UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RALPH S. JANVEY, IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK, LTD., ET AL.,	§	
Plaintiff,	§	
v.	§	
DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, INC.; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, INC.; REPUBLICAN NATIONAL COMMITTEE; and NATIONAL REPUBLICAN SENATORIAL COMMITTEE,	§	**Case No. 3:10-CV-0346**
Defendants.	§	

REPUBLICAN POLITICAL COMMITTEE DEFENDANTS' BRIEF IN SUPPORT OF THEIR PARTIAL MOTION TO DISMISS UNDER RULE 12(b)(6)

Respectfully submitted,

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I.
INTRODUCTION

Ralph S. Janvey (the "Receiver") filed the present action seeking avoidance of political contributions made by persons and entities associated with R. Allen Stanford. The Receiver's claims related to contributions made more than four years before he brought the present action are extinguished. They no longer exist. This is not a matter where the Receiver is procedurally barred from bringing the claim; there is simply no claim to bring. The plain language of Section 24.010 of the Texas Uniform Fraudulent Transfer Act ("UFTA"),[1] a statute of repose, states that claims brought outside of the prescribed period cease to exist. There is no claim to toll. With only one exception, which applies to transfers made with actual intent to defraud, Section 24.010 extinguishes a fraudulent transfer claim at most four years after the transfer was made. But even the one exception operates to extinguish a claim, not merely to procedurally bar the claim, unless the claim is brought within four years after the transfer was made, or, if later, within one year after the transfer was or could have reasonably been discovered by the claimant.

Although the Texas UFTA's statute of repose is not subject to judicial tolling doctrines, these doctrines nonetheless would have required the Receiver to bring the Stanford Entities' claims within one year of his appointment. The Receiver was appointed on February 16, 2009, but did not file suit until February 19, 2010. The Stanford Entities, in whose shoes the Receiver stands, have no cognizable action under the Texas UFTA, and the Receiver's claims must be dismissed.[2]

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[1] Codified in the Tex. Bus. & Comm. Code § 24.001 et seq.

[2] According to the Receiver, R. Allen Stanford allegedly made a contribution to the NRCC on May 21, 2008 for $28,500.00. Pl. Appx. at 1. This is the only contribution that falls within the four-year repose period, but it is not within the one-year period required by Section 24.010(a)(3). Thus, the Republican Political Committees only seek dismissal of this claim to the extent the claim is based on Section 24.006(b).

II.
LEGAL STANDARD

To survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[3] A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged.[4] In reviewing a Rule 12(b)(6) motion, the Court is not bound to accept legal conclusions as true.[5] When there are well pleaded factual allegations, the Court assumes their veracity and then determines whether they plausibly give rise to an entitlement to relief.[6]

In ruling on a motion to dismiss under 12(b)(6), the Court cannot look beyond the pleadings.[7] The pleadings, however, include the complaint and any documents attached to it.[8]

III.
ARGUMENT AND AUTHORITIES

A. Section 24.010 of the Texas UFTA is a statute of repose that substantively extinguishes a claim rather than merely barring the claim procedurally.

The Texas UFTA governs all transfers made after September 1, 1987.[9] In relevant part, the Texas UFTA allows a creditor to void transfers by a debtor that are deemed fraudulent.[10]

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[3] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

[4] *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

[5] *Iqbal*, 129 S.Ct. at 1949 50.

[6] *Id.*

[7] *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

[8] *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 99 (5th Cir. 2000).

[9] Tex. Bus. & Comm. Code § 24.012. The Receiver hints that there may be "other applicable law," but makes no attempt to identify any other law under which he can bring a fraudulent transfer action. Complaint ¶ 36.

Four sections generally govern whether a transfer is fraudulent: Sections 24.005(a)(1), 24.005(a)(2), 24.006(a), and 24.006(b).[11]

Causes of action arising under the Texas UFTA are subject to extinguishment under Section 24.010. Aptly captioned "Extinguishment of Cause of Action," Section 24.010, states in Subsection (a), that a claim "is extinguished unless" it is brought:

> (1) under Section 24.005(a)(1) of this code, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;
>
> (2) under Section 24.005(a)(2) or 24.006(a) of this code, within four years after the transfer was made or the obligation was incurred; or
>
> (3) under Section 24.006(b) of this code, within one year after the transfer was made.

