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Using a Long Arm to Undo a Fraudulent Conveyance

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But here is the rub: Although one might simplistically leap to the conclusion (as the Department of Fish and Wildlife (DFW) and the appellate court in this case did) that any project that achieves a reduction greater than 29 percent from a business-as-usual scenario is not significant (Newhall projected a 31 percent reduction from its assumed business-as-usual calculation), it turns out this determination is more complicated.

First, what is the business-as-usual scenario for the population that would end up living in Newhall? That turns out to be a somewhat murky question. While the minority was ready to hold up their hands and say, "That is one for the experts," the majority said that, as with all CEQA findings, this must be explained with reasoned analysis that is based on facts. The court here found that DFW failed to do so and suggested that, in fact, by making unsupported assumptions about the impacts of the density of the project versus the density of living sites for the business-as-usual population used by ARB, the agency may have skewed the result.

Even more importantly, the court recognized that ARB's business-as-usual scenario and its 29 percent reduction were an across-the-board average. That is, for example, there may be some projects in the future that can be expected to reduce their emissions by only 15 percent while others can be reasonably expected to reduce by 45 percent. The fact that this project was reducing its emissions by 31 percent may or may not undermine the business-as-usual projections, depending on ARB's assumptions and projections. The court argued that applying ARB's projected reduction to an individual project requires a project-specific analysis of how the project fits into the statewide analysis.

The court identified at least three ways that ARB might correct its analysis:

- *Evaluate the assumptions behind ARB's business-as-usual analysis and link those to the individual project.* This approach may or may not be as simple as it sounds and would clearly require expert analysis.
- *Demonstrate the project is using mitigation measures consistent with requirements under AB 32.* The court noted that these requirements may be limited to specific impacts. It would be better if local or regional agencies developed greenhouse gas plans consistent with AB 32 that would incorporate the project. If these agencies have not created sufficiently detailed and comprehensive plans, this route may be limited.
- *To the extent regional agencies have developed numerical thresholds for individual project greenhouse gas emissions (the example used by the court is BAAQMD's thresholds), abide by those numbers.* If the project exceeds those thresholds, or no thresholds have been adopted, then the project may adopt all feasible mitigation measures and, if impacts are still significant, issue a statement of overriding considerations. Considering that Newhall's project already has a statement of overriding considerations for other impacts, this may be the simplest and most defensible approach, especially given Newhall's representation it has designed a green project with the latest and best mitigations.

Conclusion

The larger implications of this decision are quite profound. A simple analysis based on the ARB 29 percent reduction calculation will not be sufficient. Further, the court opined that this figure may soon be outdated; far greater reductions will be required for large greenhouse gas emitters. Indeed, the state has new goals for 2030; the original Schwarzenegger climate change Executive Order (S-03–05, June 2005) called for more drastic reductions by 2050.

Perhaps most importantly, the California Supreme Court's majority has shown it is not afraid to engage in the more technical aspects of greenhouse gas-emission regulatory programs and baseline and business-as-usual calculations. While it can be expected that the court will show due deference to agencies such as ARB, fundamental gaps or gaming in the use of baselines or projections that could undermine environmental protections will not automatically be ignored.

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Roger Bernhardt

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Introduction

In Buchanan v Soto (2015) 241 CA4th 1353 (reported at p 17), two weeks after Diana Buchanan filed suit to collect money that Maria Soto owed her, Maria transferred her interest in her Olive Avenue properties to one of her co-owners, Ramon Soto, thereby ostensibly putting it beyond the reach of Buchanan's subsequent efforts to collect on the money judgment that she was later to obtain. Ramon Soto was not only Maria's husband, but had also been deported to Mexico (and appears to have been hiding), making it difficult for Buchanan to serve him in her action to set aside Maria's conveyance. The case mainly involves jurisdictional questions, which I have asked my colleague, Marc Greenberg, to comment on, but I have also used the decision as a vehicle for allowing me to update readers on some new developments in fraudulent conveyance law. (As a mortgage lawyer, I

also wondered just how Buchanan was able to get a money judgment on a secured obligation without foreclosing first on the other security that she held. But since Maria chose to default rather than raise a one-action defense in that lawsuit, I can't let that worry me.)—RB

Fraudulent Conveyance or Voidable Transaction?

The most interesting questions in *Buchanan v Soto* are the jurisdictional ones, discussed in the second part of this column written by my colleague, Marc Greenberg. But also, apart from those matters, the decision provides me with a useful platform to enable attorneys for creditors to update their vocabulary and knowledge when attempting to set aside "fraudulent conveyances" structured by their clients' debtors who are trying to avoid having to pay their bills.

If Buchanan, the judgment creditor, were filing suit today (*i.e.*, any time after January 1, 2016), rather than in 2011, she would not style her action as one to set aside a fraudulent conveyance, as the court in *Buchanan* called it. Indeed, that particular label technically went out of date in 1984, when California adopted the Uniform Fraudulent Transfer Act to replace its old (1918) Uniform Fraudulent Conveyance Act, to ensure that transfers of personal property as well as conveyances of real property came under it. (After all, a debtor's efforts to put her yacht beyond her creditor's reach can be as economically significant as doing so with her building.) Now, as of 2016, the wrongful act is to be called a "voidable transaction" by virtue of statutory amendments made in 2015, following the protocols of the new Uniform Voidable Transaction Act (UVTA), already adopted in a number of other states. See CC §3439.

