

UNIFORM FRAUDULENT TRANSFER ACT

House Bill 5708 as introduced First Analysis (3-26-98)

Sponsor: Rep. Andrew Richner
Committee: Commerce

THE APPARENT PROBLEM:

Since the Uniform Fraudulent Conveyance Act was adopted by the Michigan legislature in 1919 (and also by 24 other states following a 1918 recommendation of the National Conference of Commissioners on Uniform State Laws), many related statutes have changed, and in addition, the idea of conveyance, a term generally used in reference to personal property, has expanded to include transfers both of personal and real property.

Some argue that a new Uniform Fraudulent Transfer Act is necessary, in order to take into account changes made in related statutes and legal standards, including changes concerning fraudulent transfers made by the Bankruptcy Reform Act of 1978; changes in the law concerning security transfers under the Uniform Commercial Code; new provisions in the Model Corporations Act concerning the distribution of dividends; and new provisions in the Model Rules of Professional Conduct, which forbid a lawyer to knowingly assist a client in committing a fraud.

THE CONTENT OF THE BILL:

House Bill 5708 would create a new act to be known as the "Uniform Fraudulent Transfer Act," and would repeal the "Uniform Fraudulent Conveyance Act," Public Act 310 of 1919.

A brief description of each section of House Bill 5708 follows.

- Section 1 would define terms, including among others, affiliate, asset, claim, creditor, and transfer.
- Section 2 would establish the basic definition of insolvency.
- Section 3 defines those transactions that would be deemed "for value." This definition would replace

"fair consideration" from the Uniform Fraudulent Conveyances Act, and is more limited in scope.

- Section 4 would describe fraudulent transfers to present and future creditors, and provides for the remedies a creditor could seek.
- Section 5 would establish that constructive fraud would arise from a transfer of property or an assumption of an obligation without receiving reasonably equivalent value if the debtor was insolvent, or the transfer rendered the debtor insolvent.
- Section 6 would define the time of a transfer. This time constitutes the point at which the solvency or insolvency of the debtor would be measured, and from which the statute of limitations would run. (The current act does not specify when a transfer is completed.)
- Section 7 sets forth the remedies for a fraudulent transfer that would be generally available to creditors, and clarifies matured and unmatured claims. (A claim is 'matured' if there is a judgment against the debtor on the creditor's claim.)
- Section 8 would limit the application of the creditor's remedies. The section is said to be intended to protect the interests of good-faith transferees when a transfer is deemed fraudulent.
- Section 9 would set a statute of limitations.
- Section 10 would clarify that a limitation-of-action provision would not negate the possible application of, for example, the rule of laches in Michigan. (The doctrine of laches is the failure to assert rights, coupled with a lapse of time, resulting in a disadvantage.)

- Section 11 would establish the uniformity of the act.
- Section 12 specifies that the act would be known as the Uniform Fraudulent Transfer Act.
- Section 13 would repeal the Uniform Fraudulent Conveyance Act, Public Act 310 of 1919 (MCL 566.11 to 566.23).

BACKGROUND INFORMATION:

This bill is one of several recommended to the Michigan legislature by the Michigan Law Revision Commission, in order to update and to recodify bodies of law, including for example, the Uniform Commercial Code.

The National Conference of Commissioners on Uniform State Laws was created in 1892. The conference identifies outmoded statutes, substantiates its recommendations to eliminate those statutes with scholarly research, and then drafts uniform up-dated statutes. The updated "tentative" statutes are drafted over several years, allowing for ample review, argument, and revision. Revisions of the drafts are facilitated through a network of linkages constituted by scholars and practitioners who serve as members of the law sections of the federal and local bar associations, as well as those who serve as volunteer commissioners in state-level review commissions. These contexts provide an opportunity for stakeholders to study unacceptable statutes in light of emerging legal doctrines. The conference proposes the new statutes, first to the law sections, and then to the entirety of the American Bar Association for review by scholars, teachers of law, and legal practitioners. Once endorsed by the American Bar Association, the uniform statutes are disseminated to a network of state-level Uniform Law Commissions (for example the Michigan Law Revision Commission), whose members review the proposals once again, and then in some instances recommend their introduction as bills in the state legislatures.

According to the conference, since its organization, the conference has drafted more than 200 uniform laws on many subjects and in various fields of law, setting patterns for uniformity across the nation. Uniform acts include the Uniform Probate Code, the Uniform Child Custody Jurisdiction Act, the Uniform Partnership Act, the Uniform Anatomical Gift Act and the Uniform Limited Partnership Act. Beginning in 1940, the conference made a significant decision to attack major commercial problems with

comprehensive legal solutions--a decision that set in motion the project to produce the Uniform Commercial Code. The code took ten years to complete and another 14 years before it was enacted across the country. It remains the signature product of the conference. Today the conference is recognized primarily for its work in commercial law, family law, probate and estates, law of business organizations, health law, and conflicts in law. It rarely drafts law that is regulatory in character.

The Michigan Law Revision Commission has issued more than 30 annual reports, although the commission was created by statute in 1986 (MCL 4.1401). Each year the commission issues a report to describe the topics of its study reports, and to recommend statutes. Some statutes are enacted into law. Under its enabling statute, section 401 of Public Act 268 of 1986, the commission's membership is: four legislators to be bicameral and bipartisan, the director of the Legislative Service Bureau (or designee), and four members appointed by the Legislative Council. The Legislative Council designates the chair. The commission's reports are available at its Web Site, <http://www.dcl.edu>.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

According to the Michigan Law Revision Commission, since 1984 the Uniform Fraudulent Transfer Act has been proposed by the National Conference of Commissioners on Uniform State Laws to replace the Uniform Fraudulent Conveyance Act, although the new act would not change the basic structure of the current act. It would, however, delete certain provisions and correct deficiencies, including narrowing an over-broad definition of asset (used in determining "insolvency"); clarifying the partnership provision; establishing a timing provision; and discarding an unnecessary distinction between creditors with matured claims and those with unmatured claims.

POSITIONS:

The National Conference of Commissioners on Uniform State Laws proposed the enactment of the bill.

The Michigan Bankers Association supports the bill.
(3-25-98)

Analyst: J. Hunault

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.