

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1997

H

2

HOUSE BILL 407*
Second Edition Engrossed 4/8/97

Short Title: Uniform Fraudulent Transfer Act.

(Public)

Sponsors: Representatives Baddour and Culpepper (Cosponsors).

Referred to: Judiciary II.

March 5, 1997

1 A BILL TO BE ENTITLED
2 AN ACT TO REPEAL THE CURRENT STATUTES REGARDING FRAUDULENT
3 CONVEYANCES AND TO ADOPT THE UNIFORM FRAUDULENT TRANSFER
4 ACT IN ORDER TO MODERNIZE NORTH CAROLINA LAW AND
5 HARMONIZE OUR LAW ON THIS SUBJECT WITH THOSE STATES THAT
6 HAVE ADOPTED THIS UNIFORM ACT.

7 The General Assembly of North Carolina enacts:

8 Section 1. Article 3 of Chapter 39 of the General Statutes is repealed.

9 Section 2. Chapter 39 of the General Statutes is amended by adding a new
10 Article to read:

11 **“ARTICLE 3A.**

12 **“UNIFORM FRAUDULENT TRANSFER ACT.**

13 **“§ 39-23.1. Definitions.**

14 As used in this Article:

15 (1) ‘Affiliate’ means:

16 a. A person who directly or indirectly owns, controls, or holds with
17 power to vote, twenty percent (20%) or more of the outstanding
18 voting securities of the debtor, other than a person who holds the
19 securities.

- 1 1. As a fiduciary or agent without sole discretionary power
2 to vote the securities; or
3 2. Solely to secure a debt, if the person has not exercised the
4 power to vote;
5 b. A corporation twenty percent (20%) or more of whose
6 outstanding voting securities are directly or indirectly owned,
7 controlled, or held with power to vote, by the debtor or a person
8 who directly or indirectly owns, controls, or holds, with power to
9 vote, twenty percent (20%) or more of the outstanding voting
10 securities of the debtor, other than a person who holds the
11 securities.
12 1. As a fiduciary or agent without sole power to vote the
13 securities; or
14 2. Solely to secure a debt, if the person has not in fact
15 exercised the power to vote;
16 c. A person whose business is operated by the debtor under a lease
17 or other agreement, or a person substantially all of whose assets
18 are controlled by the debtor; or
19 d. A person who operates the debtor's business under a lease or
20 other agreement or controls substantially all of the debtor's
21 assets.
22 (2) 'Asset' means property of a debtor, but the term does not include:
23 a. Property to the extent it is encumbered by a valid lien;
24 b. Property to the extent it is generally exempt under nonbankruptcy
25 law; or
26 c. An interest in property held in tenancy by the entireties to the
27 extent it is not subject to process by a creditor holding a claim
28 against only one tenant.
29 (3) 'Claim' means a right to payment, whether or not the right is reduced to
30 judgment, liquidated, unliquidated, fixed, contingent, matured,
31 unmatured, disputed, undisputed, legal, equitable, secured, or
32 unsecured.
33 (4) 'Creditor' means a person who has a claim.
34 (5) 'Debt' means liability on a claim.
35 (6) 'Debtor' means a person who is liable on a claim.
36 (7) 'Insider' includes:
37 a. If the debtor is an individual,
38 1. A relative of the debtor or of a general partner of the
39 debtor;
40 2. A partnership in which the debtor is a general partner;
41 3. A general partner in a partnership in which the debtor is a
42 general partner; or

