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Tort Claimant May Seek to Set Aside Fraudulent Conveyance Prior to Reducing His Claim to Judgment.

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twenty years, liable for the wrong committed, the court opened the door to retaliation from or friction between a foreign government and the United States? It would seem that the above questions must be answered in the negative, and in support thereof one should recognize each of the factors considered by the court in *Hellenic Lines Limited.*

The protection of the rights of seamen, as well as the rights of competing American shipowners and resident alien shipowners, demand the result reached by the court in *Hellenic Lines Limited.* Shipowners who are resident aliens and shipowners who are United States citizens should be subject to the same liabilities for injuries suffered by their employees on their vessels, particularly when the vessels are at United States piers. If a United States shipowner is liable under the Jones Act to a foreign seaman serving on a foreign registered vessel injured in our territorial waters, a permanent resident alien should also be liable.

Raul Garcia

FRAUDULENT CONVEYANCE—TORT CLAIMANT MAY SEEK TO SET ASIDE FRAUDULENT CONVEYANCE PRIOR TO REDUCING HIS CLAIM TO JUDGMENT. *Hollins v. Rapid Transit Lines, Inc.,* 440 S.W.2d 57 (Tex. Sup. 1969).

Hollins, joined by her husband, filed a personal injury suit against Rapid Transit Lines, Inc. claiming that she had been injured while a passenger on defendant's bus. Plaintiff then amended her petition to include a cause of action alleging that defendant, in anticipation of being held liable, fraudulently conveyed substantially all of its assets to another transit company after the accident. The trial court severed and granted summary judgment for defendant on the fraudulent conveyance action on the ground that a plaintiff's tort suit must be reduced to judgment prior to his seeking to set aside the alleged fraudulent transfer. The granting of summary judgment for the defendant was affirmed by the court of civil appeals,[1] and the Texas Supreme Court granted writ of error. Held—*Reversed and cause ordered reinstated.* A tort claimant may seek to set aside fraudulent conveyance prior to reducing his claim to judgment.

The action to set aside a conveyance by a debtor in fraud of his creditors has long been recognized as a valid restriction on an individual's right to dispose of his property in the manner in which he desires.[2]

1 Hollins v. Rapid Transit Lines, Inc., 430 S.W.2d 57 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ granted).

2 37 AM. JUR. 2d, *Fraudulent Conveyances* § 1 (1968).

This right is based on the theory that since the creditor has a claim against his debtor, he has a right to have the claim satisfied out of his debtor's property.[3] Therefore, any transfer with the intent to hinder, delay, or defraud the creditor is inequitable and should not be allowed.[4] Every state allows some form of fraudulent conveyance action, and most, including Texas, have statutes based on the early English common law fraud statutes of 50 Edw. III, c. 6 (1376) and 13 Eliz. I, c. 5 (1570).[5] Approximately twenty states have adopted the Uniform Fraudulent Conveyance Statute which specifically allows the holder of an unliquidated claim to maintain an action under the statute.[6] In 1967, Texas chose not to adopt the uniform statute but revised and reenacted articles 3996 through 3999 into chapter 24 of the Texas Business and Commerce Code. Section 24.02, the article upon which the instant case is based, is essentially a reenactment of article 3996. In order to have a conveyance set aside as a fraud on a creditor, it must be proved that the debtor transferred certain property with the intent to defraud his creditors,[7] that the creditors were or will be hindered, delayed or defrauded[8] and that the transferee had knowledge of the debtor's intent.[9] A bona fide purchaser for value without knowledge of the fraud is protected under the statute.[10] Badges or circumstances which are evidence of fraud include secrecy,[11] failure to record,[12] close relationship of parties,[13] pendency of suits against the grantor,[14] transfer without delivery,[15] and conveyances between husband and wife[16] or other closely related members of the family.[17] Lack of consideration in a voluntary conveyance is covered by section 24.03.[18]

The defrauded creditor must resort to court action before he will be

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3 Ocklawaha River Farms Co. v. Young, 74 So. 644 (Fla. 1917).

4 *Id.*

5 37 AM. JUR. 2d, *Fraudulent Conveyances* § 3 (1968).

6 REPORT OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1918; 37 AM. JUR. 2d, *Fraudulent Conveyances* § 3 (1968).

7 Cates v. Clark, 24 S.W.2d 450 (Tex. Civ. App.—Eastland 1930, writ ref'd).

8 Rivera v. White, 94 Tex. 538, 63 S.W. 125 (1901); Couger v. Costello, 10 S.W.2d 746 (Tex. Civ. App.—Eastland 1928, no writ).

