

814.75 FRAUDULENT TRANSFER – PRESENT CREDITORS – TRANSFER TO
INSIDER WHILE INSOLVENT.¹

The *(state number)* issue reads:

“Was *(name debtor’s)* transfer of the *(name asset)* a voidable transaction?”

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, five things:

First, *(name debtor)*² transferred³ the *(name asset)*⁴ to *(name transferee)* because of a previous debt owed to *(name transferee)*.

Second, at the time⁵ of the transfer, *(name debtor)* was insolvent. A debtor is insolvent if the sum of *his* debts is greater than all of *his* assets at a fair valuation.⁶

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 7 is suggested.⁷

Where the basic fact has been judicially established or where the defendant has offered no rebuttal evidence, the language in endnote 7 should be modified in accordance with N.C.P.I.-Civil 101.62.

Third, *(name transferee)* had reasonable cause to believe that *(name debtor)* was insolvent.

Fourth, that (*name transferee*) was an insider.⁸

(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].)

(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].)

(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]

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[a general partner in a partnership in which the debtor is a
general partner]

[a person in control of the debtor].)

(Use where an affiliate⁹ is involved: An "insider" includes an
affiliate, or an insider of an affiliate as if the affiliate were the debtor.)

(Use where there is a managing agent: An "insider" includes a
managing agent of the debtor.)¹⁰

And Fifth, before¹¹ the transfer was made, the plaintiff was a
creditor¹² 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 voidable transaction,
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 814.75 would apply, one brought pursuant to Section 39-23.5(b), the period of repose
is one year after the transfer was made. N.C. Gen. Stat. § 39-23.9(3). Section 39-23.6 of
the Act defines when a transfer is made for purposes of the Act. The period of repose runs
from the as-defined date of the transfer, not the date when a claimant first learns of the
fraudulent nature of the transfer. *KB Aircraft v. Berry*, ___ N.C. App. at ___, 790 S.E.2d at
568.

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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 entireties 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. § 39-23.6 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.

6 N.C. Gen. Stat. § 39-23.2(a).

7 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.

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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.

8 N.C. Gen. Stat. § 39-23.1(7) provides a non-exclusive list of individuals and entities that are insiders for the purposes of the Uniform Voidable Transactions Act.

9 For a definition of "affiliate," see N.C. Gen. Stat. § 39-23.1(1).

10 N.C. Gen. Stat. § 39-23.1(7)(e).

11 See Endnote 5.

12 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).