A New Tool for Creditors
— and a New Warning for Attorneys

by Daniel D. Mauler

In 2012, Senator J. Chapman "Chap" Petersen (D-Fairfax) sponsored legislation to amend Virginia's fraudulent conveyance statutes. It is no exaggeration to say that his amendment is one of the most significant developments in Virginia's fraudulent conveyance law that traces its history back more than 400 years. During a recent interview, Petersen described the legislative intent behind the amendment to Va. Code § 55-82.1.

The amendment offers a powerful new remedy against parties who structure fraudulent conveyances regardless of whether they take title or possession to the conveyed property. This provides significant new opportunities for creditors' attorneys. But it also opens up serious liability for the attorney who knowingly assists a client in evading creditors. Attorneys must be extremely wary when a judgment debtor seeks help to hide assets and evade creditors. If an attorney assists a debtor to evade a judgment, the attorney faces sanctions under the new amendment.

Amendment Inspired by the Tragic Case of Craig and Mary Jo Sanford

Today, Virginia lawyers see more complicated schemes to fraudulently convey and hide assets of judgment debtors. Usually the assets are not real property but instead are items that can be easily hidden, disposed, or transferred. These schemes are often devised by professionals (such as lawyers, accountants, or brokers) to assist their clients in hiding assets. It was one particular scheme — complete with international intrigue, false identities, and the infamous Wikileaks documents[1] — that drove Petersen to sponsor the amendment.

In 2007, Craig and Mary Jo Sanford had just sold a successful small business and were looking forward to retirement. Interested in preserving their retirement assets, the couple was introduced to Jamie Smith, a person who held himself out as a CIA-trained veteran of military operations in the Middle East. Smith persuaded the Sanfords to invest their retirement assets in his startup company that would provide military training to official personnel. The Sanfords never saw their money again. Petersen represented the Sanfords in suing Smith for fraud and won a $9.5 million jury verdict in a case tried in the Eastern District of Virginia.[2]

When the Sanfords attempted to collect on their judgment against Smith, he claimed that he had no assets, despite driving a Mercedes throughout the litigation. According to Petersen, Smith's assets had been transferred to his relatives through a number of shell companies. Petersen recalls (with particular outrage) that without the help of an accountant who masterminded the asset transfer, Smith would not have successfully transferred his assets, leaving the Sanfords with an uncollectible judgment. The Sanfords filed a subsequent suit for fraudulent conveyance, yet the accountant could not be held liable under § 55-80 because he was not a transferee of any conveyed property.

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Virginia's Fraudulent Conveyance Law Traces its Roots 400 Years

Virginia's fraudulent conveyance law dates back to Elizabethan England. The commonwealth's fraudulent conveyance statute, codified at Va. Code § 55-80, renders void any transaction by a debtor that is intended to "delay, hinder or defraud" a

creditor. This language first appeared in the Statute of 13 Elizabeth, which was enacted by the English Parliament in 1571 to prevent judgment debtors from transferring their property to family members prior to seizure in payment of judgments.[3] "The statute [of 13 Elizabeth] is established for the suppression of fraud, the advancement of justice, and the promotion of the public good. Consequently, it should be liberally and beneficially construed to suppress the fraud, abridge the mischief, and enlarge the remedy."[4]

The statute then migrated to the Colonies: "Virginia's present fraudulent conveyance statute is a modified version of 13 Elizabeth with minor variations."[5] The same "hinder, delay, or defraud" language has been adopted, in some version or another, in most states and in the federal Bankruptcy Code.[6] Thus, the language originally drafted in 1571 "is the source of fraudulent disposition law in this country."[7]

Traditionally, fraudulent conveyance remedies would "unwind" the transaction. Developed in cases dealing with real property, unwinding the transaction did generally return the debtor's assets to his creditors. This remedy made sense in the 16th through 19th centuries when a person's major asset was land. The problem with this remedy in modern times becomes obvious when the fraudulently conveyed asset is not land, but rather is some fungible item (like cash or personal property) that cannot be readily traced. How does one "unwind" a transaction involving assets that cannot be recovered or that no longer exist?

The Supreme Court Recognizes an Alternative Remedy

In response to this problem, the Supreme Court of Virginia recognized a new remedy in *Price v. Hawkins*.[8] In *Price*, a debtor fraudulently transferred cash to his girlfriend after he was hit with a significant defamation judgment. By the time the fraudulent conveyance lawsuit was filed, the transferee had no cash to return to the creditor. In court, the transferee defended on the ground that she could not be liable because she no longer possessed the fraudulently conveyed property.

The *Price* court rejected the defendants' argument, quoting a 50-year-old treatise on the subject, which stated that a fraudulent transferee was "personally liable, on his account, for the value of the original property in case he cannot produce it or a substitute. Receiving the property fraudulently . . . the grantee is liable to the extent of its value."[9]

Price represents an important development in fraudulent conveyance law. The Court recognized that simply unwinding a transaction would not always provide an adequate remedy. Instead, the Court focused on the equitable nature of the fraudulent conveyance statute, stating: "[m]oreover, equity will not suffer a wrong to be without a remedy."[10] Invoking this traditional maxim, the Court specifically permitted circuit courts to fashion remedies to fraudulent conveyances that are not expressly provided for in § 55-80.[11]

Petersen's Expansion of Remedies

Petersen's amendment follows in the spirit of the Supreme Court's expansion of fraudulent conveyance remedies in *Price*. In 2012, Petersen sponsored SB 164 in the Virginia Senate, which inserted the following language into § 55-82.1: "Upon a finding of fraudulent conveyance pursuant to sec. 55-80, the court may assess sanctions, including such attorney fees, against all parties over which it has jurisdiction who, with the intent to defraud and having knowledge of the judgment, participated in the conveyance."

