HOUSE DOCKET, NO. 58 FILED ON: 1/15/2019

HOUSE . . . . . No. 58

So much of the recommendations of the Commission on Uniform State Laws (House, No. 56) as relates to renaming the Uniform Fraudulent Transfer Act and making other amendments thereto. The Judiciary.

The Commonwealth of Massachusetts

In the One Hundred and Ninety-First General Court
(2019-2020)

An Act to rename the Uniform Fraudulent Transfer Act and make other amendments thereto.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The title of chapter 109A of the General Laws is hereby amended by striking out the words “FRAUDULENT TRANSFER” in that title and by inserting in place thereof the following words:-- “VOIDABLE TRANSACTIONS”.

SECTION 2. Said chapter 109A is hereby amended by striking out Section 1 and by inserting in place thereof the following Section:--

§ 1. Citation of chapter

This chapter, which was formerly cited as the Uniform Fraudulent Transfer Act, may be cited as the Uniform Voidable Transactions Act.

SECTION 3. Said chapter 109A is hereby amended by striking out Section 2 and by inserting in place thereof the following Section:--

§ 2. Definitions

As used in this chapter, the following words shall, unless the context requires otherwise, have the following meanings:—

"Affiliate", (i) a person that directly or indirectly owns, controls, or holds with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person that holds the securities:

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

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

(ii) a corporation twenty percent 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 that directly or indirectly owns, controls, or holds, with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person that holds the securities:

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

(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; or

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

"Asset", property of a debtor, but the term shall not include:

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

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

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

"Claim", except as used in "claim for relief", 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.

"Creditor", a person that has a claim.

"Debt", liability on a claim.

"Debtor", a person that is liable on a claim.

"Electronic", relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

"Insider", includes:

(i) if the debtor is an individual:

(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 clause (B); or

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

(ii) if the debtor is a corporation:

(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 clause (D); or

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

(iii) if the debtor is a partnership:

(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 clause (C); or

(E) a person in control of the debtor;

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

(v) a managing agent of the debtor.

"Lien", 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.

"Organization", a person other than an individual.

"Person", an individual, estate, partnership, association, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal or commercial entity.

"Property", anything that may be the subject of ownership.

"Record", information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

"Relative", 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.

"Sign", with present intent to authenticate or adopt a record:

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

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

"Transfer", 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, license and creation of a lien or other encumbrance.

"Valid lien", a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

SECTION 4. Said chapter 109A is hereby amended by striking out Section 3 and by inserting in place thereof the following Section:--

§ 3. Insolvency; excluded assets

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

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

(c) Assets under this section shall 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 chapter.

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

SECTION 5. The title of Section 5 of said chapter 109A is hereby amended by striking out the word "Fraudulent" in that title and by inserting in place thereof the following word:-- "Voidable".

SECTION 6. Section 5 of said chapter 109A is hereby further amended by striking out the word “fraudulent” in Section 5(a) and by inserting in place thereof the following word:-- “voidable”.

SECTION 7. Section 5 of said chapter 109A is hereby further amended by striking out Section 5(a)(2)(ii) and by inserting in place thereof the following subsection:--

(ii) 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.

SECTION 8. Section 5 of said chapter 109A is hereby further amended by striking out the word “who” in Section 5(b)(11) and by inserting in place thereof the following word:-- “that”.

SECTION 9. Section 5 of said chapter 109A is hereby further amended by inserting the following new subsection at the end of Section 5:--

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

SECTION 10. The title of Section 6 of said chapter 109A is hereby amended by striking out the word “Fraudulent” in that title and by inserting in place thereof the following word:-- “Voidable”.

SECTION 11. Section 6 of said chapter 109A is hereby further amended by striking out the word

"fraudulent" wherever it appears in that Section and by inserting in each place thereof the following word:-- "voidable".

SECTION 12. Section 6 of said chapter 109A is hereby further amended by inserting the following new subsection at the end of Section 6:--

(c) Subject to subsection (b) of section three, a creditor making a claim for relief under subsection (a) or (b) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

SECTION 13. Section 7(1)(i) of said chapter 109A is hereby amended by striking out the word "whom" in that Section and by inserting in place thereof the following word:-- "which".

