

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas
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As Engrossed: H3/15/17
A Bill

HOUSE BILL 2139

By: Representative D. Whitaker

For An Act To Be Entitled

AN ACT CONCERNING FRAUDULENT TRANSFERS AND VOIDABLE
TRANSACTIONS; AND FOR OTHER PURPOSES.

Subtitle

CONCERNING FRAUDULENT TRANSFERS AND
VOIDABLE TRANSACTIONS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code Title 4, Chapter 59, Subchapter 2 is amended
to read as follows:

Subchapter 2 – ~~Fraudulent Transfers~~ Uniform Voidable Transactions Act

4-59-201. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) “Affiliate” means:

(i) a person ~~who~~ that directly or indirectly owns,
controls, or holds with power to vote, twenty percent (20%) or more of the
outstanding voting securities of the debtor, other than a person ~~who~~ that
holds the securities:

(A) as a fiduciary or agent without sole
discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not
in fact exercised the power to vote;

(ii) a corporation twenty percent (20%) or more of whose
outstanding voting securities are directly or indirectly owned, controlled,



or held with power to vote, by the debtor or a person ~~who~~ that directly or indirectly owns, controls, or holds, with power to vote, twenty percent (20%) or more of the outstanding voting securities of the debtor, other than a person ~~who~~ that holds the securities:

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(iii) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(iv) a person ~~who~~ that operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(i) property to the extent it is encumbered by a valid lien;

(ii) property to the extent it is generally exempt under nonbankruptcy law; or

(iii) an interest in property held in tenancy by the entirety to the extent it is not subject to process by a creditor holding a claim against only one (1) tenant.

(3) "Claim", except as used in "claim for relief", means 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.

(4) "Creditor" means a person ~~who~~ that has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person ~~who~~ that is liable on a claim.

(7) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(8) "Insider" includes:

(i) if the debtor is an individual:

(A) a relative of the debtor or of a general partner

of the debtor;

(B) a partnership in which the debtor is a general partner;

(C) a general partner in a partnership described in clause (B); or

(D) a corporation of which the debtor is a director, officer, or person in control;

(ii) if the debtor is a corporation:

(A) a director of the debtor;

(B) an officer of the debtor;

(C) a person in control of the debtor;

(D) a partnership in which the debtor is a general partner;

(E) a general partner in a partnership described in clause (D); or

(F) a relative of a general partner, director, officer, or person in control of the debtor;

(iii) if the debtor is a partnership:

(A) a general partner in the debtor;

(B) a relative of a general partner in, a general partner of, or a person in control of the debtor;

(C) another partnership in which the debtor is a general partner;

(D) a general partner in a partnership described in clause (C); or

(E) a person in control of the debtor;

(iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(v) a managing agent of the debtor.

~~(8)~~(9) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien, including child support liens arising under §§ 9-14-230 and 9-14-231.

~~(9)~~ "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency,

~~business trust, estate, trust, or any other legal or commercial entity.~~

(10) "Organization" means a person other than an individual.

(11) "Person" means an individual, estate, partnership, association, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal or commercial entity.

(12) "Property" means anything that may be the subject of ownership.

(13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

~~(11)~~(14) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(15) "Sign" means, with present intent to authenticate or adopt a record:

(i) to execute or adopt a tangible symbol; or

(ii) to attach to or logically associate with the record an electronic symbol, sound, or process.

~~(12)~~(16) "Transfer" means 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, license, and creation of a lien or other encumbrance.

~~(13)~~(17) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

4-59-202. Insolvency.

(a) A debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater than ~~all~~ the sum of the debtor's assets ~~at a fair valuation~~.

(b) A debtor ~~who~~ that is generally not paying ~~his or her~~ 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.

~~(c) A partnership is insolvent under subsection (a) of this section if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.~~

~~(d)~~ Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this subchapter.

~~(e)~~(d) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

4-59-203. Value.

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or other person.

(b) *For the ~~purpose~~ purposes of §§ 4-59-204(a)(2) and 4-59-205, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.*

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

4-59-204. ~~Transfers fraudulent~~ Transfer or obligation voidable as to present ~~and or~~ future ~~creditors~~ creditor.