The statute's use of the term *extinguished unless* is important. Its use is one of the key reasons courts have held that Section 24.010 is a statute of repose, rather than a mere statute of limitations.[12] Federal courts interpreting the Texas UFTA agree.[13] Section 24.010 serves to

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[10] *Id.* § 24.008.

[11] Section 24.005(a)(1) deems a transfer fraudulent when the debtor makes the transfer "with actual intent to hinder, delay, or defraud any creditor of the debtor." Sections 24.005(a)(2) and 24.006(a) require a transfer be made "without receiving a reasonably equivalent value in exchange for the transfer or obligation," when the debtor is (or is nearly) insolvent. Finally, Section 24.006(b) requires a transfer be made to an insider for an antecedent debt where the debtor is insolvent, and the insider should have known the debtor was insolvent.

[12] *See, e.g., Cadle Co. v. Wilson*, 136 S.W.3d 345, 350 (Tex. App.--Austin 2004, no pet.) (use of the word "extinguishment" indicates strict construction and §24.010 is "technically a statute of repose"); *Duran v. Henderson*, 71 S.W.3d 833, 838 (Tex. App.--Texarkana 2002, pet. denied) ("We find that Section 24.010 operates as a statute of repose rather than as a procedural statute of limitations."); *and Williams v. Performance Diesel, Inc.*, No. 14-00-00063-CV, 2002 Tex. App. LEXIS 2735 at *15 (Tex. App.--Houston[14th Dist.] April 18, 2002,) (referring to § 24.010 as imposing a four-year statute of repose based on the date of the transfers at issue).

In determining the law of the forum state, a federal court must apply the law as interpreted by the state's highest court. That said, a decision by an intermediate appellate state court must not be disregarded by a federal court unless the federal court is convinced by other data that the highest court of the state would decide otherwise. *See Texas Dep't of Hous. & Community Affairs v. Verex Assurance*, 68 F.3d 922, 928 (5th Cir. Tex. 1995).

"ensure that the lapse of the statutory periods prescribed by the section bars the right and not merely the remedy."[14] The statute's plain language—*extinguished unless*—clearly manifests this stated goal. For these and other reasons, Section 24.010 is construed as a statute of repose under Texas law.[15]

Categorizing Section 24.010 as a statute of repose rather than simply a statute of limitations carries significance. The two categories of statutes are treated very differently. A statute of limitations is a procedural mechanism that is a defense to limit the remedy available from an otherwise extant claim when the claim is brought outside the limitations period.[16] Judicially created doctrines of tolling generally apply to statutes of limitations.[17]

In contrast, a statute of repose substantively takes away a claim.[18] A claimant is not merely procedurally barred from bringing his claim; no cognizable claim exists. One of the key

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[13] *See, e.g., Smith v. Am. Founders Fin., Corp.*, 365 B.R. 647, 676 (S.D. Tex. Mar. 10, 2007) (holding that TUFTA § 24.010 is a statute of repose).

Indeed, many courts nationwide construing analogous statutes of other jurisdictions have determined that provisions similar to the Texas Extinguishment Provision are statutes of repose. *See, e.g., In re G-I Holdings, Inc.*, 2006 U.S. Dist. LEXIS 45510 (D.N.J. 2006) (collecting cases and identifying New Jersey among the jurisdictions recognizing the Extinguishment Provision as a statute of repose) ("The limitations period under the Uniform Fraudulent Conveyance Act is recognized by many jurisdictions as a statute of repose."); *Epperson v. Entm't Express, Inc.*, 159 Fed. Appx. 249, 252 (2d Cir. 2005) (Connecticut UFTA) (finding no error in the trial court's refusal to apply the tolling doctrine of fraudulent concealment to toll the "statute of repose"); *and First Southwestern Fin. Servs. v. Pulliam*, 912 P.2d 828, 830 (N.M. Ct. App. 1996) (New Mexico UFTA) ("[T]he UFTA operates in the same manner as other statutes of repose that extinguish a cause of action as of a certain date rather than simply blocking the remedy."); *Warfield v. Alaniz*, 453 F. Supp. 2d 1118, 1130 (Arizona UFTA) ("The only Arizona case interpreting the statute has referred to it as a 'statute of repose.'"); *but cf., Warfield v. Carnie*, No. 3:04-cv-633-R, 2007 U.S. Dist. LEXIS 27610 at *41 n.11 (Washington UFTA) (questioning whether the Washington UFTA was a statute of repose).

