

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

House Bill 4233

BY DELEGATES STORCH, HAMRICK, FERRO, BARRETT AND

ELLINGTON

[Introduced January 22, 2018; Referred
to the Committee on the Judiciary.]

1 A BILL to amend and reenact §40-1A-1, §40-1A-2, §40-1A-4, §40-1A-5, §40-1A-6, and §40-1A-8
 2 of the Code of West Virginia, 1931, as amended; and to amend said code by adding
 3 thereto three new sections, designated §40-1A-13, §40-1A-14, and §40-1A-15, all relating
 4 generally to fraudulent transfers; establishing that a presumption imposes on the party
 5 against which the presumption is directed the burden of proving that the nonexistence of
 6 insolvency is more probable than its existence; providing that a creditor making a claim
 7 for relief has the burden of proving the elements of the claim for relief by a preponderance
 8 of the evidence; setting forth rules regarding the defenses, liability and protection of
 9 transferees; establishing the governing law; providing for the application to series
 10 organizations; providing for the limiting, modifying or superseding of the federal Electronic
 11 Signatures in Global and National Commerce Act; and adding and modifying definitions.

Be it enacted by the Legislature of West Virginia:

ARTICLE 1A. UNIFORM FRAUDULENT TRANSFERS ACT.

§40-1A-1. Definitions.

1 As used in this article:
 2 (a) "Affiliate" means:
 3 (1) A person ~~who~~ that directly or indirectly owns, controls or holds with power to vote, 20
 4 percent or more of the outstanding voting securities of the debtor, other than a person who holds
 5 the securities"
 6 (i) As a fiduciary or agent without sole discretionary power to vote the securities; or
 7 (ii) Solely to secure a debt, if the person has not exercised the power to vote;
 8 (2) A corporation 20 percent or more of whose outstanding voting securities are directly
 9 or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly
 10 or indirectly owns, controls or holds, with power to vote, 20 percent or more of the outstanding
 11 voting securities of the debtor, other than a person who holds the securities:
 12 (i) As a fiduciary or agent without sole power to vote the securities; or

13 (ii) Solely to secure a debt, if the person has not in fact exercised the power to vote;

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

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

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

19 (1) Property to the extent it is encumbered by a valid lien;

20 (2) Property to the extent it is generally exempt under nonbankruptcy law; or

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

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

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

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

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

30 ~~(f)~~ "Debtor" means a person who is liable on a claim.

31 ~~(g)~~ "Insider" includes:

32 (1) If the debtor is an individual:

33 (i) A relative of the debtor or of a general partner of the debtor;

34 (ii) A partnership in which the debtor is a general partner;

35 (iii) A general partner in a partnership described in paragraph (ii); or

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

37 (2) If the debtor is a corporation:

38 (i) A director of the debtor;

- 39 (ii) An officer of the debtor;
- 40 (iii) A person in control of the debtor;
- 41 (iv) A partnership in which the debtor is a general partner;
- 42 (v) A general partner in a partnership described in paragraph (iv); or
- 43 (vi) A relative of a general partner, director, officer or person in control of the debtor;
- 44 (3) If the debtor is a partnership:
- 45 (i) A general partner in the debtor;
- 46 (ii) A relative of a general partner in, a general partner of, or a person in control of the
- 47 debtor;
- 48 (iii) Another partnership in which the debtor is a general partner;
- 49 (iv) A general partner in a partnership described in paragraph (iii); or
- 50 (v) A person in control of the debtor;
- 51 (4) An affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
- 52 (5) A managing agent of the debtor.
- 53 ~~(h)~~ “Lien” means a charge against or an interest in property to secure payment of a debt
- 54 or performance of an obligation, and includes a security interest created by agreement, a judicial
- 55 “Organization” means a person other than an individual lien obtained by legal or equitable
- 56 process or proceedings, a common-law lien or a statutory lien.
- 57 ~~(i)~~ “Person” means an individual, partnership, ~~corporation~~, association, ~~organization~~, trust,
- 58 business or nonprofit entity, public corporation, government or governmental subdivision or
- 59 agency, business trust, estate, trust or any other legal or commercial entity.
- 60 ~~(j)~~ “Property” means anything that may be the subject of ownership.
- 61 “Record” means information that is inscribed on a tangible medium or that is stored in an
- 62 electronic or other medium and is retrievable in perceivable form.
- 63 ~~(k)~~ “Relative” means an individual related by consanguinity within the third degree as
- 64 determined by the common law, a spouse or an individual related to a spouse within the third

65 degree as so determined, and includes an individual in an adoptive relationship within the third
66 degree.

67 “Sign” means, with present intent to authenticate or adopt a record:

68 (1) To execute or adopt a tangible symbol; or

69 (2) To attach to or logically associate with the record an electronic symbol, sound, or
70 process.

71 (†) “Transfer” means every mode, direct or indirect, absolute or conditional, voluntary or
72 involuntary, of disposing of or parting with an asset or an interest in an asset, and includes
73 payment of money, release, lease, license, and creation of a lien or other encumbrance.

74 (‡) “Valid lien” means a lien that is effective against the holder of a judicial lien
75 subsequently obtained by legal or equitable process or proceedings.

§40-1A-2. Insolvency.

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

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

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

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

14 (e) Debts under this section do not include an obligation to the extent it is secured by a

15 valid lien on property of the debtor not included as an asset.