9 Blum v. McBride, 69 Tex. 60, 5 S.W. 641 (1887); Belt v. Texas Co., 204 S.W.2d 653 (Tex. Civ. App.—Amarillo 1947, writ ref'd n.r.e.); Texas Life Insurance Co. v. Goldberg, 184 S.W.2d 333 (Tex. Civ. App.—Waco 1944, no writ).

10 Hamm v. Drew, 83 Tex. 77, 18 S.W. 434 (1892); Snyder v. Roberts, 13 Tex. 598 (1855).

11 Edmundson v. Silliman, 50 Tex. 106 (1878).

12 Matula v. Lane, 56 S.W. 112 (Tex. Civ. App. 1900, no writ).

13 Reynolds v. Lansford, 16 Tex. 287 (1856); Tinsley v. Corbett, 66 S.W. 910 (Tex. Civ. App. 1902, writ ref'd).

14 Briscoe v. Bronaugh, 1 Tex. 326 (1846); Texas Sand Co. v. Shield, 381 S.W.2d 48 (Tex. Sup. 1964).

15 Boltz v. Engelke, 43 S.W. 47 (Tex. Civ. App. 1897, no writ).

16 Byrd v. Taylor, 40 S.W.2d 942 (Tex. Civ. App.—Texarkana 1931, writ dism'd).

17 Howard v. Bolin Warehouses, Inc., 422 S.W.2d 489 (Tex. Civ. App.—Texarkana 1967, no writ).

18 Snow v. Harding, 180 S.W.2d 965 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.).

entitled to recover property fraudulently conveyed[19] because the transfer is not void, but only voidable at the option of the person protected by the statute.[20] Depending on the circumstances, he may elect between two remedies.[21] One holding a judgment lien against a debtor may cause execution to be issued under the judgment and levy on the property conveyed without necessity of a separate suit.[22] Until the creditor has a right to levy on the property by execution or attachment or has a judgment which he may have abstracted, his only remedy is an action in equity for a decree annulling the conveyance as a fraud and a hindrance in the collection of the amount due to him.[23]

Although it is usually a creditor, i.e., one who actually loans money to a debtor and later has problems in collection of the amount due, who takes advantage of the fraudulent conveyance statute, the law has long recognized that persons other than true creditors are protected by the statute. The language quoted by Justice Smith in this case of first impression in Texas, "Upon common-law principles, however, one who at the time a transfer of property is made has a right to recover damages in tort may avoid the transfer as fraudulent if the transfer is made for the purpose of defeating his right," was first set forth in the case of *Fox v. Hills*,[24] an 1815 Connecticut case that interpreted the common law and that set a course that was followed in several other cases[25] in that state including the *Murphy* case[26] cited by the Texas court. These cases were based on the English statute of 13 Eliz. I, c. 5 (1570), which was an embodiment of the common law of England at the time of its enactment[27] and stated in substance that a conveyance in fraud of creditors *or other persons* is null and void against such creditors or other persons. In the case of *Corry v. Shea*,[28] by the Wisconsin Supreme Court, an interpretation of the Wisconsin statute[29] and the statute of 13 Eliz. I on which it was based, led the court to hold that "protection extends not only to creditors but to all others who have a cause of action or suit and embraces *claims* for slander, trespass and other torts."[30]

19 Stockbridge v. Crockett, 38 S.W. 401 (Tex. Civ. App. 1896, no writ).
20 Rilling v. Schultze, 95 Tex. 352, 67 S.W. 401 (1902); Hollis v. Hollis, 226 S.W.2d 129 (Tex. Civ. App.—Amarillo 1949, writ dism'd).
21 Rutherford v. Carr, 66 Tex. 101, 87 S.W. 815 (1905).
22 Snow v. Harding, 180 S.W.2d 965 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.); American Employers Insurance Co. v. Davis, 153 S.W.2d 501 (Tex. Civ. App.—Galveston 1941, no writ).
23 Eckert v. Wendel, 120 Tex. 618, 40 S.W.2d 796 (1931), noted in 76 A.L.R. 855 (1931); *see also* Texas Sand Company v. Shield, 381 S.W.2d 48 (Tex. Sup. 1964).
24 Fox v. Hills, 1 Conn. 295 (1815).
25 White v. Amenta, 148 A. 345 (Conn. 1930); De Feo v. Hindinger, 120 A. 314 (Conn. 1923).
26 Murphy v. Dantowitz, 114 A.2d 194 (Conn. 1955).
27 GRIFFITS, CREDITORS' BILLS, in CREDITORS' RIGHTS IN TEXAS, p. 157 (McKnight ed. 1963).
28 128 N.W. 892 (Wis. 1910).
29 WISCONSIN STATUTES OF 1898 § 2320. (W.S.A. c. 242).
30 Corry v. Shea, 128 N.W. 892 (Wis. 1910).

