



Asset Protection and California Fraudulent Conveyances

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Gary S. Wolfe has over 34 years of experience, specializing in IRS Tax Audits and International Tax Matters including: International Tax Planning/Tax Compliance, and International Asset Protection.

As of July 2016, Gary Wolfe has internationally published 15 books and 28 articles. Gary has received 14 international tax awards from five different Global expert societies in LONDON/UK including being voted one of the 100 leading world's law firms with votes from over 150,000 voters in over 160 countries with the following award: Global 100 (2016) (KMH Media Group) - CA/US International Tax Planning Law Firm of the Year.

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In California, Debtors who seek to avoid paying creditors may run afoul of the California Fraudulent Conveyance laws and risk both civil and criminal penalties.

Civil

In California Civil Code Section 3439 governs transfers to defraud creditors. Under the case, *Yaesu Electronics Corp v. Tamura* (1994) 28 Cal. App. 4th 8, 13 " a fraudulent conveyance is a transfer by a debtor to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim." Under the California Uniform Fraudulent Transfer Act (CA Civ. Code Sec. 3439), the UFTA prohibits debtors from transferring property beyond their creditor's reach when that property should be available for the satisfaction of the creditors' legitimate claims.

A fraudulent transfer under the UFTA is defined as "every mode, direct, absolute or conditional, voluntary or involuntary, for disposing of or parting with an asset.... and includes payment of money, lease, and creation of a lien or other encumbrance " (CA Civ. Code Sec. 3439.01(i)). The UFTA provides remedies to those creditors to whom a debt is owed.

Whether the creditor's claim arose before or after the debtor made the transfer or incurred the obligation, four distinct grounds for finding a fraudulent transfer exist:

1) Cal. Civil Code Sec. 3439.04 (a) (1): designates as fraudulent any transfer made or obligation incurred by a debtor with an actual intent to hinder, delay, or defraud any creditor of the debtor. Under CA Civil Code Sec. 3439.04 (a) (1), the determination of "actual fraudulent intent" depends on the assessment of 11 factors, determined by CA Civ. Code Sec. 3439.04(b).

2) CA Civ. Code Sec. 3439.04 (a)(2)(A) designates as fraudulent (and presumes fraudulent intent) a transfer made or obligation incurred without receiving reasonably equivalent value where the debtor was engaged or about to be engaged in a business or transaction with unreasonably small remaining assets in relation to the business or transaction.

3) CA Civ. Code Sec. 3439.04 (a)(2)(B) designates as fraudulent (and presumes fraudulent intent) a transfer made or obligation incurred without receiving a reasonably equivalent value where the debtor intended to incur, or believed or reasonably should have believed that he would incur debts beyond his ability to pay as the debts became due.

4) CA Civ. Code 3439.05 designates as fraudulent (and presumes fraudulent intent) a transfer made or obligation or obligation incurred without receiving reasonably equivalent value when the debtor was insolvent at the time of making the transfer or incurring the obligation became insolvent as a result of the transfer or obligation.

It is not necessary that the transferor acted maliciously or with desire to harm his creditors. See *Economy Refining and Service Co. v Royal National Bank* (1971) 20 Cal App. 3d 434,441 which held: "it was the debtor's intent to make the transfer, rather than some evil intent to harm the creditor which

suffices for finding "intent to defraud". Actual intent to defraud consisted of the intent to remove the assets and to make impossible the collection of the creditor's judgment".

Under the case of *Mehrtash v. Mehrdash* (2001) 93 Cal. App. 4th 75, 80: "mere intent to delay or defraud is not sufficient. Injury to the creditor must be shown affirmatively. It cannot be said that a creditor has been injured unless the transfer puts beyond their reach property, they otherwise would have been able to use for payment to debtor."

Criminal

In California criminal penalties for fraudulent conveyance by a debtor are codified by CA Penal Codes Section 154 (Fraudulent conveyance by a Debtor) and 155 (Fraudulent Conveyance by Judgment Debtor). The statutes are similar but Penal Code Sec. 155 applies to people who fraudulently transfer their property to avoid collection or a civil judgment that has been ordered against them. The common elements of Penal Code Sections 154, 155 include:

- 1) Defendant/Debtor is responsible for repaying money to a creditor;
- 2) Debtor either sold, gave away or concealed property, or
- 3) Debtor intentionally did so to prevent, delay or obstruct a creditor's ability to be repaid.

Under CA Penal Code Sec. 531, a related offense applies to people who receive the unlawful property transfer, or who falsely defend the transfer as

not fraudulent, or who sell or otherwise give away any property that has been transferred fraudulently.

The penalties include:

- 1) A fraudulent conveyance by a debtor or judgment creditor is a misdemeanor offense, up to one year in jail and fines;

- 2) It may be a felony when the property in question is "stock in trade" that the debtor would sell as part of his normal course of business and where the value of the "stock in trade" fraudulently conveyed is more than \$250, up to 3 years in jail plus fines.

The criminal defense may be that the transfer was performed without the intent to avoid a judgment or debt.

Criminal issues to be reviewed to determine whether a conveyance can be considered a fraudulent attempt to avoid a debt or judgment may include:

- 1) Whether the transfer was made to someone that the debtor has close ties with and what, if anything, was provided in return for the property;

- 2) Whether the debtor continues to control the property after the transfer (e.g. remains in the house as a "renter");

- 3) Whether there were attempts to conceal the transfer;

- 4) The timing of the transfer in relation to efforts to collect the debt or issuance of the judgment.

