

NJ's Uniform Fraudulent Transfer Act Gives Greater Protections to Creditors

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New Jersey's Uniform Fraudulent Transfer Act (UFTA) allows a creditor to seek property, even after a debtor has transferred it to another, if inadequate consideration is given or the transfer is made to defraud the creditor. *See* N.J.S.A. §25:2-20 et seq. Under UFTA, a creditor may move to challenge a transfer made with actual intent to hinder, delay or defraud within the applicable period of repose, which is four years from the date of the transfer or one year from its discovery, whichever is later. *See* N.J.S.A. §25:2-31(a).

Recently, the Appellate Division confronted a case in which a creditor challenged a debtor's transfer of real property to his sister for no consideration

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five years after the debtor executed the deed but three years after the deed was recorded. *See Nationwide Registry & Sec. v. Melhem* (N.J. Super. Ct. App. Div. Mar. 11, 2016). In the case, the Appellate Division held that the debtor did not transfer the property under the UFTA until the deed was recorded. This decision provides another example of New Jersey's version of UFTA, which gives creditors greater rights as to the period

of repose when compared with other states.

UFTA

UFTA sets different periods of repose depending on the type of fraudulent transfer alleged. Under the national version of UFTA drafted by the Uniform Law Commission, a cause of action for a transfer made with actual intent to hinder, delay or defraud any creditor of the debtor, regardless of whether

the creditor's claim arose before or after the transfer was made, extinguishes four years after the transfer was made, "or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." See Uniform Fraudulent Transfer Act §9. In 1988, New Jersey adopted this national version of the act.

The New Jersey Supreme Court addressed the period of repose in 2001 in *SASCO 1997 NI v. Zudkewich*, 166 N.J. 579 (2001). There, an individual conveyed his real property to his wife for one dollar in 1989, months after he personally guaranteed two large commercial loans. In 1994, the creditor issued a notice of default on the loans and obtained a judgment in 1997. In 1998, less than a year after obtaining the judgment, the creditor initiated an action seeking to set aside the real property sale under UFTA. As the creditor commenced the lawsuit more than four years after the conveyance, it argued that it did not conduct an asset search until it obtained the judgment in 1997, and that it therefore had filed within one year of discovery, which would be permissible under UFTA. The Supreme Court disagreed and held that a reasonable creditor would have conducted an asset search before initiating the action in order to

determine whether the litigation would result in a recoverable judgment, and that to allow otherwise "would encourage unnecessary litigation contrary to public policy." Nonetheless, the Supreme Court acknowledged the number of amicus curiae briefs it received from creditors claiming that the creditor's delay in conducting an asset search was standard industry practice. With that in mind, the court stated that its holding would only apply prospectively and, in the future, creditors could not seek refuge in UFTA's one-year discovery period if they did not conduct an asset search until after obtaining a judgment.

In 2002, the year after the *SASCO* decision, the New Jersey Legislature amended New Jersey's version of UFTA to remove "or could reasonably have been" from the statute. Now, the statute states that a cause of action for a transfer made with actual intent to hinder, delay or defraud must be brought "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was discovered by the claimant," which is how the statute reads today. N.J.S.A. §25:2-31(a) (emphasis added). This amendment expanded a creditor's reach in New Jersey beyond that found in the national version

of UFTA, as well as that of many other states, and lessened the creditor's duty to conduct a diligent search.

'Melhem'

In *Melhem*, a creditor was assigned a Nevada judgment against a debtor in 2010. At some point, the creditor learned that the debtor owned real property in New Jersey but had sold it to his sister for one dollar in 2009. The creditor docketed the judgment in New Jersey in 2014 and in the same year filed an action seeking to declare the 2009 sale void as a fraudulent transfer under UFTA. The defendants moved for summary judgment based on the four-year period of repose, arguing that the 2014 complaint was untimely to set aside a 2009 real property sale. The trial court agreed and granted the defendants' motion. In doing so, the trial court cited to a New Jersey statute holding that a deed transfers an interest in real property upon delivery. N.J.S.A. §46:3-13. On appeal, the Appellate Division reversed the trial court's holding based upon the fact that the deed conveying the real property was not recorded until 2011, less than four years before the action was commenced. It noted that, although N.J.S.A. §46:3-13 holds that a deed transfers the property interest upon delivery, UFTA

expressly states that a transfer of real property is made when “the transfer is so far perfected that a good-faith purchaser ... cannot acquire an interest in the asset that is superior to the interest of the transferee ...” (i.e., at the time of recording). N.J.S.A. §25:2-28. It further held that the trial court judge could not look outside UFTA to determine when the allegedly fraudulent transfer was made when UFTA has its own relevant provision regarding the same issue.

In its decision, the Appellate Division made two passing references to UFTA’s discovery rule, both of which indicated that the defendants had argued that the creditor may have discovered the 2009 sale of real property more than a year before it brought this action in 2014. The court further noted, however, that “[t]his issue is not raised on appeal” and did not address it further, nor did it state when the creditor had discovered the conveyance. Had the discovery rule been raised, the Appellate Division may have had the opportunity to address New Jersey’s far-reaching period of repose in the context of a recorded deed.

Under the national version of UFTA, the provision declaring

that real property is considered transferred only after the deed is recorded is a necessity. Without this provision, there is a risk of a debtor transferring real property and waiting four years to record the deed, at which point the creditor has, at most, one year to discover the recorded deed and bring an action. Even if the creditor does so, there remains the risk, albeit unlikely, that a court reaches a conclusion similar to *SASCO* and finds that the creditor had another method of discovering this conveyance and holds that the creditor missed its opportunity to bring an action because it could have discovered the transfer earlier. This remains the law in most states that have adopted UFTA. *See, e.g.*, Connecticut (C.G.S.A. §52-552j), Delaware (6 Del.C. §309) and Pennsylvania (12 Pa.C.S.A. §5109).

Of note, New York is one of the few states that has not adopted UFTA, and allows creditors the longer of six years from the date of the conveyance, or two years from when the creditor discovered or could with reasonable diligence have discovered it, to bring an action on a fraudulent conveyance. *See* CPLR 213(8). In New Jersey, however, a creditor has one year

from the creditor’s actual discovery of the allegedly fraudulent transfer of the property to bring its action, which lessens a creditor’s need to rely on N.J.S.A. §25:2-28 for transfers made with actual intent to hinder, delay or defraud.

The practical effect of the *Melhem* decision is the reminder that creditors in New Jersey attempting to void fraudulent conveyances have protections that creditors in other states do not, specifically the one-year actual discovery rule. Although the creditor in *Melhem* relied upon the requirement that a deed be recorded to constitute a transfer, it may have similarly relied on the extended period of repose had it been necessary. Additionally, creditors must remember that New Jersey is the anomaly in this regard, and a practice of reasonable diligence in locating a debtor’s assets will always serve the creditor’s best interest regardless of where it brings an action. Finally, this decision serves as a reminder for all practitioners that what constitutes a transfer under one statute does not necessarily constitute a transfer under another.