name and address of the person holding these bonds; and

e. How the bonds were acquired (*e.g.*, by purchase, gift, inheritance, etc.).

Interrogatory No. 20. **If you have sold, traded, or otherwise disposed of any securities or other property for value, including but not limited to stocks, bonds, debentures, mortgages, certificates of deposit, business interests, or other types of assets from January 1, 2004, to the present, please state:**

a. The type and number of securities or properties sold;

b. The date of each such sale;

c. The sales price or other consideration received for the transfer of each such asset;

d. The identity of any brokers through whom any such sale or transfer was made;

e. The net gain or loss resulting from the sale; and

f. If the sale involved stocks, whether the sale was long or short.

Interrogatory No. 21. **If you have given or otherwise disposed of any securities or other property for no value, including but not limited to stocks, bonds, debentures, mortgages, certificates of deposit, business interest, or other types of assets from January 1, 2004, to the present, please state:**

a. The type and number of securities or properties transferred;

b. The date of each such transfer;

c. The identity of the recipient of each such transfer; and

d. Whether you filed a gift tax return (IRS Form 709) for any year in which you made such a transfer.

Interrogatory No. 22. **If you now own, or have since January 1, 2004, owned, any policy of life insurance, or if there is or has been any life insurance on your life owned by others, state for each policy:**

a. The name and address of the insurance carrier;

b. The policy number;

c. The date the policy was issued;

d. The identity of the insured;

e. The identity of the beneficiary;

f. The amount of the policy; and

g. The surrender value.

Interrogatory No. 23. **As to any and all credit cards or charge accounts that you have possessed either for personal or for business use since January 1, 2004, for each state:**

a. The name of the company issuing it;

b. The address of the company issuing it;

c. The account number;

d. The names and addresses of all other persons, if any, using it;

e. The present balance owed, if any; and

f. Whether the card or account was a personal or business card or account.

Interrogatory No. 24. **If you are indebted in an amount in excess of $500 other than the obligations listed in the previous Interrogatory, state:**

a. The identity of all persons and/or entities to whom you are indebted;

b. The date each such debt was incurred;

c. The original amount of each such debt;

d. The current balance on each such debt;

e. The reason each such debt was incurred; and

f. The identity of any documents evidencing each such debt.

Interrogatory No. 25. **Have you loaned anyone in excess of $500 since January 1, 2004?**

Interrogatory No. 26. **If your answer to the previous Interrogatory is affirmative, please state:**

a. The identities of all persons to whom the money was loaned;

b. The date of the loan;

c. The original amount of the loan;

d. The balance on the loan;

e. The reason the loan was incurred; and

f. The identity of any documents evidencing each such debt.

Interrogatory No. 27. **As to any motor vehicles owned or used by you from January 1, 2004, to the present, for each state:**

a. The make and model year of each vehicle;

b. How title is held and by whom;

c. The purchase price;

d. The lien balance as of the date these Interrogatories are filed; and

e. If sold, to whom, the date sold, and the sales price.

Interrogatory No. 28. **Please identify any accountants and/or accounting firms you now employ or have employed from January 1, 2004, to the present.**

Interrogatory No. 29. **Please identify any wills and/or codicils you have signed.**

Interrogatory No. 30. **Please identify any and all trusts (including, but not limited to, Illinois land trusts) of which you have been a beneficiary from January 1, 2004, to the present.**

Interrogatory No. 31. **Please identify each and every financial statement prepared by you or on your behalf, from January 1, 2004, to the present. For purposes of answering this Interrogatory, please identify:**

a. The bank, lender, or other person for whom each statement was prepared; and

b. The persons and/or entities possessing a copy of each statement.

Interrogatory No. 32. **If you have or had the right to any retirement or pension fund, profit sharing, or deferred compensation, please state:**

a. The identity of the person and/or entity holding each such fund;

b. The amount of money available to or withdrawn by you under each such fund;

c. The amounts you have contributed to each such fund;

d. The date of maturity on each such fund;

e. The certificate numbers of each such fund; and

f. Whether the financial reports are issued monthly, quarterly, or annually.

Interrogatory No. 33. **Do you now receive, or have you since January 1, 2004, received, any pension, retirement, or social security benefits? If so, please state for each such benefit:**

a. The identity of the payor of the benefits;

b. The date each payment started and the amount received to date; and

c. The monthly amount received from the benefit.

Interrogatory No. 34. **If any person, firm, or business entity holds any property for your benefit, either in the form of a trust or by any other method, state:**

a. The name and address of the person, firm, or business entity;

b. A description of the property held for your benefit;

c. The conditions under which the property is held;

d. The approximate value of the property; and

e. The date that the property was placed in trust or other form of ownership.

