

1 SB152
2 188961-1
3 By Senator Smitherman
4 RFD: Banking and Insurance
5 First Read: 11-JAN-18

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8 SYNOPSIS: Under existing law, Alabama has adopted the
9 Uniform Fraudulent Transfers Act (UFTA). Under
10 existing law, the UFTA establishes procedures by
11 which a creditor may reach assets a debtor has
12 transferred to another person in order to prevent
13 the assets from being used to settle a debt.

14 This bill would adopt the Uniform Voidable
15 Transfers Act to replace the UFTA for transactions
16 occurring after January 1, 2019. This bill would
17 establish an updated procedure by which a creditor
18 may reach assets a debtor has transferred to
19 another person in order to prevent the assets from
20 being used to settle a debt.

21
22 A BILL
23 TO BE ENTITLED
24 AN ACT

25
26 To adopt the Alabama Uniform Voidable Transactions
27 Act; to establish procedures by which a creditor may reach

1 assets a debtor has transferred to another person in order to
2 prevent the assets from being used to settle a debt; and to
3 specify that the act would apply to transactions that occur
4 after January 1, 2019.

5 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

6 Section 1. Chapter 9B, commencing with 8-9B-1, is
7 added to Title 8 of the Code of Alabama 1975, as follows:

8 Chapter 9B. UNIFORM VOIDABLE TRANSACTIONS ACT.

9 8-9B-1. SHORT TITLE. This chapter may be cited as
10 the Alabama Uniform Voidable Transactions Act.

11 8-9B-2. DEFINITIONS. As used in this chapter:

12 (1) "Affiliate" means:

13 (i) a person that directly or indirectly owns,
14 controls, or holds with power to vote, 20 percent or more of
15 the outstanding voting securities of the debtor, other than a
16 person that holds the securities:

17 (A) as a fiduciary or agent without sole
18 discretionary power to vote the securities; or

19 (B) solely to secure a debt, if the person has not
20 in fact exercised the power to vote;

21 (ii) a corporation 20 percent or more of whose
22 outstanding voting securities are directly or indirectly
23 owned, controlled, or held, with power to vote, by the debtor
24 or a person that directly or indirectly owns, controls, or
25 holds, with power to vote, 20 percent or more of the
26 outstanding voting securities of the debtor, other than a
27 person that holds the securities:

1 (A) as a fiduciary or agent without sole
2 discretionary power to vote the securities; or

3 (B) solely to secure a debt, if the person has not
4 in fact exercised the power to vote;

5 (iii) a person whose business is operated by the
6 debtor under a lease or other agreement, or a person
7 substantially all of whose assets are controlled by the
8 debtor; or

9 (iv) a person that operates the debtor's business
10 under a lease or other agreement or controls substantially all
11 of the debtor's assets.

12 (2) "Asset" means property of a debtor, but the term
13 does not include:

14 (i) property to the extent it is encumbered by a
15 valid lien;

16 (ii) property to the extent it is generally exempt
17 under nonbankruptcy law; or

18 (iii) an interest in property held in tenancy in
19 common for life with cross contingent remainder to the
20 survivor in fee to the extent it is not subject to process by
21 a creditor holding a claim against only one tenant.

22 (3) "Claim," except as used in "claim for relief,"
23 means a right to payment, whether or not the right is reduced
24 to judgment, liquidated, unliquidated, fixed, contingent,
25 matured, unmatured, disputed, undisputed, legal, equitable,
26 secured, or unsecured.

27 (4) "Creditor" means a person that has a claim.

1 (5) "Debt" means liability on a claim.

2 (6) "Debtor" means a person that is liable on a
3 claim.

4 (7) "Electronic" means relating to technology having
5 electrical, digital, magnetic, wireless, optical,
6 electromagnetic, or similar capabilities.