§40-1A-4. Transfers fraudulent as to present and future creditors.

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

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

5 (2) Without receiving a reasonably equivalent value in exchange for the transfer or
6 obligation and the debtor:

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

10 (ii) Intended to incur, or believed or reasonably should have believed that he or she (~~or~~
11 ~~she~~) would incur, debts beyond his or her (~~or her~~) ability to pay as they became due.

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

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

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

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

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

19 (5) The transfer was of substantially all the debtor's assets;

20 (6) The debtor absconded;

21 (7) The debtor removed or concealed assets;

22 (8) The value of the consideration received by the debtor was reasonably equivalent to
23 the value of the asset transferred or the amount of the obligation incurred;

24 (9) The debtor was insolvent or became insolvent shortly after the transfer was made or

25 the obligation was incurred;

26 (10) The transfer occurred shortly before or shortly after a substantial debt was incurred;

27 and

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

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

§40-1A-5. Transfers fraudulent as to present creditors.

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

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

10 (c) Subject to the provisions of §40-1A-4(b) of this code, a creditor making a claim for relief
11 under subsection (a) or (b) of this section has the burden of proving the elements of the claim for
12 relief by a preponderance of the evidence.

§40-1A-6. When transfer is made or obligation is incurred.

1 For the purposes of this article:

2 (a) A transfer is made:

3 (1) With respect to an asset that is real property other than a fixture, but including the
4 interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so
5 far perfected that a good-faith purchaser of the asset from the debtor against whom applicable

6 law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to
7 the interest of the transferee; and

8 (2) With respect to an asset that is not real property or that is a fixture, when the transfer
9 is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than
10 under this article that is superior to the interest of the transferee;

11 (b) If applicable law permits the transfer to be perfected as provided in subdivision (a) and
12 the transfer is not so perfected before the commencement of an action for relief under this article,
13 the transfer is considered made immediately before the commencement of this action;

14 (c) If applicable law does not permit the transfer to be perfected as provided in subdivision
15 (a), the transfer is made when it becomes effective between the debtor and the transferee; and

16 (d) A transfer is not made until the debtor has acquired rights in the asset transferred and
17 an obligation is incurred.

18 (e) If the obligation incurred is oral, a transfer is made when the obligation becomes
19 effective. If the obligation incurred is evidenced by a writing, the obligation becomes effective
20 when the writing is delivered to or for the benefit of the obligee.

§40-1A-8. Defenses, liability and protection of transferee.

1 (a) A transfer or obligation is not voidable under §40-1A-4(a)(1) of this code, against a
2 person who took in good faith and for a reasonably equivalent value or against any subsequent
3 transferee or obligee.

4 (b) Except as otherwise provided in this section, to the extent a transfer is voidable in an
5 action by a creditor under §40-1A-7(a)(1) of this code, the creditor may recover judgment for the
6 value of the asset transferred, as adjusted under subsection (c) of this section, or the amount
7 necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

8 (1) The first transferee of the asset or the person for whose benefit the transfer was made;
9 or

10 (2) Any subsequent transferee other than a good faith transferee who took for value or

11 from any subsequent transferee.

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

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

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

19 (2) Enforcement of any obligation incurred; or

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

21 (e) A transfer is not voidable under §40-1A-4(a)(2) or §40-1A-5(a)(2) of this code if the
22 transfer results from:

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

25 (2) Enforcement of a security interest in compliance with article nine of the uniform
26 commercial code.

27 (f) A transfer is not voidable under §40-1A-5(b) of this code:

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

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

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

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

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

37 (2) Except as otherwise provided by this subsection, the creditor has the burden of proving
38 each applicable element of subsection (b) or (c) of this section.

39 (3) The transferee has the burden of proving the applicability to the transferee of
40 subparagraph (i) or (ii), paragraph (A), subdivision (1), subsection (b) of this section.

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

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

§40-1A-13. Governing Law.

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

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

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

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

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

§40-1A-14. Application to a series organization.

1 (a) In this section:

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

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

7 (A) The organic record of the organization provides for creation by the organization of one

8 or more protected series, however denominated, with respect to specified property of the
9 organization, and for records to be maintained for each protected series that identify the property
10 of or associated with the protected series.

11 (B) Debt incurred or existing with respect to the activities of, or property of or associated
12 with, a particular protected series is enforceable against the property of or associated with the
13 protected series only, and not against the property of or associated with the organization or other
14 protected series of the organization.

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

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

§40-1A-15 Relation to Electronic Signatures In Global And National Commerce Act.

1 This article modifies, limits, or supersedes the Electronic Signatures in Global and National
2 Commerce Act, 15 U.S.C. Section 7001 *et seq.*, but does not modify, limit, or supersede Section
3 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices
4 described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

NOTE: The purpose of this bill concerns generally fraudulent transfers. The bill establishes that a 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. The bill provides that a creditor making a claim for relief has the burden of proving the elements of the claim for relief by a preponderance of the evidence. The bill sets forth rules regarding the defenses, liability and protection of transferees. The bill establishes the governing law. The bill provides for the application to series organizations. The bill provides for the limiting, modifying or superseding of the federal Electronic Signatures in Global and National Commerce Act. The bill adds new and modifies existing definitions.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.