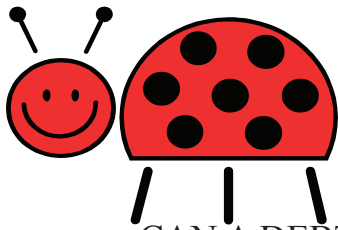


June 2009

DCSD



Debt Counsel for Seniors & the Disabled

CAN A DEBTOR TRANSFER TITLE OF THEIR ASSETS IN ORDER TO AVOID THE ASSETS BEING SEIZED BY A DEBT COLLECTOR?

A typical reaction of a debtor confronted with the possibility of seizure of property is to convey away their property to friends or relatives for little or no consideration with the understanding that the debtor shall continue to enjoy the use and benefits of the property. Since Roman law, such attempts to defraud creditors have been ineffective; creditors have been permitted to recover property so conveyed. This is because courts have ruled that these transfers are fraudulent. Eventually these fraudulent conveyances were codified under a new law entitled the “Uniform Fraudulent Transfer Act (“UFTA”).

In any debt situation, the debtor has an option to enter into a payment arrangement with the creditor or file bankruptcy, unless the debtor is judgment proof. To be judgment proof means that there are no attachable or garnishable assets available to a creditor to satisfy the debt/judgment.

However, in cases where a debtor owns property such as the family residence, the creditor could attach a lien on the family residence if the law in that state so permits. Another way to be rid of the asset of a family residence is to transfer the property to another person. However, this is precisely the type of act that is considered a fraudulent conveyance under UFTA.

This transfer presents an opportunity for creditors to examine the transaction to determine whether it can be set aside. Almost all states have statutes that prohibit what is known as fraudulent transfers of property, including real estate, for no payment or consideration. These statutes substantially state that any conveyance or transfer of property, made without fair consideration, that will render the transferor insolvent, is fraudulent as to any creditors, without regard to the intent of the particular party.

To determine if a transfer of property was actually made by the debtor to some third party, the creditor must conduct a title search either through a title company or an attorney. The transfer is a matter of record in the County Clerk’s Office or the Registrar’s Office in the county where the property is located. An examination of the deed will often reveal the amount of the consideration. In many states, the custom is not to state the consideration in the deed and instead to state a nominal consideration such as \$10.00. Nevertheless, many states require tax stamps to be affixed to the deed before recording, and the tax stamps are usually a percentage of the actual consideration. Thus, a little reverse mathematics determines how much was paid.

Courts have come to rely on circumstantial evidence known as “badges of fraud” to establish the debtor’s fraudulent state of mind. The courts consider these indicators of debtor’s actual intent according to the particular facts of each case. Some of the factors are:

1. The transfer of obligation was to an insider;
2. The debtor retains possession or control of the property transferred after the transfer;
3. The transfer of obligations was concealed;
4. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
5. The transfer was substantially all of 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 not 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.

As illustrated above, transferring the title of assets in order to avoid their being seized by a creditor must be handled in such a way as to avoid the application of the Fraudulent Conveyance Act. Ways to avoid violating the Act include:

1. The consideration paid by the grantee must be of reasonably equal to the value of the property;
2. If the debtor wishes to sell the property to an heir in installment payments, they should include a legal document similar to a mortgage, which states what exactly is being sold and the terms of the sale. It is recommended that this document be prepared by an attorney.
3. The grantee must make actual payments for the asset, and properly document those payments.

Please contact DCSD with any questions.

EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
120 S. LaSalle Street, 18th Floor / Chicago, Illinois 60603-3403
(312) 739-4200 / (800) 644-4673 / (312) 419-0379 (FAX)
E-mail: info@edcombs.com / Web: www.edcombs.com

We are looking for the following types of cases:

- **ATM machines:** You cannot be charged a fee for using an ATM machine operated by someone other than your bank unless there is a notice posted on or next to the ATM, on the outside, stating that fees may or will be charged for use of the machine. This is in addition to the notice on the screen, which must state whether a fee will be charged for the particular transaction and its amount. The amount need not be stated on the outside of the machine, but if an amount is stated, it has to be correct. An ATM receipt and a series of clear pictures of the machine and its surroundings are needed. If the problem is with the screen message, we need a picture of the screen.
- **“Balance transfers” of defaulted debts, mostly out of statute.** We have some new theories for attacking this practice and are looking for cases in which debt collectors offer to transfer delinquent debts to a new credit card. Investigation of the relationship between the parties involved is required. Card issuers include MetaBank, Affirm MasterCard, Embrace, Emblem, Aspen M, Majestic Visa, Compucredit, Jefferson Capital, Columbus Bank & Trust Company, First Bank of Delaware, First Bank & Trust, Brookings, South Dakota. It is not necessary tht the plaintiff have accepted the offer, only that they received it.
- **Deceased Debt Collection:** We are interested in companies that call or write to surviving relatives to get them to make payments on a deceased family member’s credit card or other debts.
- **Purchasers of prepaid calling cards** which do not clearly disclose all fees and charges.
- **Payday, title and other high-interest loans:** We have discovered multiple Truth in Lending and other violations. Please send whatever documents are available, including Truth in Lending disclosures and documents relating to wage assignments.
- **Landlord-tenant:** Nonpayment of security deposits, failure to pay annual interest on security deposits.
- **FDCPA/debt collection:**
 1. Debt collectors leaving voicemail or answering machine messages. We need to have the recording (can be re-recorded or forwarded).
 2. Debt collectors that communicate with (a) neighbors or (b) employers when (i) the debtor’s location is known, (ii) communication is by fax, (iii) communication is not limited to “location information” as defined by the FDCPA (“a consumer’s place of abode and his telephone number at such place, or his place of employment”). Check all **“verification of employment”** forms.
 3. In addition to “deceased debt collection,” both creditors and debt collectors often attempt to collect from spouse or family member or “authorized user” when only obligor on credit card files bankruptcy.
 4. Attempts (by anyone) to sue or threaten suit on cell phone bills more than 2 years old (what we believe to be the limitations period). The statute of limitations is routinely regarded by bad debt buyers, resulting in Fair Debt Collection Practices Act violations.

If you have any of the above-listed problems, please call Edelman’s 800 number saying you are a client of DCSD.