

# THE UNIFORM FRAUDULENT CONVEYANCES ACT

MYRON J. NADLER\*

The recent enactment of The Uniform Fraudulent Conveyances Act in Ohio is the first important statutory change in over 60 years in the law of this state regarding transfers of property in fraud of creditors.<sup>1</sup> The purpose of the Uniform Act is to clarify and make uniform the law on this subject, and to substitute clear and certain rules for much of the confusion and uncertainty that has characterized this area of jurisprudence.<sup>2</sup> The adoption of the Uniform Act will be welcomed by lawyers and the courts alike as Ohio has not escaped its share of this confusion and uncertainty. As the Commissioners on Uniform State Laws have found, "There are few legal subjects where there is a greater lack of exact definition and clear understanding of boundaries."

The Uniform Act does not revolutionize the law on this subject, but is more in the nature of a restatement of existing doctrine. It does, however, bring several important changes to existing Ohio law. It also specifically repeals Revised Code section 1335.02 originally enacted in 1810 which has been the principal statute on this subject.<sup>3</sup> Since the limitations of space will not permit a discussion of each section of the Uniform Act, an examination of the more important changes in existing Ohio law will suffice.

## UNLIQUIDATED TORT CLAIMS

One of the more important changes created by the Uniform Act stems from the definition of the term "creditor" in Ohio Revised Code section 1336.01. A "creditor" is defined as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." This definition includes a creditor holding an unliquidated tort claim.

Under Ohio law prior to the adoption of the Uniform Act, it was uniformly held that the holder of an unliquidated tort claim was not sufficiently qualified as a creditor to bring an action to set aside a conveyance of property which would hinder, delay or defraud him

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\* Of the firm of Nadler & Nadler, Youngstown, Ohio.

<sup>1</sup> Enacted as Ohio Rev. Code § 1336.01 to 1336.12, inclusive, effective October 23, 1961.

<sup>2</sup> Prefatory note, UFCA, National Conference of Commissioners on Uniform Laws.

<sup>3</sup> Ohio Rev. Code §§ 1313.56 to 1313.59, inclusive, authorizing the appointment of a receiver to recover preferences and fraudulent conveyances for the benefit of all creditors of a debtor remain in full force and effect.

in the collection of his claim until it had been reduced to judgment.<sup>4</sup> This refusal by the courts to recognize as a creditor a person having a claim for injuries in an automobile accident, for example, was apparently based on the idea that such claims were usually too uncertain both as to liability and amount to entitle the holder to an actionable remedy.<sup>5</sup> The fallacy in this kind of generalization is obvious. In many instances such claims are more certain in these respects than the ordinary claim based on contract.

Under prior law, the result often was that by the time the tort claimant recovered a judgment against the debtor-grantor of the property, a further conveyance had been made by the fraudulent grantee to a bona fide purchaser for value, thus cutting off the creditor's right of action to proceed against the property. Even if the property had not been reconveyed, a further inequity made it difficult for the tort claimant to recover. Since he was not a creditor until judgment was rendered and this occurred after the conveyance, he was required to prove that the grantor actually intended by the transfer to defraud creditors of his class before the conveyance would be set aside. The significance of the change in the status of the tort claimant created by the Uniform Act lies in the remedies now available to him.

#### REMEDIES UNDER THE UNIFORM ACT

The remedies afforded by the Uniform Act are set out in Revised Code sections 1336.09 and 1336.10, which differentiate between a creditor's claim which is matured or one which is unmatured. The holder of a matured claim may, under section 1336.09, either bring an action to set aside the conveyance or have the obligation annulled, or may disregard the conveyance and attach or levy upon the property directly. This provision merely codifies the dual remedy formerly available under Ohio practice.<sup>6</sup> It does, however, eliminate the equity requirement that the claim be reduced to judgment or that a lien be obtained before suit is filed.<sup>7</sup> Now all that is required is that the claim be matured, thus extending the protection of the Act to a simple creditor.

It should be noted that under this provision, a purchaser of the property from the fraudulent grantor who buys without knowledge of the fraud at the time of the purchase, and who pays a fair con-

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<sup>4</sup> Pennell v. Walker, 68 Ohio App. 533, 23 Ohio Ops. 263, 34 Ohio L. Abs. 151 (1941); Wheeler v. Kuntsbeck, 31 Ohio App. 338, 166 N.E. 913 (1928); Penick v. Penick, 5 Ohio App. 416, 26 OCC NS 225 (1916).

<sup>5</sup> Kushmeder v. Overton, 26 Ohio App. 74, 159 N.E. 351 (1926).

<sup>6</sup> 25 Ohio Jur. 2d, § 122, Fraudulent Conveyances.

<sup>7</sup> Webb v. Brown, 3 Ohio St. 246 (1854); Swift v. Holdridge, 10 Ohio 230 (1840).

sideration for the property is protected, and an action cannot be maintained against him for recovery of the property. Even a purchaser without actual fraudulent intent who pays less than a fair consideration for the conveyance or obligation may retain it as security for repayment to the extent of the consideration actually paid.

In the case of a creditor holding an unmatured claim, Revised Code section 1336.10 permits him to bring an action against any person against whom he could have proceeded had his claim matured, and in such cases, the court may do the following:

- (A) Restrain the defendant from disposing of his property;
- (B) Appoint a receiver to take charge of the property;
- (C) Set aside the conveyance or annul the obligation;
- (D) Make any order which the circumstances of the case may require.

