

The Illinois legislature enacted the Uniform Fraudulent Transfer Act (UFTA) to prevent debtors from hiding or transferring assets specifically to avoid satisfying claims of their creditors. The determination of whether the UFTA was violated is made by the court on a case-by-case basis. For this reason, it is important to understand the factors that go into making such a determination.

The UFTA sets forth a two-pronged analysis to determine whether a transfer is fraudulent, although only one prong need be present before a transfer can be deemed fraudulent. A transfer made or obligation incurred by a debtor will be considered fraudulent as to a creditor, *whether the claim arose before or after the transfer or obligation was incurred*, if:

1. The transfer was made 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 transaction for which the remaining asset 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.¹

The UFTA expands further on this analysis. To determine whether there is actual intent under the first prong, a court will consider (among other things) whether:

1. The transfer was made to an insider (such as relatives or partnerships in which the debtor is a general partner);
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 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 assets 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 then transferred the assets to an insider of the debtor.²

The court in *B.R. Lindholm v. Holtz* held that more than one factor must be present before there can be a finding of intent to defraud; there is no presumption when only one of the above factors is found.³ However, even the presence of several factors is not a guaranteed indicator. The court will make a final determination of whether the intent to defraud exists based on the evidence

¹ 740 ILCS 160/1 et seq.

² Id. at 160/5.

³ 221 Ill.App.3d 330 (1991).

presented by the parties.⁴ Certain factors may be weighed more heavily than others; for example, the court in In re Knippen held that a transfer of assets to a family member is “weighty proof,” of intent to defraud.⁵

In analyzing the second prong of the fraudulent transfer analysis, the court must determine whether sufficient value was given for the transfer. “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.”⁶ This value does not include an unperformed promise, unless such practice is normal in the promiser’s ordinary course of business.

The UFTA also narrows this second prong in cases where the creditor’s claim arose *prior to* the transfer. In addition to the test above, a transfer made without receiving equivalent value in exchange will be held as fraudulent if the debtor was insolvent at the time of transfer, or if the debtor became insolvent as a result of the transfer.⁷ This is further narrowed in cases where the transfer was made to an insider. If the debtor was insolvent at the time of transfer, the transfer was made for an antecedent debt, and the insider knew or had reasonable cause to believe that the debtor was insolvent, the transfer is fraudulent.

However, in these situations, the creditor cannot seek to void the transaction if

1. The insider gave new value to or for the benefit of the debtors after the transfer was made unless the new value was secured by a valid lien; or
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.⁸

A creditor may bring an action to seek various types of relief under the UFTA, including avoidance of the transfer (to the extent necessary to satisfy the creditor’s claim), an injunction, or the appointment of a receiver to handle the property. Any fraudulent transfer under the UFTA is voidable, but will not necessarily be voided in all situations. For example, even if a court finds intent to defraud is present, a transfer of assets by the debtor is not voidable against a good faith taker for equivalent value or against any subsequent taker. A subsequent good faith taker will be protected even when the original taker did not take in good faith.⁹ Other than this good faith taker exception, a judgment issued by the court voiding a transaction will be valid against a transferee and any subsequent takers.

The statute of limitations on fraudulent transfer claims in Illinois varies depending on the circumstances of the case. If a court finds intent to defraud is present under the first prong, the claim must be brought within four years of the transfer of assets, or within one year after the transfer or obligation was discovered or reasonably could have been discovered by the claimant. If the transfer is fraudulent because there was no exchange of equivalent value under the second

⁴ Id.

⁵ Bkrtcy .N.D.Ill. 2006, 355 B.R. 710

⁶ 740 ILCS §160/4(a)

⁷ 740 ILCS §160/6.

⁸ 740 ILCS §160/9.

⁹ 740 ILCS §160/9.

prong, the claim must be brought within four years. If the transfer was made to an insider for an antecedent debt, and the debtor was insolvent at the time, and the insider knew or had reason to believe the debtor was insolvent, a creditor has only one year to bring a claim of fraudulent transfer.¹⁰

¹⁰ 740 ILCS §160/10.