

814.70 FRAUDULENT TRANSFER – PRESENT CREDITORS–INSOLVENT DEBTOR AND LACK OF REASONABLY EQUIVALENT VALUE.¹

The (*state number*) issue reads:

“Was (*name debtor's*)² [transfer³ of the (*name asset*)⁴ 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 that the plaintiff must prove, by the greater weight of the evidence, three things:⁵

First, (*name debtor*) [transferred the (*name asset*)] [incurred the (*name obligation*)] without receiving a reasonably equivalent value⁶ in exchange for the [transfer] [obligation].

Second, (*name debtor*)

[was insolvent at the time⁷ *he* [transferred the (*name asset*)] [incurred the (*name obligation*)]]

[became insolvent as a result of the [transfer] [obligation]].

A debtor is insolvent if the sum of *his* debts is greater than all of *his* assets at a fair valuation.⁸

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).

Where the basic fact of general nonpayment of the debtor's debts is at issue and the defendant has offered evidence to rebut the presumption of insolvency, use of the language found in endnote 9 is suggested.⁹

Where the basic fact has been judicially established or where the defendant has offered no rebuttal evidence, the language in endnote 9 should be modified in accordance with N.C.P.I.–Civil 101.62.

And Third, before¹⁰ the [transfer was made] [obligation was incurred], the plaintiff was a creditor¹¹ of the (name debtor).

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.

1 39-23.1 et seq. 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, 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.). For a claim to which N.C.P.I.-Civil 814.70 would apply, one brought pursuant to Section 39-23.5(a), the period of repose is four years after the transfer was made or the obligation was incurred. N.C. Gen. Stat. § 39-23.9(2). 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 N.C. Gen. Stat. § 39-23.5(a).

6 “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)).

7 N.C. Gen. Stat. § 39-23.6 defines when a transfer is made or an obligation is incurred for purposes of the Uniform Fraudulent Transfer Act, N.C. Gen. Stat. § 39-23.1 et seq.

8 N.C. Gen. Stat. § 39-23.2(a).

9 Where the basic fact of general nonpayment of the debtor’s debts is at issue and the defendant has offered evidence to rebut the presumption of insolvency, the following language is suggested:

The plaintiff has offered evidence that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor’s debts as they became due. The defendant has offered evidence that [the debtor was generally paying his debts as they became due] [the debtor’s general nonpayment of his debts was as a result of bona fide dispute]. The burden is on the plaintiff to prove, by the greater weight of the evidence that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor’s debts as they became due. I instruct you that when it is established that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor’s debts as they became due, the law presumes that the debtor is insolvent. If this occurs, the burden of proof would be on the defendant to prove, by the greater weight of the evidence, that the debtor was solvent.

It is your duty to consider all of the evidence in the case. The plaintiff contends that you should find that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor’s debts as they became due. On the other hand, the defendant contends that you should not find that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor’s debts as they became due, but that even if you do so find, that he has offered evidence sufficient to show, by the greater weight of the evidence, that the debtor was solvent.

I charge you that if the plaintiff has proved, by the greater weight of the evidence, that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor’s debts as they became due, then the law presumes that the debtor is insolvent. The burden of proof then would be on the defendant, which means that the defendant must prove, by the greater weight of the evidence, that the debtor was solvent. On the other hand, if you fail to find that, other than as a result of a bona fide dispute, the debtor was generally not paying the debtor’s debts as they became due, then there would be no presumption of insolvency for the defendant to overcome.

10 See Endnote 7.

11 A “creditor is a person who has a claim.” N.C. Gen. Stat. § 39-23.1(4). A “claim” is “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).