(a) A transfer made or obligation incurred by a debtor is ~~fraudulent voidable~~ as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(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; or

(ii) intended to incur, or believed or reasonably should have believed that ~~he or she~~ the debtor would incur, debts beyond ~~his or her~~ the debtor's ability to pay as they became due.

(b) In determining actual intent under subdivision (a)(1) of this section, consideration may be given, among other factors, as to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor ~~who~~ that transferred the assets to an insider of the debtor.

(c) A creditor making a claim for relief under subsection (a) of this section has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

4-59-205. ~~Transfers fraudulent~~ Transfer or obligation voidable as to present ~~creditors~~ creditor.

(a) A transfer made or obligation incurred by a debtor is ~~fraudulent~~ voidable 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.

(b) A transfer made by a debtor is ~~fraudulent~~ voidable 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.

(c) Except as provided under § 4-59-202(b), a creditor making a claim for relief under subsection (a) or subsection (b) of this section has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

4-59-206. When transfer is made or obligation is incurred.

For the purposes of this subchapter:

(1) a transfer is made:

(i) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good faith purchaser of the asset from the debtor against ~~whom~~ which applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(ii) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this subchapter that is superior to the interest of the transferee;

(2) if applicable law permits the transfer to be perfected as provided in subdivision (1) of this section and the transfer is not so perfected before the commencement of an action for relief under this subchapter, the transfer is deemed made immediately before the commencement of the action;

(3) if applicable law does not permit the transfer to be perfected as provided in subdivision (1) of this section, the transfer is

made when it becomes effective between the debtor and the transferee;

(4) a transfer is not made until the debtor has acquired rights in the asset transferred;

(5) an obligation is incurred:

(i) if oral, when it becomes effective between the parties; or

(ii) if evidenced by a ~~writing~~ record, when the ~~writing executed record signed~~ by the obligor is delivered to or for the benefit of the obligee.

No court order or judgment of a court shall be an obligation incurred under this subchapter.

4-59-207. Remedies of ~~creditors~~ creditor.

(a) In an action for relief against a transfer or obligation under this subchapter, a creditor, subject to the limitations in § 4-59-208, may obtain:

(1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee ~~in accordance with the procedure prescribed by §§ 16-110-201—16-110-211~~ if available under applicable law;

(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure~~;~~:

(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require~~;~~ and

(4) a settlement agreement with the transferee or a child support creditor or the Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration in Title IV-D cases.

(b) If a creditor has obtained a judgment on a claim against the

debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

4-59-208. Defenses, liability, and protection of transferee or obligee.

(a) A transfer or obligation is not voidable under § 4-59-204(a)(1) against a person ~~who~~ that took in good faith and for a reasonably equivalent value given the debtor, or against any subsequent transferee or obligee.

(b) To the extent a transfer is voidable in an action by a creditor under § 4-59-207(a)(1), the following rules apply:

(1) ~~Except~~ except as otherwise provided in this section, ~~to the extent a transfer is voidable in an action by a creditor under § 4-59-207(a)(1),~~ the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

~~(1)(i)~~ the first transferee of the asset or the person for whose benefit the transfer was made; or

~~(2)(ii)~~ any ~~subsequent transferee~~ an immediate or mediate transferee of the first transferee, other than:

(A) a good faith transferee ~~who~~ that took for value;

or

(B) ~~from any subsequent transferee~~ an immediate or mediate good-faith transferee of a person described in subdivision (b)(1)(ii)(A) of this section.

(2) recovery pursuant to § 4-59-207(a)(1) or § 4-59-207(b) of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person described in subdivision (b)(1)(i) or subdivision (b)(1)(ii) of this section.

(c) If the judgment under subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this subchapter, a good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) a lien on or a right to retain ~~any~~ an interest in the asset transferred;

(2) enforcement of ~~any~~ an obligation incurred; or

(3) a reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under § 4-59-204(a)(2) or § 4-59-205 if the transfer results from:

(1) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) enforcement of a security interest in compliance with ~~chapter article 9 of the Uniform Commercial Code, § 4-9-101 et seq.~~ other than acceptance of collateral in full or partial satisfaction of the obligation it secures.

(f) A transfer is not voidable under § 4-59-205(b):

(1) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made, ~~unless~~ except to the extent the new value was secured by a valid lien;

(2) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) if made pursuant to a good faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

(g) The following rules determine the burden of proving matters referred to in this section:

(1) a party that seeks to invoke subsections (a),(d),(e), or (f) of this section has the burden of proving the applicability of that subsection.