- 1 4. A corporation of which the debtor is a director, officer, or
2 person in control;
- 3 b. If the debtor is a corporation,
4 1. A director of the debtor;
5 2. An officer of the debtor;
6 3. A person in control of the debtor;
7 4. A partnership in which the debtor is a general partner;
8 5. A general partner in a partnership in which the debtor is a
9 general partner; or
10 6. A relative of a general partner, director, officer, or person
11 in control of the debtor;
- 12 c. If the debtor is a partnership,
13 1. A general partner in the debtor;
14 2. A relative of a general partner in, a general partner of, or a
15 person in control of the debtor;
16 3. Another partnership in which the debtor is a general
17 partner;
18 4. A general partner in a partnership in which the debtor is a
19 general partner; or
20 5. A person in control of the debtor;
- 21 d. An affiliate, or an insider of an affiliate as if the affiliate were the
22 debtor; and
- 23 e. A managing agent of the debtor.
- 24 (8) 'Lien' means a charge against or an interest in property to secure
25 payment of a debt or performance of an obligation, and includes a
26 security interest created by agreement, a judicial lien obtained by legal
27 or equitable process or proceedings, a common-law lien, or a statutory
28 lien.
- 29 (9) 'Person' means an individual, partnership, corporation, association,
30 organization, government or governmental subdivision or agency,
31 business trust, estate, trust, or any other legal or commercial entity.
- 32 (10) 'Property' means anything that may be the subject of ownership.
- 33 (11) 'Relative' means an individual related by consanguinity within the third
34 degree as determined in accordance with G.S. 104A-1, a spouse, or an
35 individual related to a spouse within the third degree as so determined,
36 and includes an individual in an adoptive relationship within the third
37 degree.
- 38 (12) 'Transfer' means every mode, direct or indirect, absolute or conditional,
39 voluntary or involuntary, of disposing of or parting with an asset or an
40 interest in an asset, and includes payment of money, release, lease, and
41 creation of a lien or other encumbrance.
- 42 (13) 'Valid lien' means a lien that is effective against the holder of a judicial
43 lien subsequently obtained by legal or equitable process or proceedings.

"§ 39-23.2. Insolvency.

(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 the debtor's debts as they become due is presumed to be insolvent.

(c) A partnership is insolvent under subsection (a) of this section 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.

(d) Assets under this 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 transfer voidable under this Article.

(e) Debts under this 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.

"§ 39-23.3. Value.

(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 G.S. 39-23.4(a)(2) and G.S. 39-23.5, 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.

(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.

"§ 39-23.4. Transfers fraudulent as to present and future creditors.

(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:

a. 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; or

b. Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

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

- 1 (1) The transfer or obligation was to an insider;
- 2 (2) The debtor retained possession or control of the property transferred
- 3 after the transfer;
- 4 (3) The transfer or obligation was disclosed or concealed;
- 5 (4) Before the transfer was made or obligation was incurred, the debtor had
- 6 been sued or threatened with suit;
- 7 (5) The transfer was of substantially all the debtor's assets;
- 8 (6) The debtor absconded;
- 9 (7) The debtor removed or concealed assets;
- 10 (8) The value of the consideration received by the debtor was reasonably
- 11 equivalent to the value of the asset transferred or the amount of the
- 12 obligation incurred;
- 13 (9) The debtor was insolvent or became insolvent shortly after the transfer
- 14 was made or the obligation was incurred;
- 15 (10) The transfer occurred shortly before or shortly after a substantial debt
- 16 was incurred; and
- 17 (11) The debtor transferred the essential assets of the business to a lienor
- 18 who transferred the assets to an insider of the debtor.

19 **"§ 39-23.5. Transfers fraudulent as to present creditors.**

20 (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor

21 whose claim arose before the transfer was made or the obligation was incurred if the

22 debtor made the transfer or incurred the obligation without receiving a reasonably

23 equivalent value in exchange for the transfer or obligation and the debtor was insolvent at

24 that time or the debtor became insolvent as a result of the transfer or obligation.

25 (b) A transfer made by a debtor is voidable as to a creditor whose claim arose

26 before the transfer was made if the transfer was made to an insider for an antecedent debt,

27 the debtor was insolvent at that time, and the insider had reasonable cause to believe that

28 the debtor was insolvent.

29 **"§ 39-23.6. When transfer is made or obligation is incurred.**

30 For the purposes of this Article:

- 31 (1) A transfer is made:
 - 32 a. With respect to an asset that is real property other than a fixture,
 - 33 but including the interest of a seller or purchaser under a contract
 - 34 for the sale of the asset, when the transfer is so far perfected that
 - 35 a good-faith purchaser of the asset from the debtor against whom
 - 36 applicable law permits the transfer to be perfected cannot acquire
 - 37 an interest in the asset that is superior to the interest of the
 - 38 transferee; and
 - 39 b. With respect to an asset that is not real property or that is a
 - 40 fixture, when the transfer is so far perfected that a creditor on a
 - 41 simple contract cannot acquire a judicial lien otherwise than
 - 42 under this Article that is superior to the interest of the transferee.

