

Senate Fiscal Agency
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SFA**BILL ANALYSIS**

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House Bill 5708 (as passed by the House)

Sponsor: Representative Andrew Richner

House Committee: Commerce

Senate Committee: Economic Development, International Trade and Regulatory Affairs

Date Completed: 11-18-98

CONTENT

The bill would enact the “Uniform Fraudulent Transfer Act”, which would repeal and replace the Uniform Fraudulent Conveyance Act (MCL 566.11-566.23). The bill specifies circumstances under which a transfer made or obligation incurred by a debtor would be fraudulent; describes when a transfer would be considered made; specifies the relief that a creditor could obtain; describes when a transfer would or would not be voidable; and prescribes the period of limitations for an action brought under the proposed Act.

A “creditor” would be a person who had a claim, and a “debtor” would be a person who was liable on a claim. “Claim” would mean a right to payment, whether or not the right was reduced to judgment, liquidated, fixed, contingent, matured, disputed, legal, equitable, or secured. “Transfer” would mean 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 would include payment of money, release, lease, and creation of a lien or other encumbrance.

A transfer made or obligation incurred by a debtor would be 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 under either of the following circumstances:

- With actual intent to hinder, delay, or defraud any creditor of the debtor. (The bill describes factors that could be considered in determining the debtor’s actual intent.)
- Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either 1) was engaged or about to engage in a business or a transaction for which his or her remaining assets were unreasonably small in relation to the business or transaction, or 2) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

A transfer made or obligation incurred by a debtor would be fraudulent as to a creditor whose claim arose before the transfer was made or the obligation 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 he or she were insolvent at that time, or became insolvent as a result of the transfer or obligation. In addition, a transfer would be fraudulent as to a creditor whose claim arose before the transfer was made if the transfer were made to an insider (as defined in the bill) for an antecedent debt, the debtor were insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent. (The bill describes when a debtor would be considered insolvent, and when value would be given for a transfer or obligation.)

In an action for relief against a transfer or obligation, a creditor (subject to the bill’s limitations on

voidable transfers and obligations) could obtain one or more of the following:

- Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.
- An attachment against the asset transferred or other property of the transferee to the extent authorized in the Revised Judicature Act and applicable court rules.
- Subject to applicable principles of equity and in accordance with applicable court rules and statutes, one or more of the following: 1) an injunction against further disposition by the debtor and/or a transferee of the asset transferred or of other property; 2) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; and/or 3) any other relief the court determined appropriate.

A transfer or obligation would not be voidable against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee. To the extent that a transfer was voidable in an action by a creditor, the creditor could recover a judgment for the value of the asset transferred or the amount necessary to satisfy the creditor's claim, whichever was less. The judgment could be entered against either the first transferee of the asset or the person for whose benefit the transfer was made, or any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

Notwithstanding the voidability of a transfer or an obligation, a good-faith transferee or obligee would be entitled, to the extent of the value given the debtor for the transfer or obligation, to a lien on or a right to retain any interest in the asset transferred, enforcement of any obligation incurred, and/or reduction in the amount of the liability on the judgment.

A transfer would not be voidable if it resulted from either the termination of a lease upon default by the debtor when the termination was pursuant to the lease and applicable law; or enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. A transfer involving an insider would not be voidable if one or more of the following applied:

- To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value were secured by a valid lien.
- If made in the ordinary course of business or financial affairs of the debtor and the insider.
- 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.

The bill states that, unless in conflict with its provisions, the principles of law and equity, including the law merchant and the law relating to principle and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, would supplement the provisions of the proposed Act.

The proposed Act would have to be applied and construed to effectuate its general purpose to make uniform the law of fraudulent conveyance among the states enacting it.

Legislative Analyst: S. Lowe

FISCAL IMPACT

The bill would have no fiscal impact on State of local government.

Fiscal Analyst: M. Tyszkiewicz

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.