This amendment enjoyed overwhelming support in the General Assembly, passing the Senate 38–2 with a unanimous 99–0 vote in the House. After the governor's signature, it was effective July 1, 2012.

The new language gives courts the authority to award "sanctions" against any party who participated in a fraudulent conveyance, regardless of whether they were a transferee.[12] Thus, the scope of potential defendants is dramatically expanded. Since the Supreme Court has never addressed whether non-transferees could be held liable under a conspiracy claim (though at least eighteen other states permit such claims[13]), § 55-82.1 may be the most effective remedy against non-transferees who facilitate fraudulent conveyances.

According to Petersen, his amendment to § 55-82.1 was intended to be "as broad as possible," in terms of providing a remedy against any "party" who participated in a fraudulent conveyance regardless of whether the party was a transferee. In Petersen's words, "It is very broad. 'Parties' in the statute means more than just transferees. Anyone who touched the transaction now faces liability, whether they're lawyers, real estate agents, or accountants. If you touch it, you're dirty."

"An attorney should be very careful when a client takes a judgment. In many ways, the attorney's relationship to the client changes at that point. Since the attorney knows about the judgment, if he counsels the client on how to evade it, then the attorney faces liability," according to Petersen. His recommendation is that an attorney

who represents a client facing a final judgment should counsel that client to enter payment negotiations with the creditor or to consider bankruptcy, but the attorney should never help the client convey away assets to evade the judgment.

Section 55-82.1 speaks in terms of "sanctions" against a participating party. Petersen said that the amendment was intended to provide circuit courts "as wide latitude as possible. The idea is that the court would have maximum authority like it was sitting in equity" to fashion an appropriate remedy. "In most cases, the sanction would be an award of money damages against the parties involved . . . The sanctions are intended to make the victims whole [for the underlying judgment] so they can get on with their lives and to punish and deter anyone who helps another person evade a judgment."

Petersen also stressed a court's flexibility under the amendment and noted that the relief does not have to be money. "It could be something else that the court thinks is appropriate." Such flexibility is consistent with the Supreme Court's approval of remedies not expressly authorized in the fraudulent conveyance statute.

Conclusion

Virginia's fraudulent conveyance statute has a long history, and it is remarkable how this 400-year-old body of law was expanded due to a modern-day example of an age-old problem. Petersen has provided Virginia lawyers a new and important tool to combat this problem, but it is also comes with a warning: Attorneys must carefully avoid assisting clients to evade judgments or else face liability themselves.

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Endnotes:

1 Describing the saga of the Sanfords is beyond the scope of this article—but it makes for fascinating reading. *See, e.g.*, Ace Atkins & Michael Fechter, *Secret Agent Man*, Outside, Nov. 2014, at 90; Bill Sizemore, *His Company Defrauded Investors. Yet the Air force Kept Doing Business*, The Virginian-Pilot, July 25, 2012, at A1.

2 *See Sanford v. Smith*, 490 Fed. Appx. 570 (4th Cir. 2012).

3 *See* 1 Garrard Glenn, FRAUDULENT CONVEYANCE AND PREFERENCES § 61b, at 90-91 (rev. ed. 1940).

4 Orlando Bump, FRAUDULENT CONVEYANCES: A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS 11-12 (3d ed. 1882).

5 Prof. Doug Rendleman, ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA 307 (1982).

6 11 U.S.C. § 548(a)(1)(A) (West 2015) (prohibiting a debtor's voluntary or involuntary transfer "with actual intent to hinder, delay, or defraud" any creditor).

7 Prof. Peter A. Alces, THE LAW OF FRAUDULENT TRANSACTIONS § 1:13 (2012)

8 *Price v. Hawkins*, 247 Va. 32, 439 S.E.2d 382 (1994)

9 *Price*, 247 Va. at 36; 439 S.E.2d at 384 (*quoting* 1 Garrard Glenn, FRAUDULENT CONVEYANCE AND PREFERENCES § 239, at 415 (rev. ed. 1940)).

10 *Price*, 247 Va. at 37; 439 S.E.2d at 385.

11 *Price*, 247 Va. at 37, 439 S.E.2d at 385 ("In *Darden* and *Mills*, the respective debtors had improperly preferred legitimate creditors to the detriment of another creditor. In those cases, ratable distribution, likewise a remedy not explicitly authorized by § 55-80, was appropriate under the circumstances.")

12 This is evident by the use of the term "parties" as opposed to "debtors" (used earlier in § 55-82.1) or "transferors" (used in the Voluntary Conveyance statute in § 55-81). In short, "all parties" means something more expansive than debtors or transferees.

13 *See, e.g.*, *Janssen v. Lommen, Abdo, Cole, King & Stageberg, P.A.*, No. A14-0452, 2014 WL 7237121, at *4 (Minn. Ct. App. Dec. 22, 2014); *Essex Crane Rental Corp. v. Carter*, 371 S.W.3d 366, 379, 382 (Tex. App. 2012); *In re Allou Distributors, Inc.,* 379 B.R. 5, 36 (Bankr. E.D.N.Y. 2007) (applying New York law); *Tareco Properties, Inc. v. Morriss*, 196 F. App'x 358, 365 (6th Cir. 2006) (applying Tennessee law); *Banco Popular N. Am. v. Gandi,* 876 A.2d 253, 263 (N.J. 2005); *Qwest Commc'ns Corp. v. Weisz*, 278 F. Supp. 2d 1188, 1192-93 (S.D. Cal. 2003) (applying California law); *Summers v. Hagen,* 852 P.2d 1165, 1169 (Alaska 1993); *McElhanon v. Hing*, 728 P.2d 256 (Ariz. Ct. App. 1985); *Dalton v. Meister*, 239 N.W.2d 9 (WI 1976).

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