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4

As Engrossed: H3/15/17
A Bill

HOUSE BILL 2139

5 By: Representative D. Whitaker
6

7 **For An Act To Be Entitled**

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

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11
12 **Subtitle**

13 CONCERNING FRAUDULENT TRANSFERS AND
14 VOIDABLE TRANSACTIONS.
15

16
17 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
18

19 SECTION 1. Arkansas Code Title 4, Chapter 59, Subchapter 2 is amended
20 to read as follows:
21

22 Subchapter 2 – ~~Fraudulent Transfers~~ Uniform Voidable Transactions Act
23

24 4-59-201. Definitions.

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

26 (1) “Affiliate” means:

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

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

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

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



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

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

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

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

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

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

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

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

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

24 (3) "Claim", except as used in "claim for relief", means a right
25 to payment, whether or not the right is reduced to judgment, liquidated,
26 unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed,
27 legal, equitable, secured, or unsecured.

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

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

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

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

34 (8) "Insider" includes:

35 (i) if the debtor is an individual:

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

1 of the debtor;

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

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

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

8 (ii) if the debtor is a corporation:

9 (A) a director of the debtor;

10 (B) an officer of the debtor;

11 (C) a person in control of the debtor;

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

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

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

18 (iii) if the debtor is a partnership:

19 (A) a general partner in the debtor;

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

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

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

26 (E) a person in control of the debtor;

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

29 (v) a managing agent of the debtor.

30 ~~(8)~~(9) "Lien" means a charge against or an interest in property
31 to secure payment of a debt or performance of an obligation, and includes a
32 security interest created by agreement, a judicial lien obtained by legal or
33 equitable process or proceedings, a common-law lien, or a statutory lien,
34 including child support liens arising under §§ 9-14-230 and 9-14-231.

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

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

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

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

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

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

12 ~~(14)~~ (14) "Relative" means an individual related by consanguinity
13 within the third degree as determined by the common law, a spouse, or an
14 individual related to a spouse within the third degree as so determined, and
15 includes an individual in an adoptive relationship within the third degree.

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

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

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

21 ~~(16)~~ (16) "Transfer" means every mode, direct or indirect,
22 absolute or conditional, voluntary or involuntary, of disposing of or parting
23 with an asset or an interest in an asset, and includes payment of money,
24 release, lease, license, and creation of a lien or other encumbrance.

25 ~~(17)~~ (17) "Valid lien" means a lien that is effective against the
26 holder of a judicial lien subsequently obtained by legal or equitable process
27 or proceedings.

28
29 4-59-202. Insolvency.

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

33 (b) A debtor ~~who~~ that is generally not paying ~~his or her~~ the debtor's
34 debts as they become due, other than as a result of a bona fide dispute, is
35 presumed to be insolvent. The presumption imposes on the party against which
36 the presumption is directed the burden of proving that the nonexistence of

1 insolvency is more probable than its existence.

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

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

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

14

15 4-59-203. Value.

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

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

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

30

31 4-59-204. ~~Transfers fraudulent~~ Transfer or obligation voidable as to
32 present ~~and or~~ future ~~creditors~~ creditor.

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

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

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

5 (i) was engaged or was about to engage in a business or a
6 transaction for which the remaining assets of the debtor were unreasonably
7 small in relation to the business or transaction; or

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

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

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

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

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

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

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

20 (6) the debtor absconded;

21 (7) the debtor removed or concealed assets;

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

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

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

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

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

34
35 4-59-205. ~~Transfers fraudulent~~ Transfer or obligation voidable as to
36 present ~~creditors~~ creditor.

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

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

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

16
17 4-59-206. When transfer is made or obligation is incurred.

18 For the purposes of this subchapter:

19 (1) a transfer is made:

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

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

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

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

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

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

4 (5) an obligation is incurred:

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

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

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

12
13 4-59-207. Remedies of ~~creditors~~ creditor.

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

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

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

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

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

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

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

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

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

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

3
4 4-59-208. Defenses, liability, and protection of transferee or
5 obligee.

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

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

11 (1) ~~Except~~ except as otherwise provided in this section, ~~to the~~
12 ~~extent a transfer is voidable in an action by a creditor under § 4-59-~~
13 ~~207(a)(1),~~ the creditor may recover judgment for the value of the asset
14 transferred, as adjusted under subsection (c) of this section, or the amount
15 necessary to satisfy the creditor's claim, whichever is less. The judgment
16 may be entered against:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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~~

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

3 (a) In this section:

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

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

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

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

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

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

28
29 ~~4-59-212. Short title~~ Supplementary provisions.

30 ~~This subchapter may be cited as the Arkansas Fraudulent Transfer Act~~

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

36

1 4-59-213. ~~Repeal Uniformity of application and construction.~~

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

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

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

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

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

10
11 4-59-214. Relation to Electronic Signatures in Global and National
12 Commerce Act.

13 This subchapter modifies, limits, or supersedes the Electronic
14 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et
15 seq., but does not modify, limit, or supersede Section 101(c) of that act,
16 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the
17 notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

18
19 4-59-215. Short title.

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

22
23 *SECTION 2. DO NOT CODIFY. The General Assembly finds that although*
24 *the text of this act is in agreement with and will improve Arkansas law, the*
25 *2014 Official Uniform Law Commission comment no. 2 and comment no. 8 to*
26 *Section 4 of the uniform act, which is codified at § 4-59-204, is intended*
27 *to be persuasive authority but does not represent Arkansas law and should*
28 *not be considered when interpreting this act.*

29
30 /s/D. Whitaker

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33 **APPROVED: 04/07/2017**