7 (8) "Insider" includes: (i) if the debtor is an
8 individual:

9 (A) a relative of the debtor or of a general partner
10 of the debtor;

11 (B) a partnership in which the debtor is a general
12 partner;

13 (C) a general partner in a partnership described in
14 clause (B); or

15 (D) a corporation of which the debtor is a director,
16 officer, or person in control;

17 (ii) if the debtor is a corporation:

18 (A) a director of the debtor;

19 (B) an officer of the debtor;

20 (C) a person in control of the debtor;

21 (D) a partnership in which the debtor is a general
22 partner;

23 (E) a general partner in a partnership described in
24 clause (D); or

25 (F) a relative of a general partner, director,
26 officer, or person in control of the debtor;

27 (iii) if the debtor is a partnership:

1 (A) a general partner in the debtor;

2 (B) a relative of a general partner in, a general
3 partner of, or a person in control of the debtor;

4 (C) another partnership in which the debtor is a
5 general partner;

6 (D) a general partner in a partnership described in
7 clause (C); or

8 (E) a person in control of the debtor;

9 (iv) an affiliate, or an insider of an affiliate as
10 if the affiliate were the debtor; and

11 (v) a managing agent of the debtor.

12 (9) "Lien" means a charge against or an interest in
13 property to secure payment of a debt or performance of an
14 obligation, and includes a security interest created by
15 agreement, a judicial lien obtained by legal or equitable
16 process or proceedings, a common-law lien, or a statutory
17 lien.

18 (10) "Organization" means a person other than an
19 individual.

20 (11) "Person" means an individual, estate,
21 partnership, association, trust, business or nonprofit entity,
22 public corporation, government or governmental subdivision,
23 agency, or instrumentality, or other legal or commercial
24 entity.

25 (12) "Property" means both real and personal
26 property, whether tangible or intangible, and any interest in

1 property whether legal or equitable and includes anything that
2 may be the subject of ownership.

3 (13) "Record" means information that is inscribed on
4 a tangible medium or that is stored in an electronic or other
5 medium and is retrievable in perceivable form.

6 (14) "Relative" means an individual related by
7 consanguinity within the third degree as determined by the
8 common law, a spouse, or an individual related to a spouse
9 within the third degree as so determined, and includes an
10 individual in an adoptive relationship within the third
11 degree.

12 (15) "Sign" means, with present intent to
13 authenticate or adopt a record:

14 (i) to execute or adopt a tangible symbol; or

15 (ii) to attach to or logically associate with the
16 record an electronic symbol, sound, or process.

17 (16) "Transfer" means every mode, direct or
18 indirect, absolute or conditional, voluntary or involuntary,
19 of disposing of or parting with an asset or an interest in an
20 asset, and includes payment of money, release, lease, license,
21 and creation of a lien or other encumbrance. The term also
22 includes a transfer made pursuant to a settlement whether or
23 not incorporated into a court order.

24 (17) "Valid lien" means a lien that is effective
25 against the holder of a judicial lien subsequently obtained by
26 legal or equitable process or proceedings.

27 8-9B-3. INSOLVENCY.

1 (a) A debtor is insolvent if the sum of the debtor's
2 debts at a fair valuation is greater than the sum of the
3 debtor's assets at a fair valuation.

4 (b) A debtor that is generally not paying the
5 debtor's debts as they become due other than as a result of a
6 bona fide dispute is presumed to be insolvent. The
7 presumption imposes on the party against which the presumption
8 is directed the burden of proving that the nonexistence of
9 insolvency is more probable than its existence.

10 (c) Assets under this section do not include
11 property that has been transferred, concealed, or removed with
12 intent to hinder, delay, or defraud creditors or that has been
13 transferred in a manner making the transfer voidable under
14 this chapter.

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

18 8-9B-4. VALUE.

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

25 (b) For the purposes of Section 8-9B-5 (a) (2) and
26 Section 8-9B-6, a person gives a reasonably equivalent value
27 if the person acquires an interest of the debtor in an asset

1 pursuant to a regularly conducted, noncollusive foreclosure
2 sale or execution of a power of sale for the acquisition or
3 disposition of the interest of the debtor upon default under a
4 mortgage, deed of trust, or security agreement.

5 (c) A transfer is made for present value if the
6 exchange between the debtor and the transferee is intended by
7 them to be contemporaneous and is in fact substantially
8 contemporaneous.

9 8-9B-5. TRANSFER VOIDABLE AS TO PRESENT OR FUTURE
10 CREDITOR.

