LEGAL AND ETHICS: THE LETTER AND SPIRIT OF THE LAW
UNIFORM FRAUDULENT TRANSFER ACT (UFTA): RECOUPING FRAUD LOSSES

The Uniform Fraudulent Transfer Act (UFTA) is a robust and effective legal mechanism, useful in recouping fraud-related losses. This presentation introduces fraud professionals to the general purpose and function of the UFTA. Topics addressed in this session include the background of the UFTA, its structure and elements, traditional applications, practical applications in fraud remediation cases, and actual case histories.

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Mr. Wall was awarded the Deloitte & Touche Accounting Scholars Award, as well as the CalCPA Inland Empire Chapter Young & Emerging Professionals Student Scholarship, in addition to the American Jurisprudence and Corpus Juris Secundum awards for excellence in the study of law.

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**Overview**
The Uniform Fraudulent Transfer Act (UFTA) is a robust and effective legal mechanism, useful in recoupment of fraud losses. Often the principal culprits behind a fraud scheme are “judgment-proof,” and have disposed of the original cache of illicit funds by moving the money offshore or otherwise secreting it. Conventional wisdom indicates that once the specific stolen property has been whisked away, civil litigation is futile. The UFTA, however, may be used to enable the seizure of the separate personal property and real estate of various family members, assistants, and associates who become instruments of the scheme, often without understanding their own involvement.

**Introduction**
This presentation introduces fraud professionals to the general purpose and function of the Uniform Fraudulent Transfer Act. The UFTA is an effective and robust legal mechanism generally used in commercial litigation to defeat defendants’ attempts to transfer and secrete assets. The Act has important applications in fraud remediation cases, although it is a widely misunderstood law and is the subject of several popular myths.

**History**
The UFTA arises from old English law, specifically Twyne’s Case (3 Coke 80b), which was decided in 1601 and interpreted the Statute of 13 Elizabeth. The law provided a remedy for creditors in situations where debtors deliberately transferred property to avoid debts. This legal doctrine was recognized as common law in the United States from the time of the founding of our judicial system.

The law was codified in a model form in 1918, and was adopted by 26 states. The language was updated in 1979,
and the UFTA has been adopted by 43 states and the District of Columbia.

**Model Language**

The most important sections of the model Act (drafted by the National Conference of Commissioners of Uniform State Laws) state the following:

### Section 4. Transfers Fraudulent as to Present and Future Creditors.

(a) 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:

1. 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:
   1. 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; or
   2. 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.

(b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:

1. the transfer or obligation was to an insider;
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 was 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 asset 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 transferred the assets to an insider of the debtor.

Section 5.
Transfers Fraudulent as to Present Creditors.
(a) 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.
(b) 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.
Section 7. Remedies of Creditors.
(a) 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) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by;
(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure, (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; or
(iii) any other relief the circumstances may require.
(b) 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.

Section 8. Defenses, Liability, and Protection of Transferee.
(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Section 7(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:
(1) the first transferee of the asset or the person for whose benefit the transfer was made; or
(2) any subsequent transferee other than a good-faith transferee or obligee who took for value or from any subsequent transferee or obligee.
(c) If the judgment under subsection (b) is based upon the value of the asset transferred, the judgment must 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.

Section 9.
Extinguishment of Claim [Statute of Limitations]
A [claim for relief] [cause of action] with respect to a fraudulent transfer or obligation under this [Act] is extinguished unless action is brought:
(a) under Section 4(a)(1), within 4 years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;
(b) under Section 4(a)(2) or 5(a), within 4 years after the transfer was made or the obligation was incurred; or
(c) under Section 5(b), within one year after the transfer was made or the obligation was incurred.

Considerations in Fraud Remediation Cases
Most professionals are acquainted with the designations of “judgment-creditor” and “judgment-debtor” in regard to enforcement of judgment law. Indeed a plaintiff’s claim is vastly strengthened upon entry of a civil judgment against the perpetrator. However it is crucial to understand that it is not necessary for a fraud victim to await entry of judgment before seeking protection and remediation under the UFTA.

A creditor is a person holding a claim, matured or unmatured, liquidated or unliquidated. The victim of a fraud scheme or embezzlement is a creditor within the meaning of the UFTA. A person who is obligated to return money or property to its rightful owner is considered a
debtor. These designations are not often used in fraud-related litigation, and accordingly those involved in the process are not indoctrinated in the application of typical creditors’ remedies in fraud-related litigation.