"Voidable," as a modifier, is clearly preferable to "fraudulent," since no version of the statute ever really required fraud—"constructive fraud" or "badges of fraud" being quite adequate—and the inclusion of "fraudulent" only confused everyone—especially law students, young lawyers, and sometimes judges who thought they needed to apply heightened standards of pleading or proof because "fraud" was being alleged. See, *e.g.*, *Reddy v Gonzalez* (1992) 8 CA4th 118, 123, reported at 15 CEB RPLR 324 (Oct. 1992). See also Comment 8 to UVTA §4:

> The phrase "hinder, delay, or defraud" in §4(a)(1) ... is potentially applicable to any transaction that unacceptably contravenes norms of creditors' rights. Section 4(a)(1) is sometimes said to require "actual fraud," by contrast to §4(a)(2) and §5(a), which are said to require "constructive fraud." That shorthand is highly misleading. Fraud is not a necessary element of a claim for relief under any of those provisions. By its terms, §4(a)(1) applies to a transaction that "hinders" or "delays" a creditor, even if it does not "defraud" the creditor.

On the other hand, "voidable" emphasizes the relief the creditor seeks, rather than the quality of the acts committed by the debtor. Calling it a "transaction" rather than a "transfer" or "conveyance" clarifies that there are other bad ways of hiding an asset besides purportedly transferring it (such as encumbering it with a phony lien). So, today we would say that Maria—the judgment debtor in *Buchanan*—engaged in a voidable transaction by conveying her fractional interest in the Olive Avenue properties so as to put it beyond the reach of Buchanan.

Technically, all the statutory changes I am about to mention only apply to causes of action, transfers, and obligations that arise after 2015, but for convenience here I will assume that the rest of this story comes under the new version of the Act.

To prove her case, Buchanan would have to show that Maria either

- Transferred her interest to Ramon with an intent to hinder, delay, or defraud Buchanan ("actual fraud," as it used to be called); or
- Did not receive reasonably equivalent value for it and was insolvent (the old constructive fraud).

CC §§3934.04, 3934.05. Those standards are unchanged (although the old special definition of partnership insolvency in CC §3934.02(b) has been eliminated), but some new procedural refinements are added: Now, Buchanan has the statutory burden of proving most of the elements (of constructive fraud), but with the qualification that a preponderance of the evidence will satisfy that burden. CC §3439.05(b). Some of the particulars of the defenses of good faith and reasonably equivalent value are allocated to Maria and others to Buchanan, again with a preponderance of evidence standard. CC §3439.08(f).

In general, the controlling law for fraudulent conveyances is now the law of the jurisdiction in which Maria was located when the transaction occurred—not where the asset was (the old "situs rule" of the First Restatement of Conflict of Laws) or the jurisdiction having the primary interest in the litigation (the "interest analysis" of the Second Restatement). This should make it harder for a crooked debtor to transfer an asset in state A and thereafter move to state B, where its laws are more forgiving, but would also make it harder for a California court to undo even a California transaction when the debtor was clever enough to have located itself in a friendly jurisdiction at the start (such as Delaware, where "series organizations" are able to shelter some of their assets from their other liabilities). CC §3934.10(b).

Finally, if Buchanan had to show that Maria was insolvent at the time of the transaction—having transferred her house without receiving reasonably

equivalent value—the existing presumption of insolvency on which she might rely ("not paying debts as they become due") is now qualified by a new exception for "other than as a result of a bona fide dispute," although rebutting this presumption requires only a showing that "nonexistence of insolvency is more probable than its existence." CC §3439.02b.

There are other changes in the new Act not worth mentioning here, but which we all have to get used to.

Long-Arm Jurisdiction

The opinion authored by Judge Patricia Benke in *Buchanan v Soto* reaffirms two long-standing principles in the law of civil procedure:

- The doctrine of in rem jurisdiction applies to give the court specific jurisdiction under long-arm statutes over defendants who are out of state but whose property is within the state, when that property is at issue in the case; and
- Defendants who seek the equitable remedy of dismissal of a case, on the ground that service by publication was not valid service on them, cannot come into court with "unclean hands" and still expect that relief.

In Rem Jurisdiction

According to the court's decision, on July 29, 2011, Maria Soto transferred her interest in the Olive Avenue properties to her husband, Ramon. As soon as he became a property owner in San Diego County, under the doctrine of in rem jurisdiction, Ramon had consented to the jurisdiction of the state and federal courts in that county with respect to any litigation involving his right to, title to, or ownership of that property.