The Wisconsin statute is very similar to the original Texas Fraudulent Conveyance Statute of 1840.[31] However, although it is stated that this early Texas statute is based on the statute of 13 Eliz. I,[32] the Texas version did not include the words "or other persons" but applied only to creditors *per se*.[33] In the Revised Civil Statutes effective July 24, 1879, article 2465[34] was enacted as a revision of article 3876, and the legislature added the words "or other persons" to the statute, bringing it almost exactly in line with the statute of 13 Eliz. I, the Wisconsin statute, and the decisions by the Wisconsin and Connecticut courts. Relying on article 2465 and its later reenactments, Texas courts have held that one having a valid tort claim and demand for unliquidated damages may be a creditor entitled to protection under the fraudulent conveyance statute.[35] These cases dealt with actions brought *after* judgment on the claim. The plaintiffs sought to avoid the general rule that a subsequent creditor cannot attack a prior conveyance of which he had notice at the time he became a creditor.[36] Although these cases have mentioned that there must be a judgment in order to maintain the action to set aside the conveyance, the facts of the cases showed that a judgment was in existence, and the necessity of obtaining a judgment prior to maintenance of the action was not in issue. Even though the question had not been presented prior to the instant case, since 1879 the Texas Fraudulent Conveyance Statute, by the inclusion of the words "or other persons," seems to have allowed a claimant with unliquidated damages to maintain an action to set aside a fraudulent conveyance prior to obtaining a liquidated demand by judgment. The wording of the latest revision,[37] section 24.02, allowing the action to be maintained when the transfer was intended to defraud "interested persons of that to which he is *or may become* entitled" seems to clearly allow a claimant, in the event he should think it necessary, to file suit and obtain a judgment to set aside the conveyance prior to a final judgment being rendered in the tort suit.

A logical step from holding the tort claimant to be a creditor would be to allow him to maintain a fraudulent conveyance action at any time after his cause of action accrues. In the majority of the states in

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31 TEX. LAWS 1840, An Act to Prevent Frauds and Fraudulent Conveyances § 2; 2 H. Gammel, LAWS OF TEXAS 202 (1898).

32 Bryant v. Kelton & Uzzell, 1 Tex. 415 (1846).

33 TEX. LAWS 1840, An Act to Prevent Frauds and Fraudulent Conveyances § 2, 2 H. Gammel, LAWS OF TEXAS 202 (1898).

34 TEX. CIV. STAT. art. 2465 (1879).

35 Cole v. Terrell, 71 Tex. 549, 9 S.W. 668 (1888); Holden v. McLaury, 60 Tex. 228 (1883); Colby v. McClendon, 116 S.W.2d 505 (Tex. Civ. App.—Amarillo 1938, no writ); Robertson v. Hefley, 118 S.W. 1159 (Tex. Civ. App. 1909, no writ).

36 Lehmberg v. Biberstein, 51 Tex. 457 (1879); Collier v. Perry, 149 S.W.2d 292 (Tex. Civ. App.—El Paso 1941, writ dism'd jdgmt cor.).

37 TEX. BUS. & COMM. CODE ANN. § 24.02 (1968).

which this question has been raised, the courts have taken the position that their statutes were broad enough to include tort claimants as creditors. While many of these states have adopted the Uniform Fraudulent Conveyance Statute which specifically allows a tort claimant with an unliquidated claim to maintain an action,[38] in 1963 the Supreme Court of Mississippi, under a statute[39] which purports to cover only creditors, reversed an earlier case[40] and allowed an action by a tort claimant prior to judgment.[41] In this case the court reasoned that since, in the case of *McInnis v. Wiscassett Mills,* 28 So. 725 (a case much like *Colby v. McClendon, supra*), the tort claimant had been held to be a creditor within the protection of the statute, it was within the letter and spirit of the law to allow the fraudulent conveyance action prior to judgment as well as after judgment. In 1964, the Ohio Supreme Court reversed the earlier case of *Pennell v. Walker,*[42] and held that the statute[43] currently in force included a tort claimant within its protection and the claimant could bring the action prior to judgment. A review of the cases in the sixteen states that comprise the majority indicates that all the holdings have been based on the principle that the state statute included a tort claimant in addition to one having a tort judgment as a party entitled to protection.