[14] *Duran v. Henderson*, 71 S.W.3d at 838.

[15] *See, e.g., Smith v. Am. Founders Fin., Corp.*, 365 B.R. at 676 ("Section 24.010 states that a fraudulent-transfer claim is 'extinguished' after four years. *Cadle* and *Duran* find this language determinative. This court agrees. Section 24.010 of the TUFTA is a statute of repose.") (citations omitted).

[16] *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 866 (Tex. 2009).

[17] *Methodist*, 2010 Tex. LEXIS 211 at *5.

[18] *Galbraith Eng'g*, 290 S.W.3d at 866.

purposes of a repose statute is "to create a final deadline for filing suit that is not subject to any exceptions, except perhaps those clear exceptions in the statute itself."[19] For this reason, courts do not apply judicially created doctrines to extend these periods.[20] This necessarily means that some claims are barred through no fault of the plaintiff.[21] The Legislature, however, weighed this and other public policy concerns in deciding to enact a statute of repose where a traditional statute of limitations would be inadequate.[22]

B. The statute of repose extinguished the Receiver's claim with respect to each contribution.

1. *Each claim for contributions brought under Section 24.005(a)(2) or 24.006(a) was extinguished four years after its respective contribution was made.*

According to Section 24.010(a)(2), a claim brought under Sections 24.005(a)(2) or 24.006(a) is extinguished unless it is brought within four years of the transfer. Section 24.010(a)(2) contains no exception to the four-year repose period, and claims subject to this provision are extinguished after the four-year period ends. The Receiver filed his complaint on February 19, 2010. Therefore, all claims brought under Sections 24.005(a)(2) or 24.006(a) relating to contributions made before February 19, 2006, are extinguished.

2. *Each claim for contributions brought under Section 24.006(b) was extinguished one year after its respective contribution was made.*

According to Section 24.010(a)(3), a claim brought under Section 24.006(b) is extinguished unless it is brought within one year of the transfer. Similar to Section 24.010(a)(2), Section 24.010(a)(3) contains no exception to the one-year repose period, and claims subject to

[19] *Methodist*, 2010 Tex. LEXIS 211 at *6.

[20] *Galbraith Eng'g*, 290 S.W.3d at 866-67.

[21] *Id.*

[22] *Galbraith Eng'g*, 290 S.W.3d at 866.

this provision are extinguished after the one-year period ends. The Receiver filed his complaint on February 19, 2010. Therefore, all claims brought under Sections 24.006(b) relating to contributions made before February 19, 2009, are extinguished.

3. *Each claim for contributions brought under Section 24.005(a)(1) was extinguished four years after its respective contribution was made because the Stanford Entities "discovered" each contribution at the time each was made.*

According to Section 24.010(a)(1), a claim brought under Section 24.005(a)(1) is extinguished unless it is brought within four years of the transfer or, if later, within one year after the claimant discovers or could have reasonably discovered the transfer. Section 24.010(a)(1) operates differently from two previously discussed subsections. The legislature crafted a single exception extending, if later, the otherwise definite four-year period, to one year after the claimant discovered or could have reasonably discovered the transfer. After this one-year period, however, under the plain language of the statute, the claim is extinguished just as it would otherwise have been after the four-year period, and no substantive claim exists.

The use of the term *extinguish* lends the Section 24.010 to strict construction.[23] Because only "creditors" are entitled to relief under the Texas UFTA, the "claimant" referred to in the discovery clause is the person with the "right to payment."[24]

An equity receiver has standing only to bring claims on behalf of the entities of the receivership to which he is appointed, and stands in the shoes of the receivership entities. As succinctly put by the First Circuit:

> Since 1935 it has been well settled that "the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have." *McCandless v. Furlaud*, 296 U.S. 140, 148, 80 L. Ed. 121, 56 S.

[23] *Cadle*, 136 S.W.3d at 350.

[24] *See* Texas Bus. & Comm. Code § 24.008 ("In an action for relief against a transfer or obligation under this chapter, *a creditor*, subject to the limitations in Section 24.009 of this code, may obtain [the listed remedies].") (emphasis added); *Id.* § 24.002(3)-(4) (defining the term creditor and claim).

