

House Bill 84 (AM)

By: Representatives Martin of the 47th, Allen of the 117th, Reichert of the 126th and Campbell of the 42nd

A BILL TO BE ENTITLED
AN ACT

To amend Article 2 of Chapter 3 of Title 9 of the Official Code of Georgia Annotated, relating to specific periods of limitation, and Chapter 2 of Title 18 of the Official Code of Georgia Annotated, relating to debtor and creditor relations, so as to enact the Uniform Fraudulent Transfers Act; to provide for a short title and for definitions; to provide for circumstances when a debtor or a debtor partnership is insolvent, when a debtor is presumed insolvent, when value is given for a transfer or obligation, when a transfer made or obligation incurred by a debtor is fraudulent as to a creditor, and when a transfer is made and an obligation is incurred; to provide factors for determining actual intent in a transfer or obligation; to provide for relief for a creditor against a fraudulent transfer or obligation; to provide for instances when a transfer or obligation is not voidable; to provide for rights of a good faith transferee or obligee if a transfer or obligation is voided; to provide for statutes of limitation; to provide for supplementation of this Act; to remove certain duplicate or redundant provisions relating to conveyances by debtors deemed fraudulent and the validity of a conveyance to an innocent subsequent purchaser; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Article 2 of Chapter 3 of Title 9 of the Official Code of Georgia Annotated, relating to specific periods of limitation, is amended by inserting a new Code section to be designated Code Section 9-3-35 to read as follows:

"9-3-35.

An action by a creditor seeking relief under the provisions of Article 4 of Chapter 2 of Title 18, known as the 'Uniform Fraudulent Transfers Act,' shall be brought within the applicable period set out in Code Section 18-2-79."

SECTION 2.

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Chapter 2 of Title 18 of the Official Code of Georgia Annotated, relating to debtor and creditor relations, is amended in Article 2, relating to acts void as against creditors, by striking Code Sections 18-2-22, relating to conveyances by debtors deemed fraudulent, and 18-2-23, relating to validity of conveyance to innocent subsequent purchaser, and inserting in lieu thereof the following:

"18-2-22.

~~The following acts by debtors shall be fraudulent in law against creditors and others and as to them shall be null and void:~~

~~(1) Every assignment or transfer by a debtor, insolvent at the time, of real or personal property or choses in action of any description to any person, either in trust or for the benefit of or on behalf of creditors, where any trust or benefit is reserved to the assignor or any person for him;~~

~~(2) Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description had or made with intention to delay or defraud creditors, where such intention is known to the taking party; a bona fide transaction on a valuable consideration, where the taking party is without notice or ground for reasonable suspicion of said intent of the debtor, shall be valid; and~~

~~(3) Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance. Reserved.~~

18-2-23.

~~Where a sale void as against creditors is made, the property has not been seized, and no step has been taken to set the sale aside, the fraudulent vendee can convey to an innocent purchaser from him, for value and without notice of the fraud, a title good as against the claims or judgments of the defrauded creditors. Reserved."~~

SECTION 3.

Said chapter is further amended by inserting a new article to be designated Article 4 to read as follows:

"ARTICLE 4

18-2-70.

This article shall be known and may be cited as the 'Uniform Fraudulent Transfers Act.'

18-2-71.

As used in this article:

1 (1) 'Affiliate' means:

2 (A) A person who directly or indirectly owns, controls, or holds with power to vote,
3 20 percent or more of the outstanding voting securities of the debtor, other than a
4 person who holds the securities:

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

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

7 (B) A corporation 20 percent or more of whose outstanding voting securities are
8 directly or indirectly owned, controlled, or held with power to vote, by the debtor or a
9 person who directly or indirectly owns, controls, or holds with power to vote, 20
10 percent or more of the outstanding voting securities of the debtor, other than a person
11 who holds the securities:

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

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

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

16 (D) A person who operates the debtor's business under a lease or other agreement or
17 controls substantially all of the debtor's assets.

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

19 (A) Property to the extent it is encumbered by a valid lien;

20 (B) Property to the extent it is generally exempt under nonbankruptcy law; or

21 (C) An interest in property held in tenancy by the entireties to the extent it is not
22 subject to process by a creditor holding a claim against only one tenant.

23 (3) 'Claim' means a right to payment, whether or not the right is reduced to judgment,
24 liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed,
25 legal, equitable, secured, or unsecured.

26 (4) 'Creditor' means a person who has a claim.

27 (5) 'Debt' means liability on a claim.

28 (6) 'Debtor' means a person who is liable on a claim.

29 (7) 'Insider' includes:

30 (A) If the debtor is an individual:

31 (i) A relative of the debtor or of a general partner of the debtor;

32 (ii) A partnership in which the debtor is a general partner;

33 (iii) A general partner in a partnership described in division (ii) of this subparagraph;

34 or

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

36 (B) If the debtor is a corporation:

37 (i) A director of the debtor;

1 (ii) An officer of the debtor;

2 (iii) A person in control of the debtor;

3 (iv) A partnership in which the debtor is a general partner;

4 (v) A general partner in a partnership described in division (iv) of this subparagraph;

5 or

6 (vi) A relative of a general partner, director, officer, or person in control of the
7 debtor;

8 (C) If the debtor is a partnership:

9 (i) A general partner in the debtor;

10 (ii) A relative of a general partner in, or a general partner of, or a person in control
11 of the debtor;

12 (iii) Another partnership in which the debtor is a general partner;

13 (iv) A general partner in a partnership described in division (iii) of this subparagraph;

14 or

15 (v) A person in control of the debtor;

16 (D) An affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

17 (E) A managing agent of the debtor.

