LOS ANGELES
Daily Journal
www.dailyjournal.com

WEDNESDAY, SEPTEMBER 7, 2016

PERSPECTIVE

New law may extend time to challenge fraudulent transfers

By Evan W. Granowitz

If someone owes you money, but has transferred all of their assets away to avoid paying you or their other creditors, should you be precluded from attacking these transfers if they were made seven or more years ago? For at least 20 years, California law answered this question in the affirmative; transfers made more than seven years prior were not subject to challenge by a creditor as a fraudulent transfer. But although unnoticed by many people, this all changed last January.

For more than 400 years, the law has provided a remedy to attack transfers made by a debtor to the detriment of his creditors. The "primordial rule" was adopted by the English Parliament in 1571 based on Roman law. The doctrine is relatively simple to state: Transfers made, or obligations incurred, by a debtor intending to hinder, delay or defraud her creditors can be challenged by a creditor. Since its inception, California law incorporated this doctrine as part of the common law. In addition, the rule that transfers made with the "intent to hinder, delay or defraud" creditors are voidable has been codified in California statute for nearly a century. A transfer can be challenged under the common law where the debtor intended to hinder, delay or defraud creditors by the transfers.

A transfer can be challenged under California statutory law both where the debtor made a transfer with this intent to prejudice her creditors, and where (a) the transfer was made without the debtor receiving reasonably equivalent value in exchange and (b) the debtor had a specified financial condition, such as where the debtor was insolvent before the transfer or as a result of the transfer.

Effective Jan. 1, 2016, the California Legislature made changes to the fraudulent transfer law. Although most of the substantive changes were discussed by commentators and the Legislature, it appears that there was one seemingly minor change that has major implications. Three words — "under this chapter" — were added to one provision of the section dealing with the deadlines to file lawsuits asserting fraudulent transfer claims. By adding these three words, the Legislature either clarified prior law, or established a new rule, that common law fraudulent transfer claims are not subject to an absolute seven-years-from-the-transfer deadline that applies to statutory claims. In other words, there is now a remedy for creditors to attack fraudulent transfers of older vintage.

Civil Code Section 3439.09(c) now provides that a claim brought under the statute to challenge a fraudulent transfer "is extinguished" if the lawsuit is not filed within seven years of the transfer. Before the Legislature added these three words — *under this chapter* — one appellate court, which mentioned the statute in a footnote, thought that "by its use of the term '[n]otwithstanding any other provision of law, the Legislature clearly meant to provide an overarching, all-embracing maximum time period to attack a fraudulent transfer, no matter whether brought under the UFTA or otherwise." *Macedo v. Bosio*, 86 Cal. App. 4th 1044, 1051 n.4 (2001). Based on its "think[ing]," but not actually the basis for its decision in that case, the *Macedo* court suggested that "the maximum elapsed time for a suit under either the [Uniform Fraudulent Transfer Act] or otherwise is seven years after the transfer." Opinions from other courts, including unpublished decisions of other Courts of Appeal, as well as decisions of U.S. district judges, have reached similar conclusions based on the thought and reasoning contained in the footnote.

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Clearly, the seven-year outside deadline now expressly applies only to statutory claims. In contrast, a common law fraudulent transfer claim can now be brought within three years of obtaining a final judgment against the debtor, or within three years of discovering the fraudulent transfer, whichever is later. The statute of limitations for a common law fraudulent transfer claim is three years pursuant to Code of Civil Procedure Section 338(d). But "the California Supreme Court has held that the limitations period begins to run at the time of judgment in the underlying action, but if the creditor is unaware of the fraudulent conveyance, the limitations period begins to run when the creditor discovers the fraudulent conveyance." *Cortez v. Vogt*, 52 Cal. App. 4th 917, 929 (1997).

Thus, with the recent amendment, it is clear that "a common law action to set aside a fraudulent transfer could [now] theoretically be brought scores of years after the transfer (assuming of course, that it took that long to bring the underlying action and obtain a judgment)." *Macedo*, 86 Cal. App. 4th at 1051 n.4 (discussing what the court thought was not permitted under the prior language). This may be much, much longer than seven years from the transfer.

Whether intended or not, the recent revisions to California's fraudulent transfer statute has vastly expanded the ability of creditors to attack transfers made by debtors long after they are made.

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