Interrogatory No. 35. **For each and every asset having a value of $500 or more that you have owned or disposed of since January 1, 2004, and that has not been heretofore referred to in the responses made by you to the preceding Interrogatories, such as but not limited to jewelry or works of art, state:**

a. A description of the asset;

b. The location of the asset;

c. Whether you still own the asset or any interest therein;

d. If the asset was sold,

(1) The date of sale;

(2) The sale price;

(3) The name and address of the purchaser; and

(4) Any gain or loss resulting from the sale.

Interrogatory No. 36. **Please identify any and all persons with knowledge of the allegations contained in the pleadings filed by any party to this lawsuit, as well as your answers to these interrogatories.**

[signature and attorney information**]**

3. [14.67] Request To Produce

[Caption]

REQUEST FOR THE PRODUCTION OF DOCUMENTS

To: [defendants' attorneys]

Pursuant to Supreme Court Rule 214, Plaintiff hereby requests that Defendant DEVIOUS DEBTOR produce the following documents at the office of Plaintiff's counsel within 28 days:

DEFINITIONS

Please refer to the definitions set forth in Plaintiff's Interrogatories when answering this Request for the Production of Documents.

DOCUMENTS REQUESTED

Request #1: **Any and all documents referring to, or relating to, your answers to Plaintiff's Interrogatories.**

Request #2: **Any and all tax returns dating from 2004 to the present that bear your signature and/or your social security number.**

Request #3: **All bank statements dating from 2004 to the present for any accounts in which you held any interest whatsoever (either directly or as a beneficiary) and/or on which you have been an authorized signatory.**

Request #4: **All position statements dating from 2004 to the present for any accounts holding securities in which you held any interest whatsoever (either directly or as a beneficiary) and/or on which you have been an authorized signatory.**

Request #5: **Any and all deeds and/or other instruments transferring title to real estate that bear your name, or the name of any entity in which you have an ownership (including beneficial ownership) interest, dating from 2004 to the present.**

Request #6: **Any and all stock certificates, bonds, or other securities (either marketable or otherwise) bearing your name, or the name of any entity in which you have an ownership (including beneficial ownership) interest, dating from 2004 to the present.**

Request #7: **Any and all certificates of deposit bearing your name, or the name of any entity in which you have an ownership (including beneficial ownership) interest, dating from 2004 to the present.**

Request #8: **Any and all certificates of automobile title bearing your name, or the name of any entity in which you have an ownership (including beneficial ownership) interest, dating from 2004 to the present.**

Request #9: **Any and all financial statements and/or loan applications prepared by you and/or on your behalf from 2004 to the present.**

Request #10: **Any and all documents relating to loans or gifts made by you from 2004 to the present.**

[signature and attorney information**]**

4. [14.68] Request To Admit

[Caption**]**

REQUEST TO ADMIT

To: [defendants' attorneys**]**

Pursuant to Supreme Court Rule 216, Plaintiff hereby requests that Defendant DEVIOUS DEBTOR admit within 28 days the factual allegations contained in Part I hereof and the genuineness of the documents identified in Part II and attached as Exhibits 1 – 3.

DEFINITIONS

Please refer to the definitions set forth in Plaintiff's Interrogatories when answering this Request To Admit.

PART I — Facts To Be Admitted

1. In 2004 Defendant DEVIOUS DEBTOR (DEVIOUS) owned the following valuable assets:

a. A limited partnership interest in ABC, Ltd., an Illinois limited partnership; and

b. A 25-percent undivided beneficial interest in Goliath Bank Land Trust No. 512.

2. Plaintiff filed this suit in 2004.

3. DEVIOUS timely appeared through counsel.

4. Plaintiff moved for Judgment on the Pleadings on April 27, 2006.

5. On June 5, 2006, this Court allowed Plaintiff's motion and entered a Judgment on the Pleadings in favor of Plaintiff and against DEVIOUS on the issue of liability alone.

6. DEVIOUS, through his counsel, immediately moved to reconsider the entry of Judgment on the Pleadings.

7. On September 18, 2006, the Court denied the motion to reconsider and let stand the Judgment on the Pleadings.

8. On October 20, 2006, DEVIOUS created the DEVIOUS DEBTOR Irrevocable Life Insurance Trust No. 2 (TRUST) naming his son DASTARDLY DEBTOR (DASTARDLY) as trustee.

9. On January 4, 2007, DEVIOUS transferred his interest in ABC, Ltd., to the TRUST, which paid no consideration therefor.