18 (8) 'Lien' means a charge against or an interest in property to secure payment of a debt
19 or performance of an obligation, and includes a security interest created by agreement,
20 a judicial lien obtained by legal or equitable process or proceedings, a common-law lien,
21 or a statutory lien.

22 (9) 'Person' means an individual, partnership, corporation, association, organization,
23 government or governmental subdivision or agency, business trust, estate, trust, or any
24 other legal or commercial entity.

25 (10) 'Property' means anything that may be the subject of ownership.

26 (11) 'Relative' means an individual related by consanguinity within the third degree as
27 determined by the common law, a spouse, or an individual related to a spouse within the
28 third degree as so determined and includes an individual in an adoptive relationship
29 within the third degree.

30 (12) 'Transfer' means every mode, direct or indirect, absolute or conditional, voluntary
31 or involuntary, of disposing of or parting with an asset or an interest in an asset, and
32 includes payment of money, release, lease, and creation of a lien or other encumbrance.

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

35 18-2-72.

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

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

(c) A partnership is insolvent under subsection (a) of this Code section if the sum of the partnership's debts is greater than the aggregate of all of the partnership's assets, at a fair valuation, 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 Code 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 article.

(e) Debts under this Code 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.

18-2-73.

(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 another person.

(b) For the purposes of paragraph (2) of subsection (a) of Code Section 18-2-74 and Code Section 18-2-75, 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.

18-2-74.

(a) A transfer made or obligation incurred by a debtor is fraudulent 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:

1 (A) Was engaged or was about to engage in a business or a transaction for which the
2 remaining assets of the debtor were unreasonably small in relation to the business or
3 transaction; or

4 (B) Intended to incur, or believed or reasonably should have believed that he or she
5 would incur, debts beyond his or her ability to pay as they became due.

6 (b) In determining actual intent under paragraph (1) of subsection (a) of this Code section,
7 consideration may be given, among other factors, to whether:

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

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

11 (3) The transfer or obligation was disclosed or concealed;

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

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

15 (6) The debtor absconded;

16 (7) The debtor removed or concealed assets;

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

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

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

23 (11) The debtor transferred the essential assets of the business to a lienor who transferred
24 the assets to an insider of the debtor.

25 18-2-75.

26 (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose
27 claim arose before the transfer was made or the obligation was incurred if the debtor made
28 the transfer or incurred the obligation without receiving a reasonably equivalent value in
29 exchange for the transfer or obligation and the debtor was insolvent at that time or the
30 debtor became insolvent as a result of the transfer or obligation.

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

35 18-2-76.

For the purposes of this article:

(1) A transfer is made:

(A) 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 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

(B) 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 article that is superior to the interest of the transferee;

(2) If applicable law permits the transfer to be perfected as provided in paragraph (1) of this Code section and the transfer is not so perfected before the commencement of an action for relief under this article, 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 paragraph (1) of this Code 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; and

(5) An obligation is incurred:

(A) If oral, when it becomes effective between the parties; or

(B) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

18-2-77.

(a) In an action for relief against a transfer or obligation under this article, a creditor, subject to the limitations in Code Section 18-2-78, 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 Chapter 3 of this title;

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

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

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

1 (C) Any other relief the circumstances may require.

2 (b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the
3 court so orders, may levy execution on the asset transferred or its proceeds.

4 18-2-78.

5 (a) A transfer or obligation is not voidable under paragraph (1) of subsection (a) of Code
6 Section 18-2-74 against a person who took in good faith and for a reasonably equivalent
7 value or against any subsequent transferee or obligee.

8 (b) Except as otherwise provided in this Code section, to the extent a transfer is voidable
9 in an action by a creditor under paragraph (1) of subsection (a) of Code Section 18-2-77,
10 the creditor may recover judgment for the value of the asset transferred, as adjusted under
11 subsection (c) of this Code section, 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 whose benefit the transfer was made;
14 or

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

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

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

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

24 (2) Enforcement of any obligation incurred; or

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

26 (e) A transfer is not voidable under paragraph (2) of subsection (a) of Code Section
27 18-2-74 or Code Section 18-2-75 if the transfer results from:

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

30 (2) Enforcement of a security interest in compliance with Article 9 of the Uniform
31 Commercial Code.

32 (f) A transfer is not voidable under subsection (b) of Code Section 18-2-75:

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

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

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

18-2-79.

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

(1) Under paragraph (1) of subsection (a) of Code Section 18-2-74, 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 paragraph (2) of subsection (a) of Code Section 18-2-74 or subsection (a) of Code Section 18-2-75, within four years after the transfer was made or the obligation was incurred; or

(3) Under subsection (b) of Code Section 18-2-75, within one year after the transfer was made or the obligation was incurred.

18-2-80.

(a) Unless displaced by the provisions of this article, 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.

(b) The provisions of this article do not create a cause of action for a governmental entity or its agent or assignee with respect to a transaction which may otherwise constitute a fraudulent transfer or obligation under this article if the transaction complies with the applicable state and federal laws concerning transfers of property in the determination of eligibility for public benefits.

SECTION 4.

All laws and parts of laws in conflict with this Act are repealed.