
Fraudulent Transfers and Preferences

Hon. James D. Gregg (Moderator)

Bankruptcy Court (W.D. Mich.); Grand Rapids

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HB	JULY	AUG	SEPT	OCT	NOV	DEC	2009 TOTALS
Initial Notices Sent	1746	1862	2431				6039
Initial Incoming Calls	439	634	633				1706
All incoming calls	530	906	957				2393
Meeting Information							0
# Requested	325	491	463				1279
# Declined	50	45	27				122
#Working w/Client	46	94	127				267
Meeting Scheduled	0	0	0				0
Meeting Completed	0	0	1				1
% of Borrowers that opt-in	21.25%	31.42%	24.27%	#DIV/0!	#DIV/0!		25.60%
Financial Packages Sent	344	491	495				1330
Follow up Phone Calls Made	19	439	249				707
No Contact Letters Mailed	0	192	135				327
Financial Packages Rec'd	18	184	181				383
Response Rate to Mailing	5.23%	37.47%	36.57%	#DIV/0!	#DIV/0!		28.80%

Results							
Workouts Approved							
HAMP (mod)	1	17	22				40
Forbearance	1	2	4				7
Repayment Plan		6	11				
Partial Claim							
Homesaver Advance							
Short Sale							
Deed-in-Lieu							

MI HB 4453 REPORT

10/25/2009

Reinstatement			18	21					39
Loss Mitigation By Client			2						
Investor Close	1		7	1					9
Charge Off	1		3	10					14
Bankruptcy Filed			2	1					3
Payoff			1						1
Property Redeemed			1						1
Total Approved	4		59	70					114
Workouts Denied									
Borrower Ineligible					1				1
Borrower Non-Responsive									
Borrower Unwilling									
Client Unwilling									
Package never returned					30				30
Total Denied					31				31

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Introduction

The purpose of these materials is to consider and discuss several practical issues relating to fraudulent transfers and preferences that consumer bankruptcy practitioners are faced with on a regular basis. These include advising the client about these issues when gathering information for preparation of their bankruptcy Petition and Schedules, possibly exempting and recovering preference payment(s) for the Debtor, and advising the non-debtor client when faced with a demand for return of an alleged preference payment or fraudulent transfer. Addressing these issues at the outset will better prepare your client and will likely obtain a better (and more realistic) result for them, as well.

I. Preference and Fraudulent transfer issues and preparation of Petition and Schedules

A. Statement of Financial Affairs, Par. 3.

1. Payments exceeding \$600.00 within 90 days of Petition Date (primarily consumer debt).
2. Payments exceeding \$5,475.00 within 90 days of Petition Date (primarily non-consumer debt)
3. Payments to Insiders within 1 year of Petition Date.

B. Statement of Financial Affairs, Par. 4b.

1. Garnishments
2. Levies or seizures of assets

C. Statement of Financial Affairs, Par. 5.

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1. Repossessions.
2. Foreclosures/Deeds in lieu of foreclosure.

D. Statement of Financial Affairs, Par. 6.

1. Assignment for the Benefit of Creditors.
2. Receiverships.

E. Statement of Financial Affairs, Par. 7.

1. Gifts
2. Charitable contributions.

F. Statement of Financial Affairs, Par. 10.

1. Transfers within two years of commencement of case.
2. Transfers of assets into Trusts.

II. Exemption of funds obtained by creditors through pre-petition collection/garnishment under Section 522(g), (h), (i) and (j).

A. Under (g), Exempt to extent Debtor would have been able to exempt the property under Section 522(b), but for the transfer, if

1. Transfer was not a voluntary transfer, and
2. Debtor did not conceal the property, or
3. Debtor could have avoided transfer under 522(f)(1)(B)

B. Under (h), Debtor may avoid transfer, or avoid a setoff, to extent Debtor could have exempted it under (g)(1), if Trustee had avoided such transfer if:

1. Transfer was avoidable or recoverable by the Trustee, and
2. Trustee does not attempt to avoid the transfer.

C. Under (i), if Debtor avoids transfer or recovers setoff under (f) or (h),

1. May recover in same manner, and subject to same limitations prescribed by Section 550, as if Trustee had avoided transfer, and may exempt such property under Section (b).
2. Avoided transfer and/or recovered property may be preserved for the benefit of the Debtor to extent that Debtor may exempt such property under 522(g) or 522(i)(1).

D. Under (j), Debtor may exempt property under (g) or (i) only to extent that Debtor has exempted less property in value of such kind than that to which the Debtor is entitled under subsection (b) of this section. □

III. Defending demand for return of alleged preference payment.

A. Are elements of 547(b) established?

1. Is there a transfer of an interest of the debtor in property?
2. Is transfer made to or for the benefit of the debtor?

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3. Was the transfer made for or on account of an antecedent debt owed by the debtor before the transfer was made?
4. Was the transfer made while the debtor was insolvent?
5. Was the transfer made
 - a. On or within 90 days before the date of the filing of the Petition; or
 - b. between 90 days and one year before the date of the filing of the petition, is such creditor at the time of the transfer was an insider?
6. Did the transfer enable the creditor to receive more than it would have received if:
 - a. the case were a case under chapter 7,
 - b. the transfer had not been made, and
 - c. such creditor had received payment of such debt to the extent provided by the provisions of the Code.

