



# THE ENFORCER

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## SET with MET? Think again.

Meet Kevin Grand. Mr. Grand has an arrearage approaching six figures. In the last 10 years he has never earned more than \$30,000/year. From 2004 to 2006 ("Transfer Period"), Mr. Grand averaged just \$20,000/year in income. However, during the Transfer Period, he managed to transfer ½ of his gross income, \$30,000 (the "Transfers"), to the Michigan Education Trust ("MET"). The Transfers to MET established three (3) pre-paid tuition contracts ("Contracts") for the benefit of his three (3) children. Mr. Grand's payments toward his arrearage during the Transfer Period? \$0.00.

The Legislature created MET to provide pre-paid tuition contracts. MET holds itself out as an "irrevocable" trust established for the benefit of a contract's beneficiary. In Mr. Grand's case, the beneficiaries of the Contracts are his children. Given the irrevocable nature of the Contracts, Mr. Grand cannot unilaterally withdraw any of the \$30,000 he transferred to MET.

Was Mr. Grand motivated solely by his children's welfare when he established the Contracts? Or was he trying to place his assets out of his ex spouse's reach? Given that 50% of his income during the Transfer Period was funneled to MET, Mr. Grand had more in mind than his children's education. Mr. Grand has engaged in a fraudulent transfer to the tune of \$30,000.

Michigan's Uniform Fraudulent Transfer Act ("UFTA")<sup>1</sup> establishes four (4) causes of action to recover the Transfers from MET:

1. **Actual fraud.** A transaction can be recovered when a debtor transfers property "with actual intent to hinder, delay, or defraud any creditor."<sup>2</sup> The UFTA establishes several "badges of fraud," such as: the transfer was made to an "insider," the debtor was threatened with a lawsuit shortly before or after the transfer; or the debtor was insolvent at the time of the transfer.<sup>3</sup>

2. **Actual fraud, again.** A debtor makes a fraudulent transfer if the transfer is made without receiving "reasonably equivalent value" and the debtor did one of the following:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.<sup>4</sup>

3. **Constructive fraud.** It is not always easy to determine if a debtor made a transfer with the "actual intent" to defraud a creditor. The debtor's financial situation and circumstances surrounding the transfer provide indicia of whether the transfer falls under the UFTA.

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.<sup>5</sup>

4. **Per se fraud.** When the ship is sinking and a debtor has limited assets, he often wants to ensure that his debts to family members or friends are repaid before other debts. The UFTA has a very strong provision for this scenario.

A transfer made by a debtor **is** fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an **insider for an antecedent debt**, the debtor was insolvent at



that time, and the insider had reasonable cause to believe that the debtor was insolvent.<sup>6</sup>

Now back to Mr. Grand. His situation falls within actual fraud and constructive fraud. The Transfers provided absolutely no benefit to Mr. Grand. The benefit was provided to his children (read: insiders). Mr. Grand did not receive "reasonably equivalent value" in exchange for the Transfers to MET. This phrase contemplates an even exchange: Mr. Grant provides MET with \$30,000 and MET provides Mr. Grant with goods/services of a reasonably equal amount. Mr. Grant received nothing in exchange for the Transfers. His three children will receive 100% of the benefit of the Transfers, while Mr. Grand receives nothing.

Now that it is established that Mr. Grand violated the UFTA when he transferred \$30,000 to MET, what can Mrs. Grand obtain from MET? Under the UFTA, she can, among other things:

1. Have a receiver appointed over the transferred property;
2. Avoid the Transfers;
3. Obtain a judgment against MET for the value of the property transferred;
4. Attach the Transfers or other property of MET; and/or
5. Enjoin further disposition of the property transferred.

These remedies lead to the same end: taking from MET and giving to Mrs. Grand.

Are you concerned that MET, a state agency, will move the case to the Court of Claims and then assert "immunity"? Don't be. The Court of Claims has jurisdiction over contract and tort claims made against the State. In a case remarkably similar to Mr. Grand's case, a circuit court found that an action under UFTA is not grounded in contract nor tort, which would invoke the Court of Claims' jurisdiction.<sup>7</sup> A claim under UFTA is based on a theory of recovering property, not upon punishing a transferee. Moreover, MET is not protected by governmental immunity, as a claim under

UFTA is not a tort. The definition of "person" under the UFTA includes the "government or governmental subdivision or agency."<sup>8</sup>

MET is an attractive target for delinquent payors. It is not the only target. The following are but a few examples of fraudulent transfers subject to recovery under the UFTA:

1. Payor deeds Blackacre to his mother to avoid paying his arrearage;
2. Payor deposits his paychecks into his girlfriend's bank account to avoid having his account garnished; and
3. Payor conveys his shares in ABC Corp. to his business partner on account of an antecedent debt.

Be careful. Bringing a claim under UFTA requires extensive factual investigation and thorough knowledge of UFTA and its various defenses. What may appear to be wrong on its face is not necessarily a fraudulent transfer. Even if the transfer appears fraudulent, the transferee may have a solid defense. You should consult with an experienced insolvency practitioner before bringing an UFTA complaint against MET or another third party.

## Endnotes

1. MCL § 566.31 et seq
2. MCL § 566.34(1)(a)
3. MCL § 566.34(2)
4. MCL § 566.34(1)(b)
5. MCL § 566.35(1)
6. MCL § 566.35(2)
7. *Findling v. Michigan Education Trust*, (Case No. 2008 124555 CZ, W.C.C.C.)
8. MCL § 566.31(i)

