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WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1986



ENROLLED
Committee Substitute for
SENATE BILL NO. 150

(By Senator Sharpe, et al)



PASSED March 8, 1986
In Effect July 1, 1986



ENROLLED
COMMITTEE SUBSTITUTE
FOR
Senate Bill No. 150

(SENATORS SHARPE, COOK, PALUMBO, COLOMBO, FANNING, BURDETTE AND
SHAW, *original sponsors*)

[Passed March 8, 1986; to take effect July 1, 1986.]

AN ACT to repeal sections one, two, three, four, five and six, article one, chapter forty of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend said chapter by adding thereto a new article, designated article one-a, relating to enacting the uniform fraudulent transfers act; providing for definitions; defining when transfers are fraudulent; defining when transfers occur; providing for remedies to creditors; providing for protection of transferees; time limit on causes of action; providing that present law supplement this act; and repealing the provisions relating to acts void as to creditors, purchasers and others.

Be it enacted by the Legislature of West Virginia:

That sections one, two, three, four, five and six, article one, chapter forty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; and that said chapter be amended by adding thereto a new article, designated article one-a, to read as follows:

ARTICLE 1A. UNIFORM FRAUDULENT TRANSFERS ACT.

§40-1A-1. Definitions.

1 As used in this article:

2 (a) "Affiliate" means:

3 (1) A person who directly or indirectly owns, controls or
4 holds with power to vote, twenty percent or more of the
5 outstanding voting securities of the debtor, other than a
6 person who holds the securities:

7 (i) As a fiduciary or agent without sole discretionary
8 power to vote the securities; or

9 (ii) Solely to secure a debt, if the person has not
10 exercised the power to vote;

11 (2) A corporation twenty percent or more of whose
12 outstanding voting securities are directly or indirectly
13 owned, controlled, or held with power to vote, by the debtor
14 or a person who directly or indirectly owns, controls or
15 holds, with power to vote, twenty percent or more of the
16 outstanding voting securities of the debtor, other than a
17 person who holds the securities:

18 (i) As a fiduciary or agent without sole power to vote the
19 securities; or

20 (ii) Solely to secure a debt, if the person has not in fact
21 exercised the power to vote;

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

25 (4) A person who operates the debtor's business under a
26 lease or other agreement or controls substantially all of the
27 debtor's assets.

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

30 (1) Property to the extent it is encumbered by a valid
31 lien;

32 (2) Property to the extent it is generally exempt under
33 nonbankruptcy law; or

34 (3) An interest in property held in tenancy by the
35 entireties to the extent it is not subject to process by a
36 creditor holding a claim against only one tenant.

37 (c) "Claim" means a right to payment, whether or not
38 the right is reduced to judgment, liquidated, unliquidated,
39 fixed, contingent, matured, unmatured, disputed,
40 undisputed, legal, equitable, secured or unsecured.

- 41 (d) "Creditor" means a person who has a claim.
- 42 (e) "Debt" means liability on a claim.
- 43 (f) "Debtor" means a person who is liable on a claim.
- 44 (g) "Insider" includes:
 - 45 (1) If the debtor is an individual:
 - 46 (i) A relative of the debtor or of a general partner of the
 - 47 debtor;
 - 48 (ii) A partnership in which the debtor is a general
 - 49 partner;
 - 50 (iii) A general partner in a partnership described in
 - 51 paragraph (ii); or
 - 52 (iv) A corporation of which the debtor is a director,
 - 53 officer or person in control;
 - 54 (2) If the debtor is a corporation:
 - 55 (i) A director of the debtor;
 - 56 (ii) An officer of the debtor;
 - 57 (iii) A person in control of the debtor;
 - 58 (iv) A partnership in which the debtor is a general
 - 59 partner;
 - 60 (v) A general partner in a partnership described in
 - 61 paragraph (iv); or
 - 62 (vi) A relative of a general partner, director, officer or
 - 63 person in control of the debtor;
 - 64 (3) If the debtor is a partnership:
 - 65 (i) A general partner in the debtor;
 - 66 (ii) A relative of a general partner in, a general partner
 - 67 of, or a person in control of the debtor;
 - 68 (iii) Another partnership in which the debtor is a
 - 69 general partner;
 - 70 (iv) A general partner in a partnership described in
 - 71 paragraph (iii); or
 - 72 (v) A person in control of the debtor;
 - 73 (4) An affiliate, or an insider of an affiliate as if the
 - 74 affiliate were the debtor; and
 - 75 (5) A managing agent of the debtor.
 - 76 (h) "Lien" means a charge against or an interest in
 - 77 property to secure payment of a debt or performance of an
 - 78 obligation, and includes a security interest created by
 - 79 agreement, a judicial lien obtained by legal or equitable
 - 80 process or proceedings, a common-law lien or a statutory
 - 81 lien.
 - 82 (i) "Person" means an individual, partnership,

83 corporation, association, organization, government or
84 governmental subdivision or agency, business trust, estate,
85 trust or any other legal or commercial entity.

