JUDGMENT DAY

Identifying fraudulent transfers before it's too late.

BY **MARK TORABI**

"Victory goes to the player who makes the next-to-last mistake."

—CHESS MASTER SAVIELLY GRIGORIEVITCH TARTAKOWER (1887-1956)

If you liken the judgment collection process to the game of chess, the recalcitrant debtor intent on defrauding his creditors always has the advantage of making the first move; but just as in chess, that does not by itself guarantee victory.

Following is a summary of potential limitations issues under the Texas Uniform Fraudulent Transfer Act and an outline of pre-suit considerations that can help a creditor offset a judgment debtor's inherent first-move advantage and reduce the creditor's prospects for obtaining an uncollectable judgment.

Fraudulent transfers. The judgment debtor is the first to anticipate his own default or malfeasance and can begin transferring or hiding assets to avoid collection long before his creditor may even be aware of any potential claim against the debtor.

However, TUFTA provides creditors with a powerful means to undo any transfers of property undertaken by a judgment debtor with the intent to defraud his creditors. Whether arising in the context of a default under a loan agreement, commercial tort, probate case, or even divorce, anywhere there has been an improper transfer of cash or property by a judgment debtor seeking to avoid collection, such improperly transferred cash or property may be traceable and, ultimately, recoverable to satisfy the judgment.

In its simplest form, a debtor might gift or otherwise transfer property to friends or relatives, transfer cash to hidden accounts, or create liens or other encumbrances on the debtor's real property. More sophisticated debtors may engage in business activities intended to siphon revenues or control of business assets to outside entities not obligated for the debt. They may also enter into complex transactions involving multiple entities in an effort to make it difficult for a creditor to trace or discover the identity of beneficial owners.

Timing is everything. Though TUFTA is a powerful collection tool, Texas courts have interpreted its language to be a statute of repose as opposed to a statute of limitations. This means that you *must* bring your fraudulent transfer claim within four years of the date of the transfer; two years in suits by a spouse, minor, or ward; or one year if to an insider for an antecedent debt. If you fail to do so, you will forever lose your ability to recover against such fraudulently transferred property.[1]

The Texas Supreme Court has applied this rule to harsh effect, refusing to apply any equitable or statutory tolling and holding that the statute of repose extinguished creditor's claims where the creditor timely filed a fraudulent transfer claim in Nevada. After a determination by the Nevada court that it lacked personal jurisdiction over the defendant, the creditor promptly re-filed the suit in Texas after the four-year limitation period had expired. The court, while acknowledging the inequity of the result, reasoned that "[t]he whole point of layering a statute of repose over the statute of limitations is to 'fix an outer limit beyond which no action can be maintained.'"[2]

Nonetheless, and in spite of its statute of repose language, TUFTA still contains an exception to limitations, but only where the transfer complained of was concealed or otherwise undiscoverable prior to the expiration of limitations. Under this, a creditor must bring suit within 12 months of the date of discovery of the fraudulent transfer. However, any creditor relying upon this discovery rule exception also bears the burden of proving that the transfer in question was concealed or otherwise undiscoverable within the limitations period.

Avoiding the limitations trap. Although TUFTA is intended to provide creditors with a remedy to undo any fraudulent transfers of assets, its statue of repose can operate as a potential haven for judgment-savvy debtors. Armed with the inherent first-move advantage, a debtor intent on shielding his assets from future collection can set the TUFTA-limitations clock in motion long before his creditor may even be aware of a potential default or claim. Accordingly, any creditor failing to conduct a pre-suit investigation to timely identify and assert any potential fraudulent transfer claims against the debtor risks being barred from eventual recovery by TUFTA's statute of repose.

Sources to consider before filing suit. While it is certainly true that not every fraudulent transfer will be readily discoverable, an electronic record now evidences almost every substantial transfer of property. Consequently, evidence of many types of property transfers can be obtained through a search of real property records, assumed name filings, marriage records, Uniform Commercial Code filings, secretary of state filings, divorce decrees, and other court documents, most or all of which are currently available online.

While comprehensive products are certainly available from legal research providers on a subscription or pay-per-search basis, the following are useful sources of information that can be accessed online for little to no cost:

Basic Internet search—Look up the debtor's name, spouse, known associates, associated business entities, and/or doing business as names of debtor. You might be surprised at the amount of useful information a simple Web search can yield.

County real property records—Most counties now provide online access to real property records, doing business as filings, and marriage records. Conduct a search of real property records in the debtor's name, spouse, any associated business entities, and/or doing business as names of debtor to determine if the debtor owns or has recently transferred or encumbered any real property. Be sure to check the debtor's county of residence and any other county in which the debtor is known to have potential ties. Also, if there are any abstracts of judgment, IRS liens, labor liens, or municipal liens filed against the debtor, those too will be found in the real property records. Go to publicrecords.netronline.com/state/TX/ for a list of links to available counties.

County tax appraisal records—On the appraisal district website for the county in which the debtor resides—and any other counties in which the debtor is known to have potential ties—search for the debtor's name, spouse, and business names and/or doing business as names of debtor. You will find current and historical appraisal valuations for any properties, and most counties also disclose whether or not the debtor has claimed a homestead exemption for a particular property. Go to taad.org/cad_web_links.html for a full list of county CAD links.

Texas secretary of state—Conduct a search of records for any business entities, doing business as names, and/or UCC filings associated with the debtor. A review of secretary of state filings for any associated businesses also provides useful information about the management or control of any associated business interests and can also identify additional business addresses and associates. Go to sos.state.tx.us/corp/sosda/index.shtml to get started.

County clerk/district clerk case records—Search for the name of the debtor and any associated businesses in the county and district court records in debtor's county of residence and any other counties to which the debtor may have ties. Review any case to which the debtor is a party for potential property interests. For example, if the debtor has been divorced, the final decree will include the terms of the property settlement, providing details as to any property awarded to the debtor in the divorce. An interactive map with links to Texas courts is available at maps.txcourts.gov/.

Federal district and bankruptcy court records—Search for any filings in the name of the debtor, spouse, and any associated business names. Make sure that there is not an active bankruptcy and automatic stay in place prior to proceeding with the filing of any new suit against the debtor. If there are any prior bankruptcies filed by the debtor, the required schedules and final report will include details of any property owned by the debtor. Go to pacer.gov for more information.

In conclusion, to avoid becoming the player who made the "last mistake" in the game, the time to affirmatively conduct a search of available public records for evidence of suspicious property transfers by a prospective judgment debtor is *before* filing suit. By failing to recognize and timely assert any potential fraudulent transfer claims, a creditor will have played right into the hands of any judgment-savvy debtor seeking to shelter his assets from collection by running out the clock on TUFTA's statute of repose. **TBJ**

Notes

1. *See* Tex. Bus. & Com.Code § 24.010.
2. *Nathan v. Whittington*, 408 S.W.3d 870, 875 (Tex. 2013, per curiam).

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