> Ct. 41 (1935). In *McCandless*, Justice Cardozo "clearly emphasized that the receiver in that case was suing on behalf of the corporation, not third parties. . . ." *In other words, the receiver can only make a claim which the corporation could have made*. *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 429, 32 L. Ed. 2d 195, 92 S. Ct. 1678 (1972) (citing *McCandless*, 296 U.S. 140, 80 L. Ed. 121, 56 S. Ct. 41).[25]

Because "the receiver can only make a claim which the corporation could have made," the claimants for purposes of evaluating whether a claim is extinguished are the Stanford Entities.[26] The Stanford Entities knew of each allegedly fraudulent transfer the moment that each transfer was made. Therefore, the date of the transfer started the one-year period in which to bring a claim. So, in this instance, the one-year period was not "later" than the four-year period, and does not delay extinguishing the claims within four years of the transfer.

The Receiver cannot assert an extinguished claim. The Receiver has no greater right to bring a claim than the entities to which he has been assigned receiver.[27] Because the statute actually extinguished the claims before the Receiver was even appointed, rather than merely procedurally barred bringing the claims, the Receiver has no cognizable claim under the Texas UFTA for political contributions made more than four years before he filed suit.

C. Even if tolling were to apply, the claims would have been extinguished one year after the Receiver's appointment at the latest.

When state statutes of limitations are "borrowed," federal courts use the state tolling principles as the "primary guide."[28] Because these claims are governed by the Texas UFTA statute of repose, Texas law regarding tolling applies. As mentioned before, Texas courts do not

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[25] *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (emphasis added).

[26] *Id.*

[27] *See id.*

[28] *FDIC v. Dawson*, 4 F.3d 1303, 1306 (5th Cir. 1993).

apply judicially created tolling principles to the statutes of repose.[29] But even if tolling were to apply, the tolling of the Stanford Entities' discovery would have ended, at the latest, the day the Receiver was appointed. From that day, the Receiver would have had one year to bring the claims before they were extinguished.

Texas courts have applied the doctrine of adverse domination to toll statutes of limitations, but not statutes of repose,[30] in the limited context where the directors controlling the corporation "have been active participants in wrongdoing or fraud."[31] To the extent the adverse domination doctrine were to apply to toll the one-year period after a corporation "discovers" a particular transfer, it would toll the limitations period only while the wrongdoer retains control of the corporation.[32] To state it another way, the date of discovery remains the date that the Stanford Entities discovered the transfers, but the doctrine, if applicable, would only stop the one-year limitations period from running while the Stanford Entities were under control of the wrongdoer. So even if the doctrine were applicable, discovery by the Receiver is irrelevant where the corporation had previously discovered the transfers. This difference is particularly important here, where the running of the statute operates to substantively extinguish the claim.

The Receiver may try to argue that as of the date that he was appointed he exercised diligence in uncovering the extent of the alleged fraud and could not have reasonably known about these transfers until February 19, 2009, or thereafter. However, this argument is inconsequential. As demonstrated above, it is not the Receiver's knowledge that matters, but the

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[29] *Galbraith Eng'g*, 290 S.W.3d at 866-67.

[30] *See id.* (stating that judicial tolling doctrines do not apply to statutes of repose).

[31] *Dawson*, 4 F.3d at 1306.

[32] *Id.* at 1312.

knowledge of those in whose stead he stands, that is, the actual claimants.[33] In this case, the Stanford Entities had actual knowledge of the transfers for years. The rationale for tolling under a theory that the entities were unable to act on this knowledge due to adverse domination was no longer applicable after the Receiver's appointment.[34] As of that date, the organization was no longer under Stanford's control, its earlier "discovery" could no longer be tolled, and the one-year period began to tick. The Receiver did not bring his claims until February 19, 2010, three days after the claims would have had been extinguished, even if tolling were to apply.

IV.
PRAYER

For the reasons stated above, Plaintiffs respectfully request that the Court dismiss with prejudice all of the Receiver's claims under the Texas UFTA §§ 24.005(a)(1), 24.005(a)(2), and 24.006(a) relating to political contributions made before the February 19, 2006, claims under the Texas UFTA § 24.006(b) relating to political contributions made before February 19, 2009, and that the Court grant Republican Political Committee Defendants any other relief to which they are entitled.

[33] *Cadle*, 136 S.W.3d at 350.

[34] *See Scholes v. Lehman*, 56 F.3d 750, 754 (7th Cir. 1995) ("The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more Douglas's evil zombies.").

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2010, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, and that I have served all counsel of record electronically.

/s/ Mark A. Shank