

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1991

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SENATE BILL 626

Short Title: Uniform Fraudulent Transfer Act.

(Public)

Sponsors: Senator Odom.

Referred to: Judiciary I.

April 15, 1991

1 A BILL TO BE ENTITLED
2 AN ACT TO REPEAL THE CURRENT STATUTES REGARDING FRAUDULENT
3 CONVEYANCES AND TO ADOPT THE UNIFORM FRAUDULENT
4 TRANSFER ACT IN ORDER TO MODERNIZE NORTH CAROLINA LAW
5 AND HARMONIZE OUR LAW ON THIS SUBJECT WITH THOSE STATES
6 THAT 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 Article 3 of Chapter 39 of the General Statutes is repealed.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 Sec. 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 **“§ 39-22.1. Definitions.**

14 As used in this Article:

15 (1) ‘Affiliate’ means:

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

20 1. As a fiduciary or agent without sole discretionary power
21 to vote the securities; or

22 2. Solely to secure a debt, if the person has not exercised
23 the power to vote;

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

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

39 **"§ 39-22.2. Insolvency.**

- 40 (a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the
- 41 debtor's assets at a fair valuation.
- 42 (b) A debtor who is generally not paying his debts as they become due is
- 43 presumed to be insolvent.

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

5 (d) Assets under this section do not include property that has been transferred,
6 concealed, or removed with intent to hinder, delay, defraud creditors or that has been
7 transferred in a manner making transfer voidable under this Article.

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

10 **"§ 39-22.3. Value.**

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

15 (b) For the purposes of G.S. 39-22.4(a)(2) and G.S. 39-22.5, a person gives a
16 reasonably equivalent value if the person acquires an interest of the debtor in an asset
17 pursuant to a regularly conducted, noncollateral foreclosure sale or execution of a power
18 of sale for the acquisition or disposition of the interest of the debtor upon default under
19 a mortgage, deed of trust, or security agreement.

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

23 **"§ 39-22.4. Transfers fraudulent as to present and future creditors.**

24 (a) A transfer made or obligation incurred by a debtor is fraudulent as to a
25 creditor, whether the creditor's claim arose before or after the transfer was made or the
26 obligation was incurred, if the debtor made the transfer or incurred the obligation:

27 (1) With actual intent to hinder, delay, or defraud any creditor of the
28 debtor; or

29 (2) Without receiving a reasonably equivalent value in exchange for the
30 transfer or obligation, and the debtor:

31 a. Was engaged or was about to engage in a business or a
32 transaction for which the remaining assets of the debtor were
33 unreasonably small in relation to the business or transaction; or

34 b. Intended to incur, or believed or reasonably should have
35 believed that he would incur, debts beyond his ability to pay as
36 they became due.

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

39 (1) The transfer or obligation was to an insider;

40 (2) The debtor retained possession or control of the property transferred
41 after the transfer;

42 (3) The transfer or obligation was disclosed or concealed;

43 (4) Before the transfer was made or obligation was incurred, the debtor
44 had been sued or threatened with suit;

- 1 (5) The transfer was of substantially all the debtor's assets;
2 (6) The debtor absconded;
3 (7) The debtor removed or concealed assets;
4 (8) The value of the consideration received by the debtor was reasonably
5 equivalent to the value of the asset transferred or the amount of the
6 obligation incurred;
7 (9) The debtor was insolvent or became insolvent shortly after the transfer
8 was made or the obligation was incurred;
9 (10) The transfer occurred shortly before or shortly after a substantial debt
10 was incurred; and
11 (11) The debtor transferred the essential assets of the business to a lienor
12 who transferred the assets to an insider of the debtor.

13 **"§ 39-22.5. Transfers fraudulent as to present creditors.**

14 (a) A transfer made or obligation incurred by a debtor is fraudulent as to a
15 creditor whose claim arose before the transfer was made or the obligation was incurred
16 if the debtor made the transfer or incurred the obligation without receiving a reasonably
17 equivalent value in exchange for the transfer or obligation and the debtor was insolvent
18 at that time or the debtor became insolvent as a result of the transfer or obligation.

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

23 **"§ 39-22.6. When transfer is made or obligation is incurred.**

24 For the purposes of this Article:

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

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

10 **"§ 39-22.7. Remedies of creditors.**

11 (a) In an action for relief against a transfer or obligation under this Article, a
12 creditor, subject to the limitations in G.S. 39-22.8, may obtain:

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

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

30 **"§ 39-22.8. Defenses, liability, and protection of transferee.**

31 (a) A transfer or obligation is not voidable under G.S. 39-22.4(a)(1) against a
32 person who took in good faith and for a reasonably equivalent value or against any
33 subsequent transferee or obligee.

34 (b) Except as otherwise provided in this section, to the extent a transfer is
35 voidable in an action by a creditor under G.S. 39-22.7(a)(1), the creditor may recover
36 judgment for the value of the asset transferred, as adjusted under subsection (c) of this
37 section, or the amount necessary to satisfy the creditor's claim, whichever is less. The
38 judgment may be entered against:

- 39 (1) The first transferee of the asset or the person for whose benefit the
40 transfer was made; or
41 (2) Any subsequent transferee other than a good faith transferee who took
42 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 must be for an amount equal to the value of the asset
3 at 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. 39-22.4(a)(2) or G.S. 39-22.5 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. 39-22.5(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
19 by 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
23 the transfer secured present value given for that purpose as well as an
24 antecedent debt of the debtor.

25 **"§ 39-22.9. Extinguishment of cause of action.**

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

28 (1) Under G.S. 39-22.4(a)(1), within four years after the transfer was
29 made or the obligation was incurred or, if later, within one year after
30 the transfer or obligation was or could reasonably have been
31 discovered by the claimant;

32 (2) Under G.S. 39-22.4(a)(2) or G.S. 39-22.5(a), within four years after
33 the transfer was made or the obligation was incurred; or

34 (3) Under G.S. 39-22.5(b), within one year after the transfer was made or
35 the obligation was incurred.

36 **"§ 39-22.10. 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 **"§ 39-22.11. 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.

44 **"§ 39-22.12. Short title.**

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

2 Sec. 3. This act is effective upon ratification and applies to all transfers
3 subject to this act made on or after that date.