Four states support the minority view.[44] In California,[45] New Jersey,[46] and Washington,[47] there appear to be no cases exactly on point, but the courts, when writing on other subjects, have recognized the rule that a judgment must be taken prior to seeking to set aside a fraudulent conveyance. This rule appears to be based on the 1861 United States Supreme Court case of *Adler v. Fenton*[48] where the Court held that, in the absence of special legislation, a general creditor cannot bring action against his debtor prior to the debt becoming due. This was an action for tortious interference with collection of a debt and seems to be quite different from a suit to set aside a conveyance. In addition, the objection of the Supreme Court in the *Adler* case is clearly overcome in Texas by the statute's allowing "other interested persons" to maintain actions of fraudulent conveyance.[49] In Rhode Island the Federal Court of Appeals, First Circuit, held that an injunction would

38 UNIFORM FRAUDULENT CONVEYANCE ACT, 1918 § 1.
39 MISSISSIPPI CODE OF 1942, § 265.
40 Jones v. Jones, 30 So. 651 (Miss. 1901).
41 Allred v. Nesmith, 149 So. 2d 29 (Miss. 1963).
42 36 N.E.2d 150 (Ohio 1941).
43 OHIO REVISED CODE, tit. 13 § 1336.01 (1964).
44 73 A.L.R.2d 749 (1931).
45 Chalmers v. Sheehy, 64 P. 709 (Cal. 1901).
46 Washington Nat. Bank v. Beatty, 76 A. 442 (N.J. 1910); Boid v. Dean, 21 A. 618 (N.J. 1891).
47 Allen v. Kane, 140 P. 534 (Wash. 1914).
48 65 U.S. 407, 16 L. Ed. 696 (1861).
49 TEX. BUS. & COMM. CODE ANN. § 24 (1968).

not issue to prevent the fraudulent transfer of property in a personal injury action.[50] However, in that suit the plaintiff failed to allege fraud on defendant's part. It would seem, therefore, that there is no solid minority position or reasoning against allowing a tort claimant to maintain a fraudulent conveyance action prior to judgment.

It should be noted that in the Connecticut case,[51] cited by the Texas Supreme Court in the instant case, it was held that plaintiff could join her tort action with her fraudulent conveyance action and try both at the same time. Although usually it would be best to join the actions and dispense with both claims at once (unless the jury would be adversely influenced against the defendant by hearing evidence on the conveyance), section 24.02[52] seems to clearly allow the fraudulent conveyance action to be tried first. This might be an advantage to a plaintiff because the sooner the conveyance is set aside, the less likely a creditor of the transferee or a bona fide purchaser will enter the picture and eliminate the plaintiff's chance to recover the property. Although it seems that the defendant may still obtain a severance of the two causes of action,[53] as in the instant case, the severance seems to be less advantageous because the fraudulent conveyance action would not be subject to dismissal but could be tried prior to the tort action.

The *Naumovich* case,[54] distinguished by the supreme court as not on point, is still authority for the rule that a temporary injunction from another court will not issue to enjoin the sale of property in fraud of a creditor. It would seem logical to allow an injunction to prevent a fraudulent transfer if a suit to set aside the transfer is to be allowed as soon as the sale is complete. Other states do not seem to distinguish between the two remedies, and with the blended system of law and equity in Texas, the court will probably allow this once the point is presented.

Justice Walker, in his concurring opinion,[55] points out that the court's only holding is that the trial court erred in dismissing the suit to set aside. However, it would seem that a plaintiff interested in cancelling a fraudulent conveyance before his tort suit was tried could certainly rely on the instant case and bring a cancellation action at any time after his cause of action arose and the alleged fraudulent conveyance was made.

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50 Martin v. James B. Berry Sons Co., 83 F.2d 857 (1st Cir. 1936).
51 Murphy v. Dantowitz, 114 A.2d 194 (Conn. 1955).
52 TEX. BUS. & COMM. CODE ANN. (1968).
53 TEX. R. CIV. P. 41.
54 Naumovich v. Reese, 247 S.W.2d 417 (Tex. Civ. App.—Dallas 1952, no writ).
55 Hollins v. Rapid Transit Lines, Inc., 440 S.W.2d 57, 60 (Tex. Sup. 1969).