10. On March 28, 2008, Plaintiff filed a Motion for Summary Judgment on the issue of damages.

11. On April 13, 2008, DEVIOUS transferred his interest in the Goliath Bank Land Trust No. 512 to the TRUST, which paid no consideration therefor.

12. On June 8, 2008, the Court allowed Plaintiff's Motion for Summary Judgment.

PART II — Documents To Be Admitted

PLAINTIFF'S EXHIBIT 1: **Court order dated June 5, 2006.**

PLAINTIFF'S EXHIBIT 2: **Court order dated September 18, 2006.**

PLAINTIFF'S EXHIBIT 3: **Trust agreement for the TRUST.**

PLAINTIFF'S EXHIBIT 4: **Assignment of rights in ABC, Ltd., to the TRUST dated January 4, 2007.**

PLAINTIFF'S EXHIBIT 5: **Assignment of beneficial interest in Goliath Bank Land Trust No. 512 to the TRUST dated April 13, 2008.**

PLAINTIFF'S EXHIBIT 6: **Summary judgment order dated June 8, 2008.**

[signature and attorney information**]**

5. [14.69] Subpoenas

The local circuit courts generally provide form subpoenas that can be completed with the appropriate information. In Cook County, use Form CCG 0106, which is available at the clerk's office and at www.cookcountyclerkofcourt.org.

C. Motions

1. [14.70] Judgment on the Pleadings

[Caption]

MOTION FOR JUDGMENT ON THE PLEADINGS

NOW COMES Plaintiff, CRUEL CREDITOR, INC., an Illinois corporation, by its attorneys, _____, and states as follows as its Motion for Judgment on the Pleadings:

1. Plaintiff moves this Court to enter Judgment in its favor and against all defendants.

2. Judgment on the Pleadings is proper when the pleadings present only questions of law and not of fact. *Harris Trust & Savings Bank v. Donovan,* 145 Ill.2d 166, 582 N.E.2d 120, 123 – 124, 163 Ill.Dec. 854 (1991).

3. The allegations in Defendants' Answer do not, as a matter of law, defeat Plaintiff's claim. Judgment on the pleadings is therefore proper.

4. A supporting brief is attached.

[signature and attorney information]

2. [14.71] Summary Judgment

[Caption]

MOTION FOR SUMMARY JUDGMENT

NOW COMES Plaintiff, CRUEL CREDITOR, INC., an Illinois corporation, by its attorneys, _____, and asks this honorable Court to render a Summary Judgment in its favor for all damages prayed for in Plaintiff's Complaint To Set Aside Fraudulent Transfers, for the reason that there is no genuine issue as to any material fact and therefore Plaintiff is entitled to Judgment as a matter of law.

1. In support of its Motion, Plaintiff attaches and incorporates the following:

PLAINTIFF'S EXHIBIT 1: **Plaintiff's Complaint To Set Aside Fraudulent Transfers.**

PLAINTIFF'S EXHIBIT 2: **Answer of Dastardly Debtor (DASTARDLY), as Trustee of the Devious Debtor Irrevocable Life Insurance Trust No. 2, to Plaintiff's Complaint To Set Aside Fraudulent Transfers (DASTARDLY ANSWER).**

PLAINTIFF'S EXHIBIT 3: **Answer of Devious Debtor (DEVIOUS) to Plaintiff's Complaint To Set Aside Fraudulent Transfers (DEVIOUS ANSWER).**

PLAINTIFF'S EXHIBIT 4: **Selected excerpts of transcript of Pretrial Discovery Deposition of Dastardly Debtor (DASTARDLY TRANSCRIPT).**

PLAINTIFF'S EXHIBIT 5: **Selected excerpts of transcript of Citation To Discover Assets of Devious Debtor (DEVIOUS TRANSCRIPT).**

PLAINTIFF'S EXHIBIT 6: **Plaintiff's Brief in Support of Motion for Summary Judgment.**

2. Plaintiff further states that no genuine issue exists as to the following material facts:

a. On June 5, 2006, this Court entered a Judgment on the Pleadings in favor of Plaintiff and against Defendant DEVIOUS on the issue of liability alone.

b. On September 18, 2006, this Court denied DEVIOUS' motion to reconsider and let stand the Judgment on the Pleadings.

c. On October 20, 2006, DEVIOUS created the DEVIOUS DEBTOR Irrevocable Life Insurance Trust No. 2 (TRUST) naming his son DASTARDLY as trustee.

d. On January 4, 2007, DEVIOUS transferred his interest in ABC, Ltd., to DASTARDLY, as Trustee of the TRUST, which paid no consideration therefor.

e. On March 28, 2008, Plaintiff filed a Motion for Summary Judgment on the issue of damages.

f. On April 13, 2008, DEVIOUS transferred his interest in the Goliath Bank Land Trust No. 512 to DASTARDLY, as Trustee of the TRUST, which paid no consideration therefor.

g. On June 8, 2008, this Court allowed Plaintiff's Motion for Summary Judgment.

