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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

UNITED STATES OF AMERICA,
Plaintiff

v.

JAMES LESLIE READING, CLARE L.
READING, FOX GROUP TRUST,
MIDFIRST BANK, CHASE, FINANCIAL
LEGAL SERVICES, STATE OF ARIZONA
Defendants

2:11-cv-00698-FJM

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS
COMPLAINANT'S SEVENTH CLAIM
ON BEHALF OF JAMES LESLIE
READING, CLARE L. READING AND
FOX GROUP TRUST**

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

This cause was filed on April 8, 2011, by plaintiff, United States of America, hereinafter “government” or “the government”, seeking, among other relief, to have a transfer from James Leslie Reading and Clare L. Reading (hereinafter “Readings”) to Fox Group Trust set aside as a fraudulent transfer on the basis of Arizona Uniform Fraudulent Transfer Act (AFTA), A.R.S. 44-1001 *et seq.* The claim to set the transfer aside is identified in the complaint as plaintiff’s Seventh Claim.

The complaint alleges that the Readings transferred property to Fox Group Trust on or about June 10, 2005, which date is confirmed by examination of the certified copy of the transfer attached as Exhibit “A” to the instant motion.

Readings and the Fox Group Trust now move the Court to dismiss plaintiff's Seventh Claim due to the fact that on the basis of the face of plaintiff's complaint any cause of action that may have existed no longer exists by virtue of statutory extinguishment as provided by AFTA, A.R.S. 44-1009, and, therefore, plaintiff fails to state a claim upon which relief may be granted.

ARGUMENT AND LAW

The plaintiff's claim to set aside the transfer complained of is based upon the AFTA, particularly §§ 1004 and 1005. The causes of action thereby created, however, are extinguished by four years passage of time by § 1009, which provides:

44-1009. Extinguishment of claim for relief

A claim for relief with respect to a fraudulent transfer or obligation under this article is extinguished unless an action is brought:

1. Under section 44-1004, subsection A, paragraph 1 within four years after the transfer was made or the obligation was incurred or, if later, within one year after the fraudulent nature of the transfer or obligation was or through the exercise of reasonable diligence could have been discovered by the claimant.
2. Under section 44-1004, subsection A, paragraph 2 or section 44-1005, within four years after the transfer was made or the obligation was incurred.

The relevant dates for this issue are April 23, 2001, the date, according to the complaint, that defendants incurred an obligation to plaintiff; June 10, 2005, when the transfer occurred, and April 8, 2011, when the complaint was filed. Thus, by virtue of § 1009, any action the obligee, complainant, might have had to set aside the transfer would be extinguished, no longer in existence, after June 10, 2009.

It is anticipated that plaintiff will respond to this motion by claiming that it is not affected by statutes of limitation, even those appended to and specifically referring to the very statute of which plaintiff seeks to avail itself, but § 1009 is not a statute of limitation. It is, rather, a statute of repose.

This court, in *Warfield v. Alaniz*, 453 F. Supp.2d 1118 (D.Ariz. 2006), clearly addressed this question, not only in general terms, but specifically pertinent to Arizona's Uniform Fraudulent Transfer Act, stating at p. 1130:

A statute of limitations is a procedural device that operates as a defense to limit the remedy available for an existing cause of action. *Duran v. Henderson*, 71 S.W.3d 833, 837 (Tex.Ct.App. 2002). A statute of repose, on the other hand, creates a substantive right to be free from liability after a legislatively-determined period. *Id.* While a statute of limitations merely bars the enforcement of a right, a statute of repose *extinguishes* the claim after the specified time period has expired. *Id.*; see also *U.S. v. Bacon*, 82 F.3d 822, 823 (9th Cir. 1996). Unlike a traditional statute of limitations, the statute of repose contained in the UFTA cannot be waived. *Duran*, 71 S.W.3d at 837.

The Plaintiff cites no law in support of its argument that A.R.S. § 44-1009(A)(1) is a statute of limitation rather than a statute of repose. The only Arizona case interpreting the statute has referred to it as a "statute of repose." *Moore*, 203 Ariz. at 107, 50 P.3d at 857. Additionally, the fact that the legislature chose language specifying that claims brought outside the statute's time limits are "extinguished," rather than merely "barred," supports the conclusion that this is a statute of repose rather than a statute of limitation. A.R.S. § 44-1009; *Bacon*, 82 F.3d at 823.

And at 1131:

Substantive time limits, as opposed to procedural statutes of limitation, are binding on the federal government. *Resolution Trust Corp. v. Olson*, 768 F.Supp. 283, 285 (D. Ariz. 1991). Put another way, **although statutes of limitations are not binding on the government, statutes of repose are.** *U.S. v. Rezzonico*, 32 F.Supp.2d 1112, 1113 (D. Ariz. 1998); *Shasta View Irrigation Dist. v. Amoco Chemicals Corp.*, 986 P.2d 536, 543 (Or. 1999) (the public policy for exempting governments from statutes of limitations does not apply to statutes of ultimate repose).
(Emphasis added)

Accordingly, the cause of action sued upon, assuming arguendo that it existed in the first place, ceased to exist at midnight, June 10, 2009, and, therefore, based upon the allegations of the complaint on its face, there is no cause of action to have the transfer set aside on the basis of the Arizona Uniform Fraudulent Transfer Act.

CONCLUSION

It is, therefore, respectfully submitted that plaintiff's Seventh Claim, to set aside the transfer from the Readings to the Fox Group Trust, must be dismissed.

Respectfully submitted,

/s/ Tommy K. Cryer

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CERTIFICATE OF SERVICE

I hereby certify that I have on this date electronically filed the foregoing Memorandum in Support of Motion to Dismiss Complainant's Seventh Claim with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel for the parties:

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Shreveport, Louisiana, this 9th day of May, 2012.

/s/ Tommy K. Cryer