B. Defenses to preference claim.

1. Contemporaneous exchange. Section 547(c)(1).
 - a. COD payments

- b. Payments intended to be contemporaneous which are in fact contemporaneous.
2. Ordinary Course of Business. Section 547(c)(2).
- a. Transfer must be in payment of a debt incurred by debtor in the ordinary course of business or financial affairs of debtor and transferee, and such transfer was
 - b. Made in ordinary course of business or financial affairs of debtor and transferee; or
 - c. Made according to ordinary business terms.
3. Subsequent New Value. Section 547(c)(4).
- a. New value must be given after alleged preferential transfer was made;
 - b. cannot be secured by an otherwise unavoidable security interest; and
 - c. on account of the new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

§ 548. Fraudulent transfers and obligations

(a) (1) The trustee *may avoid any transfer of an interest of the debtor in property*, or any obligation incurred by the debtor, that was *made or incurred on or within 2 years before the date of the filing of the petition*, if the debtor voluntarily or involuntarily

(A) *made such transfer* or incurred such obligation *with actual intent to hinder, delay, or defraud* any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B) (i) *received less than a reasonably equivalent value* in exchange for such transfer or obligation; and

(ii)(I) *was insolvent* on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, *debts that would be beyond the debtor's ability to pay* as such debts matured; or

(IV) *made such transfer to or for the benefit of an insider*, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) *A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer* covered under paragraph (1)(B) in any case in which

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) *The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.*

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d) (1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section □

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(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment;

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution

(A) is made by a natural person; and

(B) consists of□

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term □qualified religious or charitable entity or organization□ means□

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

(e) (1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if□

(A) such transfer was made to a self-settled trust or similar device;

(B) such transfer was by the debtor;

(C) the debtor is a beneficiary of such trust or similar device; and

(D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by□

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c (a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78l and 78o (d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b) (1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is avoidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

UNIFORM FRAUDULENT TRANSFER ACT

Act 434 of 1998

566.32 Insolvency.

Sec. 2.

(1) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(2) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.

(3) A partnership is insolvent under subsection (1) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess

of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(4) As used in this section:

(a) Assets do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this act.

(b) Debts do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

566.33 Transfer for value.

Sec. 3.

(1) 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. Value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) For the purposes of sections 4(a)(2) and 5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

566.34 Transfer with intent to defraud.

Sec. 4.

(1) A transfer made or obligation incurred by a debtor is fraudulent 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 in either of the following:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(2) In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

- (c) The transfer or obligation was disclosed or concealed.
- (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (e) The transfer was of substantially all of the debtor's assets.
- (f) The debtor absconded.
- (g) The debtor removed or concealed assets.
- (h) 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 incurred.
- (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
- (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

566.35 Transfer by debtor as fraud.

Sec. 5.

- (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the

transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

566.36 Completion of transfer; perfection.

Sec. 6.

(1) A transfer is made under this act when 1 of the following occurs:

(a) With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee.

(b) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this act that is superior to the interest of the transferee.

(2) If applicable law permits the transfer to be perfected as provided in subsection (1) and the transfer is not so perfected before the commencement of an action for relief under this act, the transfer is considered made immediately before the commencement of the action.

(3) If applicable law does not permit the transfer to be perfected as provided in subsection (1), the transfer is made when it becomes effective between the debtor and the transferee.

(4) A transfer is not made under this act until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred under this act if 1 of the following occurs:

(a) If oral, when it becomes effective between the parties.

(b) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

566.37 Action for relief against transfer or obligation; right of creditor to execution on asset or proceeds.

Sec. 7.

(1) In an action for relief against a transfer or obligation under this act, a creditor, subject to the limitations in section 8, may obtain 1 or more of the following:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

(b) An attachment against the asset transferred or other property of the transferee to the extent authorized under section 4001 of the revised judicature act of 1961, 1961 PA 236, MCL 600.4001, and applicable court rules.

(c) Subject to applicable principles of equity and in accordance with applicable court rules and statutes, 1 or more of the following:

(i) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property.

(ii) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee.

(iii) Any other relief the court determines appropriate.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

566.38 Transfer or obligation not voidable; recovery of judgment; rights of good-faith transferee or obligee.

Sec. 8.

(1) A transfer or obligation is not voidable under section 4(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under section 7(1)(a), the creditor may recover a judgment for the value of the asset transferred, as adjusted under subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against either of the following:

(a) The first transferee of the asset or the person for whose benefit the transfer was made.

(b) Any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

(3) If the judgment under subsection (2) is based upon the value of the asset transferred, the judgment shall be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(4) Notwithstanding the voidability of a transfer or an obligation under this act, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to 1 or more of the following:

(a) A lien on or a right to retain any interest in the asset transferred.

(b) Enforcement of any obligation incurred.

(c) A reduction in the amount of the liability on the judgment.

(5) A transfer is not voidable under section 4(1)(b) or 5 if the transfer results from either of the following:

(a) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.

(b) Enforcement of a security interest in compliance with article 9 of the uniform commercial code, 1962 PA 174, MCL 440.9101 to 440.9708.

(6) A transfer is not voidable under section 5(2) if 1 or more of the following occur:

(a) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien.

(b) If made in the ordinary course of business or financial affairs of the debtor and the insider.

(c) 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.

566.39 Cause of action; extinguishment.

Sec. 9.

A cause of action with respect to a fraudulent transfer or obligation under this act is extinguished unless action is brought under 1 or more of the following:

(a) Sections 4(1)(a) and (b) and 5(1), within the time period specified in sections 5813 and 5855 of the revised judicature act of 1961, 1961 PA 236, MCL 600.5813 and 600.5855.

(b) Section 5(2), within 1 year after the transfer was made or the obligation was incurred.

566.40 Supplemental principles of law and equity.

Sec. 10.

Unless in conflict with the provisions of this act, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement the provisions of this act.

566.41 Application and construction of act.

Sec. 11.

This act shall be applied and construed to effectuate its general purpose to make uniform the law of fraudulent conveyance among the states enacting it.