WHEREFORE, Plaintiff prays that this honorable Court enter an Order:

A. Finding that the facts stated above are true and correct;

B. Finding that the beneficiaries of the TRUST are "insiders," as defined by 740 ILCS 160/2(g)(1)(A);

C. Finding that the transfers of assets by DEVIOUS to the TRUST constitute fraudulent transfers, as set forth in 740 ILCS 160/5 and 160/6;

D. Setting aside the fraudulent transfers of assets by DEVIOUS to the TRUST, pursuant to 740 ILCS 160/8;

E. Granting Summary Judgment in favor of Plaintiff and against DASTARDLY as Trustee of the TRUST for $85,000 plus costs of suit and interest; and

F. Awarding such other and further relief to Plaintiff as this Court deems necessary and proper in the interest of justice.

[signature and attorney information**]**

3. [14.72] Preliminary Injunction

[Caption]

MOTION FOR PRELIMINARY INJUNCTION

NOW COMES Plaintiff, CRUEL CREDITOR, INC., an Illinois corporation, by its attorneys, _____, and states as follows as its Motion for Preliminary Injunction:

1. As alleged in the Complaint To Set Aside Fraudulent Transfers, which is attached hereto and incorporated herein as Exhibit A, Plaintiff filed the above-captioned lawsuit against DEVIOUS DEBTOR herein in 2004 and prosecuted it successfully to Judgment.

2. As alleged in the Complaint To Set Aside Fraudulent Transfers, during the pendency of the lawsuit, DEVIOUS DEBTOR engaged in a pattern of fraudulent transfers whereby he transferred all of his significant assets to a trust in favor of his family, thereby rendering himself insolvent and judgment-proof.

3. 740 ILCS 160/8 states, in pertinent part:

> **(a) In an action for relief against a transfer or obligation under this Act, a creditor, subject to the limitations in Section 9, may obtain:**
>
> *** * ***
>
> **(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure,**
>
> **(A)** ***an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;*** [or]
>
> *** * ***
>
> **(C) any other relief the circumstances may require.** [Emphasis added.]

4. Caselaw supports the use of injunctions to preserve the rights of creditors under the Uniform Fraudulent Transfer Act. ***See, e.g., Bowman v. Dixon Theatre Renovation, Inc.,*** **221 Ill.App.3d 35, 581 N.E.2d 804, 163 Ill.Dec. 650 (2d Dist. 1991).**

5. Injunctive relief is warranted in this case because:

a. Defendant has already demonstrated his willingness to engage in conduct designed to delay, hinder, and defeat the just claims of his creditors, namely transferring funds to a family member without receiving compensation therefor, and entry of an injunction is necessary to prevent further transfers of assets designed to frustrate plaintiff's just claims;

b. The entry of a temporary injunction will not prejudice the rights of any party hereto;

c. The entry of a temporary injunction will preserve the status quo;

d. Plaintiff has demonstrated a likelihood of success on the merits;

e. Plaintiff has demonstrated a clearly ascertainable right in need of protection, namely, the Judgment in its favor; and

f. Plaintiff has no adequate remedy at law.

6. Plaintiff attaches the following documents hereto and incorporates them as Exhibits to this motion:

***EXHIBIT A:* Plaintiff's Complaint To Set Aside Fraudulent Transfers.**

***EXHIBIT B:* Brief in Support of Motion for Preliminary Injunction.**
***EXHIBIT C:* Proposed Preliminary Injunction Order.**

WHEREFORE, Plaintiff respectfully requests that this honorable Court enter a Preliminary Injunction in its favor and against DEVIOUS DEBTOR, the TRUST, and DASTARDLY DEBTOR, as Trustee of the TRUST:

A. Enjoining them against disposition of their interests in any property of the TRUST until after the Court rules on Plaintiff's Complaint To Set Aside Fraudulent Transfers; and

B. For such other and further relief as the Court deems necessary and proper.

[signature and attorney information**]**

D. [14.73] Order

[Caption**]**

ORDER

THIS CAUSE coming on to be heard on the Motion for Summary Judgment of Plaintiff CRUEL CREDITOR, INC., an Illinois corporation, due notice having been given, and the Court being fully advised in the premises after reviewing the parties' written arguments and after hearing oral arguments of counsel, the Court hereby FINDS:

A. On June 5, 2006, this Court entered a Judgment on the Pleadings in favor of Plaintiff and against DEVIOUS DEBTOR (DEVIOUS) on the issue of liability alone.