11 (a) A transfer made by a debtor is voidable as to a
12 creditor, whether the creditor's claim arose before or after
13 the transfer was made, if the debtor made the transfer:

14 (1) with actual intent to hinder, delay, or defraud
15 any creditor of the debtor; or

16 (2) without receiving a reasonably equivalent value
17 in exchange for the transfer, and the debtor:

18 (i) was engaged or was about to engage in a business
19 or a transaction for which the remaining assets of the debtor
20 were unreasonably small in relation to the business or
21 transaction; or

22 (ii) intended to incur, or believed or reasonably
23 should have believed that the debtor would incur, debts beyond
24 the debtor's ability to pay as they became due.

25 (b) In determining actual intent under
26 subsection (a) (1), consideration may be given, among other
27 factors, to whether:

- 1 (1) the transfer was to an insider;
- 2 (2) the debtor retained possession or control of the
- 3 property transferred after the transfer;
- 4 (3) the transfer was concealed or not disclosed;
- 5 (4) before the transfer was made, the debtor had
- 6 been sued or threatened with suit;
- 7 (5) the transfer was of substantially all the
- 8 debtor's assets;
- 9 (6) the debtor absconded;
- 10 (7) the debtor removed or concealed assets;
- 11 (8) the value of the consideration received by the
- 12 debtor was not the reasonably equivalent to the value of the
- 13 asset transferred;
- 14 (9) the debtor was insolvent or became insolvent
- 15 shortly after the transfer was made;
- 16 (10) the transfer occurred shortly before or shortly
- 17 after a substantial debt was incurred; and
- 18 (11) the debtor transferred the essential assets of
- 19 the business to a lienor that transferred the assets to an
- 20 insider of the debtor.

21 (c) A creditor making a claim for relief under
22 subsection (a) has the burden of proving the elements of the
23 claim for relief by a preponderance of the evidence.

24 8-9B-6. TRANSFER VOIDABLE AS TO PRESENT CREDITOR.

25 (a) A transfer made by a debtor is voidable as to a
26 creditor whose claim arose before the transfer was made if the
27 debtor made the transfer without the debtor receiving a

1 reasonably equivalent value in exchange for the transfer and
2 the debtor was insolvent at that time or the debtor became
3 insolvent as a result of the transfer.

4 (b) A transfer made by a debtor is voidable as to a
5 creditor whose claim arose before the transfer was made if the
6 transfer was made to an insider for an antecedent debt, the
7 debtor was insolvent at that time, and the insider had
8 reasonable cause to believe that the debtor was insolvent.

9 (c) Subject to Section 8-9B-3(b), a creditor making
10 a claim for relief under subsection (a) or (b) has the burden
11 of proving the elements of the claim for relief by a
12 preponderance of the evidence.

13 8-9B-7. WHEN TRANSFER IS MADE. For the purposes of
14 this chapter:

15 (1) a transfer is made:

16 (i) with respect to an asset that is real property
17 other than a fixture, but including the interest of a seller
18 or purchaser under a contract for the sale of the asset, when
19 the transfer is so far perfected that a good-faith purchaser
20 of the asset from the debtor against which applicable law
21 permits the transfer to be perfected cannot acquire an
22 interest in the asset that is superior to the interest of the
23 transferee; and

24 (ii) with respect to an asset that is not real
25 property or that is a fixture, when the transfer is so far
26 perfected that a creditor on a simple contract cannot acquire

1 a judicial lien otherwise than under this chapter that is
2 superior to the interest of the transferee;

3 (2) if applicable law permits the transfer to be
4 perfected as provided in paragraph (1) and the transfer is not
5 so perfected before the commencement of an action for relief
6 under this chapter, the transfer is deemed made immediately
7 before the commencement of the action;

8 (3) if applicable law does not permit the transfer
9 to be perfected as provided in paragraph (1), the transfer is
10 made when it becomes effective between the debtor and the
11 transferee; and

12 (4) except with respect to personal property and
13 fixtures where a lender has perfected its security interest in
14 such property in which event paragraph (1)(i) shall apply, a
15 transfer is not made until the debtor has acquired rights in
16 the asset transferred.

17 8-9B-8. REMEDIES OF CREDITOR.