The history and rationale behind this policy is the subject of study by every first-year law student in the course on Civil Procedure. The case of *International Shoe v Washington* (1945) 326 US 310, 316, 66 S Ct 154, established that personal jurisdiction could be asserted over a person who was not present in the forum state when that person had, by virtue of their contacts within the forum, purposely availed themselves of the protection and benefits of the laws of that jurisdiction. The policy rationale was that, having received the benefits of doing business or engaging in other activities within the forum state, a defendant should be amenable to suit within that state as well, as long as the assertion of that jurisdiction was reasonable and didn't offend traditional notions of fair play and substantial justice.

Following the decision in *International Shoe*, states adopted "long-arm" statutes designed to allow state courts to assert in personam jurisdiction over nonresident defendants, which comported with due process requirements. When a nonresident defendant had systematic and continuous contacts within the forum, it was deemed that the courts of that forum had general jurisdiction over that defendant—which meant that a suit or suits for any and all claims against that defendant could be brought in that forum's courts. When the contact with the forum was less frequent or less extensive, the assertion of jurisdiction required meeting the test for specific jurisdiction. To meet this test, a plaintiff would have to show that a nonresident defendant has sufficient "minimum contacts" within the jurisdiction, and that those contacts gave rise to the claim asserted by the plaintiff, such that the due process principles of giving notice and an opportunity to be heard, in the context of fair play and substantial justice, were met. Very few out-of-state defendants have sufficient contacts to warrant general jurisdiction over them, so most cases, such as this one, use the specific jurisdiction test.

When the plaintiff's claim(s) have to do with the defendant's right to, title to, or ownership of real property, the in rem doctrine applies to determine whether specific jurisdiction can be asserted. In the *Buchanan* decision, Judge Benke held that "As the then-owner of Maria's interest in the Olive Properties, we independently conclude Ramon purposefully availed himself of the benefits and protections of the laws of California." 241 CA4th at 1363. She justified this holding by citing three cases establishing that holding a deed of trust represents a significant contact with the forum state. *Buchanan v Soto*, *supra*, citing *Easter v American W. Fin.* (9th Cir 2004) 381 F3d 948, 960; *Gognat v Ellsworth* (WD Ky, Mar. 6, 2009, No. 5:08-CV-100-TBR) 2009 US Dist Lexis 99456; and *Johnson v Long Beach Mortgage Loan Trust 2001–4* (D DC 2006) 451 F Supp 2d 16, 32.

Moving to the "arising out of" forum-related activity requirement, Judge Benke found the circumstances that created Ramon's ownership interest in the Olive Properties were at the heart of the case. "Quite simply, without the transfer of that interest by Maria, there would be no fraudulent conveyance action against Ramon." 241 CA4th at 1364. Based on that finding, she concluded that Ramon's conduct within the forum state, in receiving this transfer, met the "arising out of " requirement for specific jurisdiction.

The last element of the test—that the assertion of jurisdiction be reasonable and not offend traditional notions of fair play and substantial justice—is generally found to be met when the evidence shows purposeful availment and forum-related contacts from which the case arises. In my experience, it is very rare that a defendant whose conduct satisfies the first two elements is able to avoid jurisdiction by asserting that it would be unreasonable to have to defend the case in that forum. In our digital, easy-to-connect world, there is very little basis for asserting that defending a case in a distant forum is a

severe hardship. Judge Benke also asserted this view: "[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a *compelling case* that the presence of some other considerations would render jurisdiction unreasonable." 241 CA4th at 1365 (emphasis added).

Having disposed of Ramon Soto's objections about the assertion of jurisdiction over him, the court next addressed his claim that the service of process by publication was improper.

The Service Issue: Buchanan's Good Faith Effort Versus Ramon's Bad Faith Evasion

My title here foreshadows the outcome. Ramon Soto argued that service by publication wasn't warranted here and that Buchanan failed to exercise due diligence in finding him and having him personally served, in violation of his due process rights. The proper analysis of this issue thus requires an assessment of Buchanan's efforts to serve Ramon and whether Ramon's conduct contributed to the failure to find and personally serve him.

The court noted that the case record reflects that Buchanan first tried serving Ramon at his marital residence in San Marcos. Maria Soto disclosed at that time that Ramon no longer lived there—he had been deported due to criminal activities and was now living in Mexico, somewhere in the rural Mexicali area. Mexicali is the capital city of the Mexican state of Baja California, with a population of over one million people and a physical territory covering over 212 square miles. Without more specifics, Maria's information about Ramon's whereabouts was next to worthless.

Left with no other information about Ramon's location, Buchanan sought and was granted the right to serve him via publication. The trial court found, and the court of appeal affirmed, that her efforts were sufficiently diligent to warrant that method of service. This conclusion was amply supported by evidence that Ramon, with the active participation of Maria, was attempting to avoid service. He was in telephone communication with Maria during the relevant time periods. In his motion to vacate the judgment (via a special appearance), he filed a declaration listing an address in Mexico where he had not lived for several months. Based on this conduct, the court found Buchanan's efforts to be reasonable, in good faith, and diligent—and, by implication, found Ramon's efforts to avoid service to be bad faith conduct.

In sum, Ramon's acquisition of an ownership interest in the property justified the assertion of specific jurisdiction over him via the doctrine of in rem jurisdiction. His efforts to evade service of process warranted the use of service by publication.