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PERSPECTIVE

Not a fraudulent transfer... even with intent to defraud?

By Geoffrey M. Gold

Until a recent appellate ruling, it appeared that, under California law, if a debtor made a transfer without receiving “reasonably equivalent value” in exchange, that transfer, by itself, could be — but need not be — a basis for finding there was “actual fraud” rendering the transfer voidable under the California Uniform Voidable Transfer Act (“UVTA”).

Not anymore. In *Universal Home Improvement, Inc., et al. v. Robertson, et al.*, 51 Cal. App. 5th 116 (June 24, 2020, modified July 21, 2020), the 1st District Court of Appeal held that, “[t]he ‘badges of fraud’ do not matter when value is given, such as satisfaction of antecedent debt.” As such, the court found the transfer was allowed under Civil Code Section 3432, which permits a debtor to “pay one creditor in preference to another.”

This ruling conflicts with California Civil Jury Instructions (“CACI”) 4200, 4201 and 4207, Civil Code Sections 3439.04 and 3439.08, and decisional authorities.

First, the UVTA at Civil Code Section 3439.04(a) provides: “A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor

made the transfer or incurred the obligation as follows: (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.” See also CACI 4200.

Section 3439.04(b) provides: “In determining actual

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intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following: (1) Whether the transfer or obligation was to an insider. (2) Whether the debtor retained possession or control of the property transferred after the transfer. (3) Whether the transfer or obligation was disclosed or concealed. (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit. (5) Whether the transfer was of substantially all the debtor’s assets. (6) Whether the debtor absconded. (7) Whether the debtor removed or concealed assets. (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation in-

curred. (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred. (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred. (11)

Whether the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.”

Second, CACI 4201 includes all of these factors and adds a catchall extra: “insert other appropriate factor.” It further provides: “Evidence of one or more factors does not automatically require a finding that [name of defendant] acted with the intent to hinder, delay, or defraud creditors. The presence of one or more of these factors is evidence that may suggest the intent to delay, hinder, or defraud.”

The above-quoted statement of the *Robertson* court says none of these factors is even relevant if the transfer was on account of an antecedent debt. Furthermore, notwithstanding Civil Code Section 3439.04(a),

if there is a finding of actual fraud by the transferor Section 3439.08(a) allows a good faith transferee a defense if the transferee can prove good faith and reasonable equivalent value. *Robertson* turns the “and” into an “or.”

Following the UVTA, CACI 4207, entitled “Affirmative Defense-Good Faith (Civ. Code § 3439.08(a), (f) (1)),” states verbatim: “[Name of defendant] is not liable to [name of plaintiff] [on the claim for actual fraud] if [name of defendant] proves both of the following: [Use one of the following two sets of elements:] [1. That [name of defendant] took the property from [name of debtor] in good faith; and 2. That [he/she/it] took the property for a reasonably equivalent value.] [or] [1. That [name of defendant] received the property from [name of third party], who had taken the property from [name of debtor] in good faith; and 2. That [name of third party] had taken the property for a reasonably equivalent value.]”

CACI 4207 defines “good faith” to mean “that [name of defendant/ third party] acted without actual fraudulent intent and that [he/she/ it] did not conspire with [name of debtor] or otherwise actively participate in any fraudulent scheme. If you decide that [name of debtor] had fraudulent intent and that [name of defendant/third party] knew it, then you may consider [his/her/ its] knowl-

edge in combination with other facts in deciding the question of [name of defendant/third party]'s good faith."

"The Legislative Committee comment to Civil Code section 3439.08, subdivision (a), provides that 'good faith,' within the meaning of the provision, 'means that the transferee acted without actual fraudulent intent and that he or she did not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor. The transferee's knowledge of the transferor's fraudulent intent may, in combination with other facts, be relevant on the issue of the transferee's good faith.'" *Annod Corp. v. Hamilton & Samuels*, 100 Cal. App. 4th 1286, 1299 (2002).

Despite Civil Code Section 3432, it is not correct that a debtor may always favor one creditor over another. Section 3432 provides: "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." However, case law makes clear that Section 3432 applies *only when there is no fraud by the transferor*. It has no application if there is an actual fraud voidable transfer under the UVTA. *Arnold v. Hadgis*, 102 Cal. App. 2d 88, 91 (1951) ("Defendant con-

cedes it is well settled that a debtor may prefer any one of his creditors over others provided he does not do so to defraud his creditors."); *Kemp v. Lynch*, 8 Cal. 2d 457, 460-61 (1937) (fraudulent intent "will vitiate" a transfer which otherwise appears to be a lawful preference transfer pursuant to Civil Code Section 3432). "The statutory right of a debtor to prefer one creditor to another is based upon the principle that in the absence of fraud the owner of property may do with it as he pleases." *United States Fidelity and Guaranty v. Postel*, 64 Cal. App. 2d 567, 572 (1944).

If there is a conflict between the UVTA and Section 3432, then the UVTA should govern. "If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones [citation]." *Fernandez v. California Dept. of Pesticide Regulation*, 164 Cal. App. 4th 1214, 1233 (2008). Section 3432 was adopted in 1872. The Uniform Fraudulent Transfer Act was adopted in 1986 and replaced by the UVTA in 2015. "The UVTA on its face applies to all transfers." *Chen v. Berenjian*, 33 Cal. App. 5th 811, 817 (2019) ("A creditor may set

aside a transfer under Civil Code section 3439.004(a) by showing actual fraud as defined in subdivision (a)(1)...")

Section 3432 should be interpreted in harmony with fraudulent transfer case law. In *Commons v. Schine*, 35 Cal. App. 3d 141, 144 (1973), the court held that a transfer could be fraudulent under the predecessor to the UVTA even though the defendant claimed the transfer was preferential pursuant to Section 3432. In that case, the insider defendant, Schine, "totally dominated" two corporations, one of which was bankrupt. He arranged to have the bankrupt corporation sell a portion of its property, then used the proceeds to repay loans made to it by the second corporation. As a result, Schine and the second corporation received payment in a greater percentage than the other general creditors of the bankrupt corporation, on whose behalf the plaintiff sued. The court held that Section 3432 did not protect Schine from the fraudulent transfer claim stated against him: "One who dominates and controls an insolvent corporation may not ... assert the general immunity of creditor preferences from attack. He may not use his power to secure for himself an advantage over other creditors of the corporation."

The foregoing authorities insist that actual fraud may, of itself, render a transfer voidable. No authority supports the broad proposition that a transfer on account of an antecedent debt necessarily moots all other inquiries and legalizes actual fraud.

The court in *Robertson* ignored the UVTA, CACI and longstanding, consistent precedent in finding that Section 3432 will defeat an "actual fraud" voidable transfer automatically, in every case, even where there is an actual fraudulent transfer by the transferor and there is a not a good faith transferee. That can't be right. Unless the California Supreme Court does something about it, *Robertson* may sanction fraud. ■

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