

A close-up photograph of a desk with a calculator, a pen, and a stack of papers. The calculator is a silver and black handheld device with a numeric keypad and function keys like 'GT', 'MPC', 'M+', 'M-', 'M\*', 'M/', 'CE', and 'C'. A black pen with silver accents lies diagonally across a stack of papers. The papers are slightly fanned out, showing some text and numbers. The background is a wooden desk surface.

# How to Defeat a Fraudulent Transfer

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## Legal Alert

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### How to Defeat a Fraudulent Transfer

After borrowers default and as your collection efforts near the entry of judgment, many debtors begin to hide assets. Can you get the money or property back from the individuals to whom the debtors transferred those assets?

Let's set the stage with an example. The debtor owes the Bank \$150,000, is about to have judgment entered against him, and owns real property (for simplicity, let's assume it's his only asset) in another jurisdiction in which he has equity, but not in excess of the amount he owes his creditors. This makes the debtor insolvent.

Prior to the entry of judgment, the debtor transfers the real property to a friendly third party such as a parent, spouse, sibling, girlfriend, etc. Sometime thereafter, the debtor files for a Chapter 7 bankruptcy. Case law is filled with examples of debtors transferring property for insufficient consideration to family members or friends. Giving assets away to defraud creditors won't work if the creditor pursues its rights!

So, how does the Bank proceed? The Bank's governing authority here is the Arizona Uniform Fraudulent Transfer Act, which is found at Arizona Revised Statutes § 44-1001 and sets forth the guidelines for determining whether a transfer is fraudulent as to a creditor and can be set aside by a court.

The Act provides that transfers can be set aside if they are made "with actual intent to hinder, delay, or defraud any creditor of the debtor . . . ." Moreover, a transfer may be set aside if the debtor did not receive fair value in exchange for the transfer and the transfer made the debtor unable to pay its obligations as they become due. Numerous factors can be taken into account to make these determinations.

Now, most debtors are unlikely to testify that they made a transfer with the affirmative intention of defrauding creditors. Therefore, courts may rely upon the Fraudulent Transfer Act to find "badges of fraud," including (1) a relationship between the debtor and the transferee, (2) a lack of adequate consideration for the transfer, (3) the insolvency of the debtor at the time of transfer, (4) a transfer of the debtor's entire estate, (5) a reservation of the benefits from the property by the debtor, (6) secrecy or concealment of the transaction, and (7) threat of litigation at the time of the transfer. While any single "badge of fraud" might only raise suspicions, where several are present they can form the basis to support a court order to have the property returned.

While the outcome of any fraudulent transfer case will depend upon the facts, dishonest debtors and their family members and friends will generally lose because the transfers are to related parties for inadequate consideration. More sophisticated business-driven or estate planning transfers (especially with regard to exempt assets) are less likely to be set aside by a court. Transfers made before the threat of insolvency or a pending collection action are also less likely to be set aside.

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