86 (j) "Property" means anything that may be the subject
87 of ownership.

88 (k) "Relative" means an individual related by
89 consanguinity within the third degree as determined by the
90 common law, a spouse or an individual related to a spouse
91 within the third degree as so determined, and includes an
92 individual in an adoptive relationship within the third
93 degree.

94 (l) "Transfer" means every mode, direct or indirect,
95 absolute or conditional, voluntary or involuntary, of
96 disposing of or parting with an asset or an interest in an
97 asset, and includes payment of money, release, lease and
98 creation of a lien or other encumbrance.

99 (m) "Valid lien" means a lien that is effective against the
100 holder of a judicial lien subsequently obtained by legal or
101 equitable process or proceedings.

§40-1A-2. Insolvency.

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

3 (b) A debtor who is generally not paying his (or her)
4 debts as they become due is presumed to be insolvent.

5 (c) A partnership is insolvent under subsection (a) if the
6 sum of the partnership's debts is greater than the aggregate,
7 at a fair valuation, of all of the partnership's assets and the
8 sum of the excess of the value of each general partner's
9 nonpartnership assets over the partner's nonpartnership
10 debts.

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

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

§40-1A-3. Value.

1 (a) Value is given for a transfer or an obligation if, in

2 exchange for the transfer or obligation, property is
3 transferred or an antecedent debt is secured or satisfied, but
4 value does not include an unperformed promise made
5 otherwise than in the ordinary course of the promisor's
6 business to furnish support to the debtor or another person.

7 (b) For the purposes of subdivision (2), subsection (a),
8 section four, and subsection (a), section five, all of this
9 article, a person gives a reasonably equivalent value if the
10 person acquires an interest of the debtor in an asset
11 pursuant to a regularly conducted, noncollusive foreclosure
12 sale or execution of a power of sale for the acquisition or
13 disposition of the interest of the debtor upon default under
14 a mortgage, deed of trust or security agreement.

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

**§40-1A-4. Transfers fraudulent as to present and future
creditors.**

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

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

8 (2) Without receiving a reasonably equivalent value in
9 exchange for the transfer or obligation and the debtor:

10 (i) Was engaged or was about to engage in a business or a
11 transaction for which the remaining assets of the debtor
12 were unreasonably small in relation to the business or
13 transaction; or

14 (ii) Intended to incur, or believed or reasonably should
15 have believed that he (or she) would incur, debts beyond his
16 (or her) ability to pay as they became due.

17 (b) In determining actual intent under subdivision (1),
18 subsection (a), consideration may be given, among other
19 factors, to whether:

20 (1) The transfer or obligation was to an insider;

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

23 (3) The transfer or obligation was disclosed or
24 concealed;

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

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

29 (6) The debtor absconded;

30 (7) The debtor removed or concealed assets;

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

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

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

39 (11) The debtor transferred the essential assets of the
40 business to a lienor who transferred the assets to an insider
41 of the debtor.

§40-1A-5. Transfers fraudulent as to present creditors.

1 (a) A transfer made or obligation incurred by a debtor is
2 fraudulent as to a creditor whose claim arose before the
3 transfer was made or the obligation was incurred if the
4 debtor made the transfer or incurred the obligation without
5 receiving a reasonably equivalent value in exchange for the
6 transfer or obligation and the debtor was insolvent at that
7 time or the debtor became insolvent as a result of the
8 transfer or obligation.

9 (b) A transfer made by a debtor is fraudulent as to a
10 creditor whose claim arose before the transfer was made if
11 the transfer was made to an insider for an antecedent debt,
12 the debtor was insolvent at that time and the insider had
13 reasonable cause to believe that the debtor was insolvent.

§40-1A-6. When transfer is made or obligation is incurred.

1 For the purposes of this article:

2 (a) A transfer is made:

3 (1) With respect to an asset that is real property other
4 than a fixture, but including the interest of a seller or
5 purchaser under a contract for the sale of the asset, when
6 the transfer is so far perfected that a good-faith purchaser

7 of the asset from the debtor against whom applicable law
8 permits the transfer to be perfected cannot acquire an
9 interest in the asset that is superior to the interest of the
10 transferee; and

11 (2) With respect to an asset that is not real property or
12 that is a fixture, when the transfer is so far perfected that a
13 creditor on a simple contract cannot acquire a judicial lien
14 otherwise than under this article that is superior to the
15 interest of the transferee;

16 (b) If applicable law permits the transfer to be perfected
17 as provided in subdivision (a) and the transfer is not so
18 perfected before the commencement of an action for relief
19 under this article, the transfer is considered made
20 immediately before the commencement of the action;

21 (c) If applicable law does not permit the transfer to be
22 perfected as provided in subdivision (a), the transfer is
23 made when it becomes effective between the debtor and the
24 transferee; and

25 (d) A transfer is not made until the debtor has acquired
26 rights in the asset transferred and an obligation is incurred.
27 If the obligation is oral, a transfer is made when the
28 obligation becomes effective. If the obligation is evidenced
29 by a writing, the obligation becomes effective when the
30 writing is delivered to or for the benefit of the obligee.