- 1 (2) If applicable law permits the transfer to be perfected as provided in
2 subdivision (1) of this section and the transfer is not so perfected before
3 the commencement of an action for relief under this Article, the transfer
4 is deemed made immediately before the commencement of the action.
- 5 (3) If applicable law does not permit the transfer to be perfected as provided
6 in subdivision (1) of this section, the transfer is made when it becomes
7 effective between the debtor and the transferee.
- 8 (4) A transfer is not made until the debtor has acquired rights in the asset
9 transferred.
- 10 (5) An obligation is incurred:
- 11 a. If oral, when it becomes effective between the parties; or
12 b. If evidenced by a writing, when the writing executed by the
13 obligor is delivered to or for the benefit of the obligee.

14 **"§ 39-23.7. Remedies of creditors.**

15 (a) In an action for relief against a transfer or obligation under this Article, a
16 creditor, subject to the limitations in G.S. 39-23.8, may obtain:

- 17 (1) Avoidance of the transfer or obligation to the extent necessary to satisfy
18 the creditor's claim;
- 19 (2) An attachment or other provisional remedy against the asset transferred
20 or other property of the transferee in accordance with the procedure
21 prescribed by Article 35 of Chapter 1 of the General Statutes;
- 22 (3) Subject to applicable principles of equity and in accordance with
23 applicable rules of civil procedure,
- 24 a. An injunction against further disposition by the debtor or a
25 transferee, or both, of the asset transferred or of other property;
- 26 b. Appointment of a receiver to take charge of the asset transferred
27 or of other property of the transferee; or
- 28 c. Any other relief the circumstances may require.

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

31 **"§ 39-23.8. Defenses, liability, and protection of transferee.**

32 (a) A transfer or obligation is not voidable under G.S. 39-23.4(a)(1) against a
33 person who took in good faith and for a reasonably equivalent value or against any
34 subsequent transferee or obligee.

35 (b) Except as otherwise provided in this section, to the extent a transfer is voidable
36 in an action by a creditor under G.S. 39-23.7(a)(1), the creditor may recover judgment for
37 the value of the asset transferred, as adjusted under subsection (c) of this section, or the
38 amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be
39 entered against:

- 40 (1) The first transferee of the asset or the person for whose benefit the
41 transfer was made; or
- 42 (2) Any subsequent transferee other than a good-faith transferee who took
43 for value or from any subsequent transferee.

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

4 (d) Notwithstanding voidability of a transfer or an obligation under this Article, a
5 good-faith transferee or obligee is entitled, to the extent of the value given the debtor for
6 the transfer or obligation, to:

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

8 (2) Enforcement of any obligation incurred; or

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

10 (e) A transfer is not voidable under G.S. 39-23.4(a)(2) or G.S. 39-23.5 if the
11 transfer results from:

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

14 (2) Enforcement of a security interest in compliance with Article 9 of
15 Chapter 25 of the General Statutes, the Uniform Commercial Code.

16 (f) A transfer is not voidable under G.S. 39-23.5(b):

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

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

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

25 **"§ 39-23.9. Extinguishment of cause of action.**

26 A cause of action with respect to a fraudulent or voidable transfer or obligation under
27 this Article is extinguished unless action is brought:

28 (1) Under G.S. 39-23.4(a)(1), within four years after the transfer was made
29 or the obligation was incurred or, if later, within one year after the
30 transfer or obligation was or could reasonably have been discovered by
31 the claimant;

32 (2) Under G.S. 39-23.4(a)(2) or G.S. 39-23.5(a), within four years after the
33 transfer was made or the obligation was incurred; or

34 (3) Under G.S. 39-23.5(b), within one year after the transfer was made or
35 the obligation was incurred.

36 **"§ 39-23.10. Supplementary provisions.**

37 Unless displaced by the provisions of this Article, the principles of law and equity,
38 including the law merchant and the law relating to principal and agent, estoppel, laches,
39 fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or
40 invalidating cause, supplement its provisions.

41 **"§ 39-23.11. Uniformity of application and construction.**

42 This act shall be applied and construed to effectuate its general purpose to make
43 uniform the law with respect to the subject of this Article among states enacting it.

1 **"§ 39-23.12. Short title.**

2 This Article may be cited as the Uniform Fraudulent Transfer Act."

3 Section 3. The Revisor of Statutes shall cause to be printed with this act all
4 relevant portions of the official comments to the Uniform Fraudulent Transfer Act and all
5 explanatory comments of the drafters of this act, as the Revisor deems appropriate.

6 Section 4. This act is effective October 1, 1997, and applies to all transfers
7 subject to this act made on or after that date.