18 (a) In an action for relief against a transfer under
19 this chapter, a creditor, subject to the limitations in
20 Section 8-9B-9, may obtain:

21 (1) avoidance of the transfer to the extent
22 necessary to satisfy the creditor's claim;

23 (2) an attachment or other provisional remedy
24 against the asset transferred or other property of the
25 transferee if available under applicable law; and

26 (3) subject to applicable principles of equity and
27 in accordance with applicable rules of civil procedure:

1 (i) an injunction against further disposition by the
2 debtor or a transferee, or both, of the asset transferred or
3 of other property;

4 (ii) appointment of a receiver to take charge of the
5 asset transferred or of other property of the transferee; or

6 (iii) any other relief the circumstances may
7 require.

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

11 8-9B-9. DEFENSES, LIABILITY, AND PROTECTION OF
12 TRANSFEREE.

13 (a) A transfer is not voidable under
14 Section 8-9A-5(a)(1) against a person that took in good faith
15 and for a reasonably equivalent value given the debtor or
16 against any subsequent transferee that took in good faith.

17 (b) To the extent a transfer is avoidable in an
18 action by a creditor under Section 8-9B-8(a)(1), the following
19 rules apply:

20 (1) Except as otherwise provided in this section,
21 the creditor may recover judgment for the value of the asset
22 transferred, as adjusted under subsection (c), or the amount
23 necessary to satisfy the creditor's claim, whichever is less.
24 The judgment may be entered against:

25 (i) the first transferee of the asset or the person
26 for whose benefit the transfer was made; or

27 (ii) any subsequent transferee, other than:

1 (A) a good-faith transferee that took for value; or
2 (B) a subsequent transferee of a person described in
3 clause (A).

4 (2) Recovery pursuant to Section 8-9B-8(a)(1) or (b)
5 of or from the asset transferred or its proceeds, by levy or
6 otherwise, is available only against a person described in
7 paragraph (1)(i) or (ii).

8 (c) If the judgment under subsection (b) is based
9 upon the value of the asset transferred, the judgment must be
10 for an amount equal to the value of the asset at the time of
11 the transfer, subject to adjustment as the equities may
12 require.

13 (d) Notwithstanding voidability of a transfer under
14 this chapter, a good-faith transferee is entitled, to the
15 extent of the value given the debtor for the transfer, to:

16 (1) a lien on or a right to retain an interest in
17 the asset transferred; or

18 (2) a reduction in the amount of the liability on
19 the judgment.

20 (e) A transfer is not voidable under
21 Section 8-9B-5(a)(2) or Section 8-9B-6 if the transfer results
22 from:

23 (1) termination of a lease upon default by the
24 debtor when the termination is pursuant to the lease and
25 applicable law;

26 (2) enforcement of a security interest in compliance
27 with Article 9 of the Uniform Commercial Code, Article 9A,

1 commencing with Section 7-9A-1, of Title 7, other than
2 acceptance of collateral in full or partial satisfaction of
3 the obligation it secures; or

4 (3) a regularly conducted, noncollusive foreclosure
5 sale or execution of a power of sale for the acquisition or
6 disposition of the interest of the debtor under a mortgage,
7 deed of trust, or security agreement.

8 (f) A transfer is not voidable under
9 Section 8-9B-6(b):

10 (1) to the extent the insider gave new value to or
11 for the benefit of the debtor after the transfer was made,
12 except to the extent the new value was secured by a valid
13 lien;

14 (2) if made in the ordinary course of business or
15 financial affairs of the debtor and the insider; or

16 (3) if made pursuant to a good-faith effort to
17 rehabilitate the debtor and the transfer secured present value
18 given for that purpose as well as an antecedent debt of the
19 debtor.

20 (g) The following rules determine the burden of
21 proving matters referred to in this section:

22 (1) A party that seeks to invoke subsection (a),
23 (d), (e), or (f) has the burden of proving the applicability
24 of that subsection.

25 (2) Except as otherwise provided in paragraphs (3)
26 and (4), the creditor has the burden of proving each
27 applicable element of subsection (b) or (c).

1 (3) The transferee has the burden of proving the
2 applicability to the transferee of subsection (b) (1) (ii) (A) or
3 (B).

4 (4) A party that seeks adjustment under
5 subsection (c) has the burden of proving the adjustment.

6 (h) The standard of proof required to establish
7 matters referred to in this section is preponderance of the
8 evidence.