B. On September 18, 2006, the Court denied DEVIOUS' motion to reconsider and let stand the Judgment on the Pleadings.

C. On October 20, 2006, DEVIOUS created the Devious Debtor Irrevocable Life Insurance Trust No. 2 (TRUST) naming his son DASTARDLY DEBTOR (DASTARDLY) as trustee.

D. On January 4, 2007, DEVIOUS transferred his interest in ABC, Ltd., to DASTARDLY, as Trustee of the TRUST, which paid no consideration therefor.

E. On March 28, 2008, Plaintiff filed a Motion for Summary Judgment on the issue of damages.

F. On April 13, 2008, DEVIOUS transferred his interest in the Goliath Bank Land Trust No. 512 to DASTARDLY, as Trustee of the TRUST, which paid no consideration therefor.

G. DEVIOUS' transfers to the TRUST left him without sufficient funds to pay his debt to Plaintiff.

H. On June 8, 2008, the Court entered summary Judgment in favor of Plaintiff and against DEVIOUS for $85,000 plus Plaintiff's costs of suit.

I. DEVIOUS' transfers to the TRUST have delayed and impaired Plaintiff's ability to collect on its Judgment against DEVIOUS. Based on the close proximity in time between those transfers and the Judgment, this Court finds that the transfers rendered him insolvent.

J. The above-mentioned facts establish a prima facie case against DEVIOUS of fraudulent transfers under the fraud in law standard as set forth in 740 ILCS 160/6. *Stoller v. Exchange National Bank of Chicago,* 199 Ill.App.3d 674, 557 N.E.2d 438, 145 Ill.Dec. 668 (1st Dist. 1990).

K. Plaintiff having established a prima facie case of fraudulent in law transfers, a presumption of fraud arises, and the burden of proof shifts to Defendants to rebut that presumption. Defendants may overcome the presumption of fraud only by showing that after the transfer, the debtor either (1) retained ample assets to cover the debts or (2) was given adequate consideration for the transfer. If Defendants fail to rebut that presumption, it becomes conclusive. *First Security Bank of Glendale Heights v. Bawoll,* 120 Ill.App.3d 787, 458 N.E.2d 193, 76 Ill.Dec. 54 (2d Dist. 1983).

L. Defendants have not met their burden of proof. The transfers from DEVIOUS to the TRUST were voluntary gifts, made for his stated purpose of "estate planning" for his present wife and children. Moreover, the TRUST's Response to Plaintiff's Motion for Summary Judgment does not establish that DEVIOUS retained sufficient collectible assets to satisfy his obligations to Plaintiff after he made his gifts to the TRUST. It is of no moment that the property remaining in the grantor's hands after the conveyance is in nominal value more than equal to the amount of his indebtedness if subsequent events show that the property retained is not sufficient to discharge all his liability. The test is whether the conveyance directly tends to or does impair the rights of creditors. *Falcon v. Thomas,* 258 Ill.App.3d 900, 629 N.E.2d 789, 196 Ill.Dec. 244 (4th Dist. 1994).

M. The affidavits, sworn discovery responses, and other exhibits appended to the parties' motions and briefs do not present any material issues of fact that would preclude the entry of summary judgment in favor of Plaintiff. Therefore, Plaintiff is entitled to a Judgment in its favor as a matter of law pursuant to 735 ILCS 5/2-1005 on the issue of a fraudulent in law transfer. *Derby Meadows Utility Co. v. Inter-Continental Real Estate,* 202 Ill.App.3d 345, 559 N.E.2d 986, 147 Ill.Dec. 646 (1st Dist. 1990).

THEREFORE, IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Summary Judgment is granted with respect to Plaintiff's claim of a fraudulent in law transfer pursuant to 740 ILCS 160/6.

2. Judgment is entered in favor of Plaintiff and against DASTARDLY, as Trustee of the TRUST, for $85,000 plus costs of suit and interest from June 8, 2008, to the present.

3. DASTARDLY, as Trustee of the TRUST, shall either satisfy this Judgment, together with Plaintiff's costs of suit, and the statutory interest accrued from June 8, 2008, or shall provide for the liquidation of TRUST property sufficient to satisfy the Judgment within 30 days, and if the TRUST fails to do so, Plaintiff may execute on the Judgment in 30 days' time.

4. A lien is established instanter on all property in which the TRUST owns any legal, beneficial, or other interest for $85,000 plus Plaintiff's costs of suit and interest from June 8, 2008, to the present.

ENTERED:

By: _____
Judge **Judge's No.**

Order prepared by:

[attorney information**]**