Under this provision, the unliquidated tort claimant may secure immediate relief which was formerly unavailable to him. The remedy, of course, rests entirely with the discretion of the court in each case.

#### PRESUMPTIONS OF FRAUD

One reason for much of the confusion in the law on this subject is that the Statute of 13 Elizabeth,<sup>8</sup> the original English prohibition against fraudulent conveyances, condemned such conveyances only when made with actual intent to defraud creditors. However, there are many conveyances which defeat the rights of creditors where an actual intent to defraud on the part of the debtor-grantor does not exist, or is extremely difficult to prove. To assist in striking down these conveyances, the courts over the years developed presumptions of law as to intent, holding intent to be presumed when a transfer was made under certain factual situations. The effect given these presumptions by the courts varied from merely rebuttable to conclusive presumptions that could not be rebutted.

The Uniform Act codifies some of the more important of these presumptions or "badges of fraud" as they came to be called, and eliminates all confusion regarding the matter by providing that they shall all be considered conclusively fraudulent. In the case of a voluntary conveyance, one made by a debtor while insolvent without a fair consideration, the Uniform Act makes no change in Ohio law.<sup>9</sup>

As to sections 1336.05 and 1336.06 of the Uniform Act, the pronouncement that these "badges of fraud" are deemed conclusively fraudulent as to all creditors does bring a change. These sections

<sup>8</sup> Stat. 13 Eliz. c. 5 (1571).

<sup>9</sup> Ohio Rev. Code § 1336.04.

strike down as fraudulent every conveyance made and every obligation incurred without fair consideration when the person making or incurring it is engaged in or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonable small capital,<sup>10</sup> and every conveyance made and obligation incurred without fair consideration when the person making the conveyance or entering into the obligation believes that he will incur debts beyond his ability to pay as they mature.<sup>11</sup>

#### “EXISTING” AND “SUBSEQUENT” CREDITORS

The Uniform Act further changes the rule in Ohio regarding the kind of proof required of certain creditors to set aside a conveyance under the above-mentioned “badges of fraud” and under Revised Code section 1336.07 which requires fraudulent conveyances made with an actual intent to defraud as opposed to intent presumed in law. Formerly, a “subsequent” creditor, one who became a creditor after the conveyance was made, could not rely on the presumptions available to “existing” creditors, those who were creditors at the time of the conveyance. A “subsequent” creditor was required to prove that by the transfer the grantor actually intended to defeat creditors of his class.<sup>12</sup> This was true in Ohio even where the basis for voiding the conveyances was the actual fraudulent intent of the grantor.

This inequitable double standard of proof is eliminated by the Uniform Act which recognizes that the injury to the “subsequent” creditor may be no less real merely because his claim arose after the transfer. Now, both “subsequent” and “existing” creditors need only prove that the conveyance was made under the circumstances described in sections 1336.04, 1336.05 or 1336.06, or if actual intent to defraud was present, that such intent existed as to creditors generally.

#### PARTNERSHIP PROPERTY

The treatment of partnership property by the Uniform Act is also new in Ohio. Formerly, a conveyance by a partnership of partnership assets to a partner with a promise by him to assume the firm's debts was not improper.<sup>13</sup> Neither was a conveyance of partnership assets to pay the individual debts of the partners considered a fraudulent

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<sup>10</sup> Ohio Rev. Code § 1336.05.

<sup>11</sup> Ohio Rev. Code § 1336.06.

<sup>12</sup> Pfisterer v. Toledo, B. G. & S. Traction Co., 89 Ohio St. 172, 106 N.E. 18 (1913); Evans v. Lewis, 30 Ohio St. 11 (1876).

<sup>13</sup> Pfirman v. Koch, 13 Ohio Dec. Reprint 660 (1871); Miller v. Estill, 5 Ohio St. 508 (1856).

conveyance in Ohio even though the firm was insolvent at the time of the transfer, provided there was no actual intent to defraud.<sup>14</sup>

Revised Code section 1336.08 holds both of the above conveyances fraudulent as to partnership creditors if made while the firm was insolvent regardless of whether there was an actual intent to defraud. The position taken by the Uniform Act is more easily justified under the entity theory of partnership law, also adopted by the Uniform Partnership Act in effect in Ohio, which holds the firm to be a separate legal person apart from its individual partners. This change coordinates the law of fraudulent conveyances with the changes that have been made in Ohio partnership law through the enactment of the UPA.

A further indication that the Uniform Act is not intended as a revolutionary change of the law is found in Ohio Revised Code section 1336.11 which preserves existing law in the state to treat with any cases not provided for under the Act. The Act is not intended to furnish an exclusive course of procedure, but rather an additional or supplemental basis for the protection of creditor's interests. As previously indicated, Ohio Revised Code section 1335.02 has been repealed by the Uniform Act, but common law remains as an alternative procedure for creditors to follow in voiding fraudulent conveyances. The Uniform Act is thus a valuable addition to the arsenal of remedies available to creditors in Ohio.

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<sup>14</sup> Sigler v. Knox County Bank, 8 Ohio St. 511 (1858).