



## MEMORANDUM

**To:** Henry David **cc:** Lydia Tavera; Madalena Virbila  
**From:**Carolynn Beck  
**Date:** June 12, 2008  
**In Re:** Whether there is a separate cause of action with respect to fraudulent conveyance that survives the Uniform Fraudulent Transfer Act.  
**File No.:** 601141.002

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### Summary of Issue

Are there separate common law causes of action under California common law with respect to fraudulent transfers that survive the Uniform Fraudulent Transfer Act ("UFTA")?

### Answer

None that are relevant. While the legislative history and case law indicates that remedies and other non-substantive issues "survive" the UFTA in that they supplement UFTA causes of action, it does not appear that there is a separate cause of action (that has not already been considered) relevant to the case at hand.

### Relevant Research & Analysis

#### 1. Treatises

The UFTA, which is codified in *Civ. Code* §3439 et seq ". . . does not supersede or otherwise eliminate common law remedies that existed before the uniform laws went into effect."<sup>1</sup> Instead, ". . . the remedies of the UFTA and its predecessor are cumulative to the pre-existing common law remedies."<sup>2</sup> In *Civ. Code* § 3439.10, the statute

. . . provides that, unless displaced by the provisions of the act, the principles of law and equity, including the law merchant and the law relating to principle and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake,

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<sup>1</sup> 23-270 California Forms of Pleading and Practice--Annotated § 270.30.

<sup>2</sup> *Id.*

insolvency, or other validating or invalidating cause, supplement its provisions.<sup>3</sup>

While the guide provides limited discussion on statutes of limitation relevant to the UFTA and preexisting remedies, it does not provide insight into alternative causes of action that may be available to creditors under common law. Collier on Bankruptcy and the Rutter Group California Practice Guide: Bankruptcy do not address the issue of common law actions or remedies available under California common law as relevant to fraudulent conveyances.

## 2. Case Law

Case law suggests that the UFTA is cumulative to other preexisting remedies and causes of action. Because fraudulent transfers have been regulated in California since 1850, however, it does not appear that there are separate causes of action for fraudulent conveyance relevant to the case at hand. While some cases make brief mention of common law actions such as fraud,<sup>4</sup> unjust enrichment,<sup>5</sup> conspiracy, and aiding and abetting of fraudulent conveyances,<sup>6</sup> such causes of action are irrelevant to the facts in our case, have already been pled, or are unavailable in California as separate causes of action. Additionally, cases that consider the effect of the UFTA on common law have considered issues such as the right to jury trial, statutory limitations, or application of equitable remedies where relevant statutes were unavailing.<sup>7</sup> There is no indication that the courts in these cases required a separate common law cause of action for such theories to be applied. It is clear, however, that other remedies may be supplemented by, and supplement, remedies available to creditors through the UFTA.

The legislative and decisional history of the UFTA indicates that its remedies are cumulative to preexisting remedies for fraudulent conveyances.<sup>8</sup> Thus, the UFTA provides creditors with an option to ". . . maintain an action to annul a fraudulent conveyance before his debt has matured."<sup>9</sup> A creditor

. . . may 'reject the aid of equity, and levy attachment or execution at law as he might before the statute.' Or [he] 'may seek the aid of equity, and without

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<sup>3</sup> *Id.*

<sup>4</sup> *Fleet Nat'l Bank v. Valente (In re Valente)*, 360 F.3d 256, 261 (1st Cir. 2004) (stating that principles of law and equity, including law relating to fraud, supplement the UFTA unless displaced by the UFTA, because legislative intent of the UFTA drafters was to preserve common law as a supplement to the UFTA).

<sup>5</sup> *Arena Dev. Group, LLC v. Naegele Commns.*, 2008 U.S. Dist. LEXIS 35628, 13-16 (D. Minn. 2008) (Dismissing unjust enrichment claim because remedies in equity are unavailable where there is a sufficient remedy available under the law).

<sup>6</sup> *Id.* at 28-29. (Considering whether defendants may be held personally liable for aiding and abetting fraudulent transfer under Minnesota common law).

<sup>7</sup> See, *In Re Valente* at 260 (Stating that ". . . courts have long granted common law remedies to defrauded creditors when statutory relief was otherwise barred"). See also *Wisden v. Superior Court*, 124 Cal. App. 4th 750, 756-58 (Cal. App. 2d Dist. 2004)(Deciding that because the right to jury trial existed in fraudulent conveyance actions in English common law, the California constitution guarantees the right to jury trial in similar actions today, even if the UFTA does not provide for jury trial in its provisions).

<sup>8</sup> *Cortez v. Vogt*, 52 Cal. App. 4th 917, 929 (Cal. App.1997).

<sup>9</sup> *Id.*, at 930.

attachment or execution, may establish his debt, whether matured or unmatured, and challenge the conveyance in the compass of a single suit.' But the creditor's choice goes further because the Uniform law does not forbid his seeking the older remedy or judgment, followed by judgment creditor's suit, or the rights that he may gain by virtue of an attachment.<sup>10</sup>

The preexisting remedies referred to in *Cortez v. Vogt* are proceedings "by way of creditors' bills to attach fraudulent conveyances only where the plaintiff had a specific lien on the property or had reduced his claim to judgment."<sup>11</sup> Thus, it is clear that the UFTA merely supplemented preexisting remedies by allowing for creditors to bring actions for protective relief, even where the claims have not yet matured, rather than requiring creditors ". . . to file and prosecute [multiple causes of] action to protect against the expiration of the limitations period."<sup>12</sup> Doing so would result in unnecessary effort and expense to all parties involved.<sup>13</sup>

The statute of limitations under the UFTA is four years long.<sup>14</sup> Common law causes of action and other remedies that existed before the UFTA was enacted, however, have a three year statute of limitations under *Code of Civil Procedure section 338 (d)* that does not begin to toll until after a final judgment on the underlying action, or longer if there is delayed discovery of the fraudulent conveyance.<sup>15</sup> Such causes of action may include fraud, mistake, or breach of contract.<sup>16</sup> In addition, provision 3439.09 *subdiv. (c)* of the UFTA provides for a seven year maximum statute of limitations under all causes of action.<sup>17</sup> This provision was intended to be an "over-arching, all-embracing maximum time period to attack a fraudulent transfer, no matter whether brought under the UFTA or otherwise."<sup>18</sup>

The UFTA's statutory language, legislative history, and relevant case law indicate that it is meant to supplement existing remedies, including those available to creditors at common law. There is no indication, however, that there are separate causes of action at common law in California, that must be filed separately from the UFTA or other state laws regulating fraudulent conveyances, in order to receive these remedies. Moreover, fraud, mistake, breach of contract, and other common law remedies that were available before enactment of the UFTA are already codified in California state statutes, are causes of action we have already considered, or are irrelevant to the provided facts. It is likely that common law is only relevant in that it provides for remedies under theories of equity when remedies might be unavailable under statutory law.

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<sup>10</sup> *Id.*, at 931.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, at 931-32.

<sup>13</sup> *Id.*, at 932.

<sup>14</sup> *Macedo v. Bosio*, 86 Cal. App. 4th 1044, 1048 (Cal. App. 2001).

<sup>15</sup> *Id.*, at 1050.

<sup>16</sup> See *Id.*, at 1049.

<sup>17</sup> *Id.*, at 1051 n. 4.

<sup>18</sup> *Id.*