9 8-9B-10. EXTINGUISHMENT OF CLAIM FOR RELIEF.

10 A claim for relief with respect to a transfer under
11 this chapter is extinguished unless action is brought:

12 (a) under Section 8-9B-5(a) (1), within ten years
13 after the transfer of real property was made;

14 (b) under Section 8-9B-5(a) (1), within six years
15 after the transfer of personal property was made;

16 (c) under Section 8-9B-5(a) (2) or 8-9B-6(a), within
17 four years after the transfer was made when the action is
18 brought by a creditor whose claim arose before the transfer
19 was made;

20 (d) under Section 8-9B-5(a) (2), within one year
21 after the transfer was made when the action is brought by a
22 creditor whose claim arose after the transfer was made; or

23 (e) under Section 8-9B-6(b), within one year after
24 the transfer was made.

25 8-9B-11. GOVERNING LAW.

26 (a) In this section, the following rules determine a
27 debtor's location:

1 (1) A debtor who is an individual is located at the
2 individual's principal residence.

3 (2) A debtor that is an organization and has only
4 one place of business is located at its place of business.

5 (3) A debtor that is an organization and has more
6 than one place of business is located at its chief executive
7 office.

8 (b) A claim for relief in the nature of a claim for
9 relief under this chapter is governed by the local law of the
10 jurisdiction in which the debtor is located when the transfer
11 is made.

12 8-9B-12. APPLICATION TO SERIES ORGANIZATION.

13 (a) In this section:

14 (1) "Series" means an arrangement, however
15 denominated, created by a series organization that, pursuant
16 to the law under which the series organization is organized,
17 has the characteristics set forth in paragraph (2).

18 (2) "Series organization" means an organization
19 that, pursuant to the law under which it is organized, has the
20 following characteristics:

21 (i) The public organic record of the organization
22 provides for creation by the organization of one or more
23 series, however denominated, with respect to specified
24 property of the organization, and for records to be maintained
25 for each series that identify the property of or associated
26 with the series.

1 (ii) Debt incurred or existing with respect to the
2 activities of, or property of or associated with, a particular
3 series is enforceable against the property of or associated
4 with the series only, and not against the property of or
5 associated with the organization or associated with any other
6 series of the organization.

7 (iii) Debt incurred or existing with respect to the
8 activities or property of the organization is enforceable
9 against the property of the organization only, and not against
10 the property of or associated with a series of the
11 organization.

12 (b) A series organization and each series of the
13 organization is a separate person for purposes of this
14 chapter, even if for other purposes a series is not a person
15 separate from the organization or other series of the
16 organization.

17 8-9B-13. SUPPLEMENTARY PROVISIONS. Unless displaced
18 by the provisions of this chapter, the principles of law and
19 equity, including the law merchant and the law relating to
20 principal and agent, estoppel, laches, fraud,
21 misrepresentation, duress, coercion, mistake, insolvency, or
22 other validating or invalidating cause, supplement its
23 provisions.

24 8-9B-14. UNIFORMITY OF APPLICATION AND CONSTRUCTION.
25 This chapter shall be applied and construed to effectuate its
26 general purpose to make uniform the law with respect to the
27 subject of this chapter among states enacting it.

1 8-9B-15. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL
2 AND NATIONAL COMMERCE ACT. This chapter modifies, limits, or
3 supersedes the Electronic Signatures in Global and National
4 Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
5 modify, limit, or supersede Section 101(c) of that act, 15
6 U.S.C. Section 7001(c), or authorize electronic delivery of
7 any of the notices described in Section 103(b) of that act, 15
8 U.S.C. Section 7003(b).

9 8-9B-16. APPLICATION; CONFORMING AMENDMENTS. This
10 chapter applies to transfers made on or after January 1, 2019,
11 and does not apply to a transfer made before January 1, 2019.
12 The Alabama Uniform Fraudulent Transfer Act, Sections 8-9A-1
13 to 8-9A-12, inclusive, Code of Alabama 1975, shall apply to
14 transfers made prior to January 1, 2019, and shall not apply
15 to a transfer made on or after January 1, 2019.

16 8-9B-17. EFFECTIVE DATE. This act shall become
17 effective on January 1, 2019.

18 Section 2. This act shall become effective January
19 1, 2019.