(2) except as otherwise provided in subdivisions (g)(3) and (g)(4) of this section, the creditor has the burden of proving each applicable element of subsection (b) or subsection (c) of this section.

(3) the transferee has the burden of proving the applicability to the transferee of subdivision (b)(1)(ii)(A) or subdivision (b)(1)(ii)(B) this section.

(4) a party that seeks adjustment under subsection (c) of this section has the burden of proving the adjustment.

(h) The standard of proof required to establish matters referred to in this section is a preponderance of the evidence.

4-59-209. ~~Extinguishment of cause of action~~ claim for relief.

A ~~cause of action~~ claim for relief with respect to a ~~fraudulent~~ transfer or obligation under this subchapter is extinguished unless action is brought:

(a) under § 4-59-204(a)(1), ~~within three (3)~~ not later than four (4) years after the transfer was made or the obligation was incurred or, if later, not later than one (1) year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(b) under § 4-59-204(a)(2) or § 4-59-205(a), ~~within three (3)~~ not later than four (4) years after the transfer was made or the obligation was incurred; or

(c) under § 4-59-205(b), ~~within~~ not later than one (1) year after the transfer was made or the obligation was incurred.

4-59-210. ~~Supplementary provisions~~ Governing law.

~~Unless displaced by the provisions of this subchapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.~~

(a) In this section, the following rules determine a debtor's location:

(1) a debtor who is an individual is located at the individual's principal residence.

(2) a debtor that is an organization and has only one place of business is located at its place of business.

(3) a debtor that is an organization and has more than one place of business is located at its chief executive office.

(b) A claim for relief in the nature of a claim for relief under this subchapter is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.

4-59-211. ~~Uniformity of application and construction~~ Application to series organization.

~~This subchapter shall be applied and construed to effectuate its~~

~~general purpose to make uniform the law with respect to the subject of this subchapter among states enacting it.~~

(a) In this section:

(1) "Protected series" means an arrangement, however denominated, created by a series organization that, pursuant to the law under which the series organization is organized, has the characteristics set forth in subdivision (a)(2) of this section.

(2) "Series organization" means an organization that, pursuant to the law under which it is organized, has the following characteristics:

(i) the organic record of the organization provides for creation by the organization of one or more protected series, however denominated, with respect to specified property of the organization, and for records to be maintained for each protected series that identify the property of or associated with the protected series.

(ii) debt incurred or existing with respect to the activities of, or property of or associated with, a particular protected series is enforceable against the property of or associated with the protected series only, and not against the property of or associated with the organization or other protected series of the organization.

(iii) debt incurred or existing with respect to the activities or property of the organization is enforceable against the property of the organization only, and not against the property of or associated with a protected series of the organization.

(b) A series organization and each protected series of the organization is a separate person for purposes of this subchapter even if for other purposes a protected series is not a person separate from the organization or other protected series of the organization.

4-59-212. ~~Short title~~ Supplementary provisions.

~~This subchapter may be cited as the Arkansas Fraudulent Transfer Act~~
Unless displaced by the provisions of this subchapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

4-59-213. ~~Repeal Uniformity of application and construction.~~

~~The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed:~~

~~(a) Sections 1 through 7, Chapter 65 Revised Statutes of 1837;~~

~~(b) Section 1 of Act 99 of March 31, 1887;~~

~~(c) Section 1 of Act 24 of 1965, First Extraordinary Session~~

This subchapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this subchapter among states enacting it.

4-59-214. Relation to Electronic Signatures in Global and National Commerce Act.

This subchapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

4-59-215. Short title.

This subchapter, which was formerly cited as the Uniform Fraudulent Transfer Act, may be cited as the Uniform Voidable Transactions Act.

SECTION 2. DO NOT CODIFY. The General Assembly finds that although the text of this act is in agreement with and will improve Arkansas law, the 2014 Official Uniform Law Commission comment no. 2 and comment no. 8 to Section 4 of the uniform act, which is codified at § 4-59-204, is intended to be persuasive authority but does not represent Arkansas law and should not be considered when interpreting this act.

/s/D. Whitaker