SECTION 14. Section 7 of said chapter 109A is hereby further amended by inserting the word "and" after the word "transferred;" in Section 7(4).

SECTION 15. Section 7 of said chapter 109A is hereby further amended by striking out Section 7(5)(ii) and by inserting in place thereof the following subsection:--

(ii) if evidenced by a record, when the record signed by the obligor is delivered to or for the benefit of the obligee.

SECTION 16. Section 8(a)(2) of said chapter 109A is hereby amended by striking out that Section and by inserting in place thereof the following subsection:--

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

SECTION 17. Section 8 of said chapter 109A is hereby further amended by striking out the comma after the word “procedure” in Section 8(a)(3) and by inserting in place thereof the following:-- “:”.

SECTION 18. Said chapter 109A is hereby amended by striking out Section 9 and by inserting in place thereof the following Section:--

§ 9. Voidable transfers; creditor’s judgment

(a) A transfer or obligation is not voidable under paragraph (1) of subsection (a) of section five against a person that took in good-faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee.

(b) To the extent a transfer is avoidable in an action by a credit under paragraph (1) of subsection (a) of section eight, the following rules apply:

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

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

(ii) an immediate or mediate transferee of the first transferee, other than:

(A) a good-faith transferee that took for value; or

(B) an immediate or mediate good-faith transferee of a person described in clause (A).

(2) Recovery pursuant to paragraph (1) of subsection (a) or (b) of section eight of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person described in clause (i) or (ii) of paragraph (1).

(c) If the judgment under subsection (b) 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.

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

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

(2) enforcement of an obligation incurred; or

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

(e) A transfer is not voidable under paragraph (2) of subsection (a) of section five or section six if the transfer results from:

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

(2) enforcement of a security interest in compliance with Article 9 of chapter one hundred and six, other than acceptance of collateral in full or partial satisfaction of the obligation it secures.

(f) A transfer is not voidable under subsection (b) of section six:

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

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

(3) 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.

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

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

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

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

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

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

SECTION 19. Said chapter 109A is hereby amended by striking out Section 10 and by inserting in place thereof the following Section:--

§ 10. Limitation of actions

A claim for relief with respect to a transfer or obligation under this chapter shall be extinguished unless action is brought:

(a) under paragraph (1) of subsection (a) of section five, not later than four years after the transfer was made or the obligation was incurred or, if later, not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(b) under paragraph (2) of subsection (a) of section five or subsection (a) of section six, not later than four years after the transfer was made or the obligation was incurred; or

(c) under subsection (b) of section six, not later than one year after the transfer was made.

SECTION 20. Said chapter 109A is hereby amended by renumbering Section 11 as follows:-- "§ 13." and by inserting the following new Section 11:--

§ 11. Governing Law

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

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

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

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

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

SECTION 21. Said chapter 109A is hereby amended by renumbering the original Section 13 as follows:-- “§ 16.”.

SECTION 22. Said chapter 109A is hereby amended by renumbering Section 12 as follows:-- “§ 14.” and by inserting the following new Section 12:--

§ 12. Application to series organization

(a) In this section:

(1) “Protected series” means an arrangement, however denominated, created by a series organization that, pursuant to the law under which the series organization is organized, has the characteristics set forth in paragraph (2).

(2) “Series organization” means an organization that, pursuant to the law under which it is organized, has the following characteristics:

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

(ii) Debt incurred or existing with respect to the activities of, or property of or associated with, a particular protected series is enforceable against the property of or associated with the

protected series only, and not against the property of or associated with the organization or other protected series of the organization.

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

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

SECTION 23. Said chapter 109A is hereby amended by inserting the following new Section 15:--

§ 15. Relation to electronic signatures in Global and National Commerce Act

This chapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 24. The amendments to chapter 109A made by this bill: (a) apply to a transfer made or obligation incurred on or after the effective date of the amendments; (b) do not apply to a transfer made or obligation incurred before the effective date of the amendments; and (c) do not apply to a right of action that has accrued before the effective date of the amendments. For the foregoing purposes a transfer is made and an obligation is incurred at the time provided in section six of the chapter.