

814.50 FRAUDULENT TRANSFER – PRESENT AND FUTURE CREDITORS – INTENT TO DELAY, HINDER OR DEFRAUD.<sup>1</sup>

The (*state number*) issue reads:

“Was (*name debtor's*) [transfer of the (*name asset*) a fraudulent transfer] [incurring of the (*name obligation*) a fraudulently incurred obligation]?”

On this issue the burden of proof is on the plaintiff. This means the plaintiff must prove, by the greater weight of the evidence, that (*name debtor*<sup>2</sup>) [transferred<sup>3</sup> the (*name asset*)<sup>4</sup>] [incurred the (*name obligation*)] with intent<sup>5</sup> to hinder, delay or defraud any<sup>6</sup> of *his* creditors.<sup>7</sup> [It is immaterial whether the plaintiff’s claim arose before or after (*name debtor*) [made the transfer] [incurred the obligation].<sup>8</sup>] In determining whether (*name debtor*) had this intent, you may consider:<sup>9</sup>

[whether the [transfer] [obligation] was to an insider<sup>10</sup>]

[whether (*name debtor*) retained possession or control of the property after its transfer]

[whether the [transfer] [obligation] was disclosed or concealed]

[whether (*name debtor*) had been sued or threatened with suit before the [transfer was made] [obligation was incurred]]

[whether the transfer was of substantially all of (*name debtor's*) assets]

[whether (*name debtor*) absconded]

[whether (*name debtor*) removed or concealed assets]

[whether the value of the consideration received by (*name debtor*) was reasonably equivalent to the value of the [asset transferred] [amount of the obligation incurred]]<sup>11</sup>

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[whether (*name debtor*) was insolvent or became insolvent shortly after the [transfer was made] [obligation was incurred]]. For purposes of determining insolvency, [a debtor is insolvent if the sum of *his* debts is greater than all of *his* assets at a fair valuation<sup>12</sup>].

[whether the transfer occurred shortly before or shortly after a substantial debt was incurred]

[whether (*name debtor*) transferred the essential assets of the business to a lien holder who transferred the assets to an insider<sup>13</sup> of (*name debtor*)]

[whether (*name debtor*) [made the transfer] [incurred the obligation] without receiving reasonably equivalent value in exchange for the [transfer] [obligation], and (*name debtor*) reasonably should have believed that *he* would incur debts beyond *his* ability to pay them as they would become due]

[whether (*name debtor*) transferred the assets in the course of legitimate [estate] [tax] planning]

[(*state such other factors as are relevant to the debtor's intent based upon the evidence*)].

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that (*name debtor's*) [transfer of the (*name asset*) was a fraudulent transfer] [incurring of the (*name obligation*) was a fraudulently incurred obligation], then it would be your duty to answer this issue “Yes” in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue “No” in favor of the defendant.

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1 Section 39-23.9 of the Uniform Voidable Transactions Act (the “Act”), entitled “Extinguishment of claim for relief,” is a statute of repose, establishing a finite and fixed time within which claims for relief under the Act may be brought. *KB Aircraft Acquisition*,

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*LLC v. Jack M. Berry, Jr., et al.*, \_\_ N.C. App. \_\_, \_\_, 790 S.E.2d 559, 568 (2016), *aff'd per curiam*, 805 S.E.2d 670 (N.C. 2017) (mem.). A claim brought pursuant to Section 39-23.4(a)(1) must be brought within four years of the date of the transfer, if the transfer was or could reasonably have been discovered within four years of the date it occurred. N.C. Gen. Stat. § 39-23.9(1). However, if the transfer was not discovered and could not reasonably have been discovered within four years of the date it occurred, the claim may be brought within one year of the discovery of the transfer or obligation. N.C. Gen. Stat. § 39-23.9(1). Section 39-23.6 of the Act defines when a transfer is made or an obligation is incurred for purposes of the Act. The period of repose runs from the as-defined date of the transfer or obligation, not the date when a claimant first learns of the fraudulent nature of the transfer or obligation. *KB Aircraft v. Berry*, \_\_ N.C. App. at \_\_, 790 S.E.2d at 568.

2 A “debtor” is a “person” who is liable on a “right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” N.C. Gen. Stat. § 39-23.1(3) and (6).

A “person” is an “individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.” N.C. Gen. Stat. § 39.23.1(9).

