

Act No. 434
Public Acts of 1998
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STATE OF MICHIGAN
89TH LEGISLATURE
REGULAR SESSION OF 1998

Introduced by Reps. Richner, Baird, Law and Nye

ENROLLED HOUSE BILL No. 5708

AN ACT to define and regulate fraudulent transfers and conveyances; to set aside and modify certain transfers and conveyances; to make uniform the law of fraudulent transfers; and to repeal acts and parts of acts.

The People of the State of Michigan enact:

Sec. 1. As used in this act:

(a) "Affiliate" means 1 or more of the following:

(i) A person who directly or indirectly owns, controls, or holds with power to vote 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities in either of the following circumstances:

(A) As a fiduciary or agent without sole discretionary power to vote the securities.

(B) Solely to secure a debt, if the person has not exercised the power to vote.

(ii) A corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities in either of the following circumstances:

(A) As a fiduciary or agent without sole power to vote the securities.

(B) Solely to secure a debt, if the person has not in fact exercised the power to vote.

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

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

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

(i) Property to the extent it is encumbered by a valid lien.

(ii) Property to the extent it is generally exempt under nonbankruptcy law.

(iii) An interest in property held in tenancy by the entirety to the extent it is not subject to process by a creditor holding a claim against only 1 tenant.

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

(d) "Creditor" means a person who has a claim.

(e) "Debt" means liability on a claim.

- (f) “Debtor” means a person who is liable on a claim.
- (g) “Insider” includes all of the following:
 - (i) If the debtor is an individual, all of the following:
 - (A) A relative of the debtor or of a general partner of the debtor.
 - (B) A partnership in which the debtor is a general partner.
 - (C) A general partner in a partnership described in sub-subparagraph (B).
 - (D) A corporation of which the debtor is a director, officer, or person in control.
 - (ii) If the debtor is a corporation, all of the following:
 - (A) A director of the debtor.
 - (B) An officer of the debtor.
 - (C) A person in control of the debtor.
 - (D) A partnership in which the debtor is a general partner.
 - (E) A general partner in a partnership described in sub-subparagraph (D).
 - (F) A relative of a general partner, director, officer, or person in control of the debtor.
 - (iii) If the debtor is a partnership, all of the following:
 - (A) A general partner in the debtor.
 - (B) A relative of a general partner in, a general partner of, or a person in control of the debtor.
 - (C) Another partnership in which the debtor is a general partner.
 - (D) A general partner in a partnership described in sub-subparagraph (C).
 - (E) A person in control of the debtor.
 - (iv) An affiliate, or an insider of an affiliate as if the affiliate were the debtor.
 - (v) A managing agent of the debtor.
- (h) “Lien” means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.
- (i) “Person” means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.
- (j) “Property” means anything that may be the subject of ownership.
- (k) “Relative” means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.
- (l) “Transfer” means 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 includes payment of money, release, lease, and creation of a lien or other encumbrance.
- (m) “Valid lien” means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

Sec. 2. (1) 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.

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

(3) A partnership is insolvent under subsection (1) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(4) As used in this section:

(a) Assets 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 act.

(b) Debts 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.

Sec. 3. (1) 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. 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.

(2) For the purposes of sections 4(a)(2) and 5, 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.

(3) 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.

Sec. 4. (1) 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 in either of the following:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:

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

(ii) 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.

(2) In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all of the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

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

Sec. 5. (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was 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 the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

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

Sec. 6. (1) A transfer is made under this act when 1 of the following occurs:

(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.

(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 act that is superior to the interest of the transferee.

(2) If applicable law permits the transfer to be perfected as provided in subsection (1) and the transfer is not so perfected before the commencement of an action for relief under this act, the transfer is considered made immediately before the commencement of the action.

(3) If applicable law does not permit the transfer to be perfected as provided in subsection (1), the transfer is made when it becomes effective between the debtor and the transferee.

(4) A transfer is not made under this act until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred under this act if 1 of the following occurs:

(a) If oral, when it becomes effective between the parties.

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

Sec. 7. (1) In an action for relief against a transfer or obligation under this act, a creditor, subject to the limitations in section 8, may obtain 1 or more of the following:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

(b) An attachment against the asset transferred or other property of the transferee to the extent authorized under section 4001 of the revised judicature act of 1961, 1961 PA 236, MCL 600.4001, and applicable court rules.

(c) Subject to applicable principles of equity and in accordance with applicable court rules and statutes, 1 or more of the following:

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

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

(iii) Any other relief the court determines appropriate.

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

Sec. 8. (1) A transfer or obligation is not voidable under section 4(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under section 7(1)(a), the creditor may recover a judgment for the value of the asset transferred, as adjusted under subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against either of the following:

(a) The first transferee of the asset or the person for whose benefit the transfer was made.

(b) Any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

(3) If the judgment under subsection (2) is based upon the value of the asset transferred, the judgment shall be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(4) Notwithstanding the voidability of a transfer or an obligation under this act, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to 1 or more of the following:

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

(b) Enforcement of any obligation incurred.

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

(5) A transfer is not voidable under section 4(1)(b) or 5 if the transfer results from either of the following:

(a) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.

(b) Enforcement of a security interest in compliance with article 9 of the uniform commercial code, 1962 PA 174, MCL 440.9101 to 440.9507.

(6) A transfer is not voidable under section 5(2) if 1 or more of the following occur:

(a) 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 was secured by a valid lien.

(b) If made in the ordinary course of business or financial affairs of the debtor and the insider.

(c) 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.

Sec. 9. A cause of action with respect to a fraudulent transfer or obligation under this act is extinguished unless action is brought under 1 or more of the following:

(a) Sections 4(1)(a) and (b) and 5(1), within the time period specified in sections 5813 and 5855 of the revised judicature act of 1961, 1961 PA 236, MCL 600.5813 and 600.5855.

(b) Section 5(2), within 1 year after the transfer was made or the obligation was incurred.

Sec. 10. Unless in conflict with the provisions of this act, 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 the provisions of this act.

Sec. 11. This act shall be applied and construed to effectuate its general purpose to make uniform the law of fraudulent conveyance among the states enacting it.

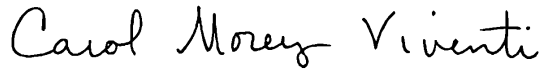
Sec. 12. This act shall be known and may be cited as the "uniform fraudulent transfer act".

Sec. 13. The uniform fraudulent conveyance act, 1919 PA 310, MCL 566.11 to 566.23, is repealed.

This act is ordered to take immediate effect.



Clerk of the House of Representatives.



Secretary of the Senate.

Approved _____

Governor.