§40-1A-7. Remedies of creditors.

1 (a) In an action for relief against a transfer or obligation
2 under this article, a creditor, subject to the limitations in
3 section eight of this article, may obtain:

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

6 (2) An attachment or other provisional remedy against
7 the asset transferred or other property of the transferee;

8 (3) Subject to applicable principles of equity and in
9 accordance with applicable rules of civil procedure:

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

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

15 (iii) Any other relief the circumstances may require.

16 (b) If a creditor has obtained a judgment on a claim

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

§40-1A-8. Defenses, liability and protection of transferee.

1 (a) A transfer or obligation is not voidable under
2 subdivision (1), subsection (a), section four of this article,
3 against a person who took in good faith and for a reasonably
4 equivalent value or against any subsequent transferee or
5 obligee.

6 (b) Except as otherwise provided in this section, to the
7 extent a transfer is voidable in an action by a creditor under
8 subdivision (1), subsection (a), section seven of this article,
9 the creditor may recover judgment for the value of the asset
10 transferred, as adjusted under subsection (c) of this section,
11 or the amount necessary to satisfy the creditor's claim,
12 whichever is less. The judgment may be entered against:

13 (1) The first transferee of the asset or the person for
14 whose benefit the transfer was made; or

15 (2) Any subsequent transferee other than a good faith
16 transferee who took for value or from any subsequent
17 transferee.

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

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

27 (1) A lien on or a right to retain any interest in the asset
28 transferred;

29 (2) Enforcement of any obligation incurred; or

30 (3) A reduction in the amount of the liability on the
31 judgment.

32 (e) A transfer is not voidable under subdivision (2),
33 subsection (a), section four or section five, all of this article,
34 if the transfer results from:

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

38 (2) Enforcement of a security interest in compliance
39 with article nine of the uniform commercial code.

40 (f) A transfer is not voidable under subsection (b),
41 section five of this article:

42 (1) To the extent the insider gave new value to or for the
43 benefit of the debtor after the transfer was made unless the
44 new value was secured by a valid lien;

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

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

§40-1A-9. Extinguishment of claim for relief, cause of action.

1 A cause of action with respect to a fraudulent transfer or
2 obligation under this article is extinguished unless action is
3 brought:

4 (a) Under subdivision (1), subsection (a), section four of
5 this article, within four years after the transfer was made or
6 the obligation was incurred or, if later, within one year after
7 the transfer or obligation was or could reasonably have
8 been discovered by the claimant;

9 (b) Under subdivision (2), subsection (a), section four or
10 subsection (a), section five of this article, within four years
11 after the transfer was made or the obligation was incurred;
12 or

13 (c) Under subsection (b), section five of this article,
14 within one year after the transfer was made or the
15 obligation was incurred.

§40-1-10. Supplementary provisions.

1 Unless displaced by the provisions of this article, the
2 principles of law and equity, including the law merchant
3 and the law relating to principal and agent, estoppel,
4 laches, fraud, misrepresentation, duress, coercion, mistake,
5 insolvency or other validating or invalidating cause,
6 supplement its provisions.

§40-1A-11. Uniformity of application and construction.

1 This article shall be applied and construed to effectuate

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2 its general purpose to make uniform the law with respect to
3 the subject of this article among states enacting it.

§40-1A-12. Short title.

1 This article may be cited as the “Uniform Fraudulent
2 Transfers Act.”

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Bruce O. Williams
.....
Chairman Senate Committee

Floyd Fuller
.....
Chairman House Committee

Originated in the Senate.

To take effect July 1, 1986.

Todd C. Wirth
.....
Clerk of the Senate

Donald S. Hoop
.....
Clerk of the House of Delegates

Russ Tamborini
.....
President of the Senate

Joseph P. Allington
.....
Speaker House of Delegates

The within *approved* this the *26th*
day of *March*, 1986.

Arch A. Brown Jr.
.....
Governor



PRESENTED TO THE
GOVERNOR

Date 3/20/86

Time 3:46 p.m.

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SECRETARY OF STATE

FILED IN THE OFFICE OF
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WEST VIRGINIA

THIS DATE 3/26/86