*NOTE WELL: For transfers made or obligations incurred prior to October 1, 2015, the Act provided a specific definition of insolvency applicable to partnerships. N.C. Gen. Stat. § 39-23.2(c), repealed by Session Laws 2015-23, s.1, effective October 1, 2015.*

3 A “transfer” includes “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, and creation of a lien or other encumbrance.” N.C. Gen. Stat. § 39-23.1(12).

4 “Assets” do not include “property to the extent it is encumbered by a valid lien; property to the extent it is generally exempt under nonbankruptcy law; or an interest in property held in tenancy by the entirety to the extent it is not subject to process by a creditor holding a claim against only one tenant.” N.C. Gen. Stat. § 39-23.1(2).

5 For an instruction on intent, see N.C.P.I.-Civil 101.46.

6 “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, but 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.” N.C. Gen. Stat. § 39-23.3(a).

7 A “creditor” is someone who has “a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” N.C. Gen. Stat. § 39-23.1(3) and (4).

8 If a transfer made or obligation incurred by a debtor meets the requirements set forth in N.C. Gen. Stat. § 39-23.4, it is immaterial whether the creditor's claim arose before or after the debtor made the transfer or incurred the obligation. N.C. Gen. Stat. § 39-23.4(a).

9 N.C. Gen. Stat. § 39-23.4(b)(1)-(13). The factors enumerated in N.C. Gen. Stat. § 39-23.4(b) is a non-exhaustive list. *Estate of Hurst ex rel. Cherry v. Jones*, 230 N.C. App. 162, 170, 750 S.E.2d 14, 20 (2013).

*10 NOTE WELL: If an instruction as to the definition of an "insider" is requested, the following instruction (as applicable) may be given:*

*(Use where the debtor is an individual: An "insider" is*  
[a relative of the debtor]  
[a relative of a general partner of the debtor]  
[a partnership in which the debtor is a general partner]  
[a general partner in a partnership in which the debtor is a general partner]  
*)[a corporation of which the debtor is a director, officer, or person in control].)*

N.C. Gen. Stat. § 39-23.1(7)(a).

*(Use where the debtor is a corporation: An "insider" is*  
[a director of the debtor]  
[an officer of the debtor]  
[a person in control of the debtor]  
[a partnership in which the debtor is a general partner]  
[a general partner in a partnership in which the debtor is a general partner]  
*)[a relative of a general partner, director, officer, or person in control of the debtor].)*

N.C. Gen. Stat. § 39-23.1(7)(b).

*(Use where the debtor is a partnership: An "insider" is*  
[a general partner in the debtor]  
[a relative of a general partner in, a general partner of, or a person in control of the debtor]  
[another partnership in which the debtor is a general partner]  
[a general partner in a partnership in which the debtor is a general partner]  
*)[a person in control of the debtor].)*

N.C. Gen. Stat. § 39-23.1(7)(c) (1997).

*(Use where an affiliate is involved: An "insider" includes an affiliate, or an insider of an affiliate as if the affiliate were the debtor.)* N.C. Gen. Stat. § 39-23.1(7)(d) (1997).

*(Use where there is a managing agent: An "insider" includes a managing agent of the debtor.)* N.C. Gen. Stat. § 39-23.1(7)(e).

11 "To evaluate whether reasonably equivalent value was exchanged, we examine the net effect of the transaction on the debtor's [financial condition] and whether there has been a net loss to the debtor's [financial condition] as a result of the transaction." *Estate of Hurst ex rel. Cherry v. Jones*, 230 N.C. App. 162, 169, 750 S.E.2d 14, 20 (2013) (citing N.C. Gen. Stat. § 39-23.5 (2011)).

12 N.C. Gen. Stat. § 39-23.2(a). *Civil 101.62 NOTE WELL: A debtor that is generally not paying the debtor's debts as they become due other than as a result of a bona fide dispute is presumed to be insolvent. The presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.* N.C. Gen. Stat. § 39-23.2(b). *For an instruction on this presumption, see the Note Well following the second element in N.C.P.I.-Civil 814.70.*

Page 5 of 5

N.C.P.I.-Civil 814.50

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N.C. Gen. Stat. § 39-23.4(a)(1)

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13 See *supra* note 9 for language to use in instructing the jury as to the meaning of “insider.”