**Popular Myths of Fraudulent Transfer Theory**

*Myth #1: The plaintiff has to prove all of the elements of fraud. FALSE.*

At common law there are nine distinct elements of fraud: (1) a representation, (2) falsity of the representation, (3) materiality of the representation, (4) speaker’s knowledge of the falsity of the representation, (5) the speaker’s intent that the false statement should be relied upon, (6) the hearer’s ignorance of the falsity of the representation, (7) the hearer’s reliance on the representation, (8) the hearer’s reliance on the representation, and (9) the hearer’s proximate injury. Fraud is often difficult to prove, and open to numerous areas of tactical defense.

Although the name is misleading, to prove a claim of fraudulent transfer, the plaintiff needs only to prove the elements contained in the explicit language of the UFTA.

*Myth #2: The plaintiff has to prove intent. FALSE.*

The defense attorney’s rallying cry is always the same: “You’ll never prove intent.” My response: “I don’t have to.” The UFTA provides several methods of proving that a fraudulent transfer occurred, without ever having to prove that anyone had any bad intent.

Section 4(a)(1) states that a transfer is fraudulent if it is made with the actual intent to hinder, delay, or defraud a creditor. However the act provides several other situations in which a transfer may be deemed fraudulent.
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regardless of the intent or understanding of the parties involved in the transaction.

Section 4(a)(2)(i) provides that a transfer is fraudulent if it is made without receiving a reasonably equivalent value in exchange for the transfer at a time when the debtor was engaged in a business or a transaction for which the debtor’s remaining assets were unreasonably small.

Section 4(a)(2)(ii) provides that a transfer is fraudulent if it is made without receiving a reasonably equivalent value in exchange for the transfer, and the debtor believed or reasonably should have believed that he or she would incur debts beyond his or her ability to pay as they became due.

Section 5(a) provides that a transfer is fraudulent if it is made without receiving a reasonably equivalent value in exchange for the transfer and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer.

And finally Section 5(b) provides that a transfer is fraudulent 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.

The UFTA provides four separate and distinct situations that enable a plaintiff to set aside a transfer, without ever having to prove the intent of the parties. These are situations that speak for themselves, and are viewed as fraudulent on their face, and without inquiry into the minds of the participants.
Myth #3: The only remedy under the UFTA is the return of the specific transferred property. FALSE.

Section 8(b) provides that a creditor may recover judgment for the value of the asset transferred or the amount necessary to satisfy the creditor’s claim, whichever is less. The judgment may be entered against the first transferee of the asset or any subsequent transferee.

Once the creditor has obtained a money judgment against the transferee, the creditor has the power to levy execution on any non-exempt assets of the transferee. This aspect renders the UFTA a powerful and persuasive tool in the plaintiff’s arsenal.

The perpetrator often uses various intermediaries to convey money and property out of the area where the fraud occurred, and often out of the country. Once word of an investigation trickles out, the suspect may also liquidate other assets to move them out of the court’s jurisdiction, or to disguise the true ownership of unmovable assets. The initial recipients of these transfers are often family members, romantic associates, business associates, and employees of the defendant.

Hypothetical Fact Pattern
A typical fact pattern might look like this: Defendant David is suspected of procuring $500,000 of designer garments through means of fraud. Inquiries are under way, but before any suspicion is cast upon David, he cashes in $250,000 of bearer bonds he has accumulated from ordinary income over a period of years. No longer maintaining any accounts in his own name, David deposits the $250,000 cash into his brother Bill’s account. David assures his brother that the $250,000 did not come from any ill-gotten source.
Promptly thereafter Bill wire transfers that $250,000 to a recipient bank in Nevis.

David disappears. Bill has a wife, two children, and $600,000 in equity in his home. Bill has now opened himself up to a lawsuit under the UFTA. Depending on the jurisdiction, it is likely that these facts would be sufficient to overcome a summary judgment motion, and require trial of the matter. The outcome would not be guaranteed, but it would be possible to obtain a money judgment against Bill in the amount of $250,000, and to place a lien on Bill’s house.

**Case Histories**

The live presentation will detail two actual case histories involving fraud cases that generated a number of claims under the UFTA.

**Conclusion**

A plaintiff’s attorney who is able to skillfully apply this leverage is capable of getting people’s attention and settling cases. The UFTA is not practical or applicable in all situations, but the purpose of this discussion is to raise awareness of the special uses of this powerful tool.