

HOUSE BILL NO. 439

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced: 2/4/94

Referred: Labor & Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

1 **"An Act enacting the Uniform Fraudulent Transfer Act."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 *** Section 1. AS 34 is amended by adding a new chapter to read:**

4 **CHAPTER 41.**

5 **UNIFORM FRAUDULENT TRANSFER ACT.**

6 **Sec. 34.41.010. INSOLVENCY. (a) A debtor is insolvent if the sum of**
7 **the debtor's debts is greater than all of the debtor's assets at a fair valuation.**

8 **(b) A debtor who is generally not paying the debtor's debts as they become**
9 **due is presumed to be insolvent.**

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

14 **(d) Assets under this section do not include property that has been transferred,**

1 concealed, or removed with intent to hinder, delay, or defraud creditors or that has
2 been transferred in a manner making the transfer voidable under this chapter.

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

5 Sec. 34.41.020. VALUE. (a) Value is given for a transfer or an obligation
6 if, in exchange for the transfer or obligation, property is transferred or an antecedent
7 debt is secured or satisfied, but value does not include an unperformed promise made
8 otherwise than in the ordinary course of the promisor's business to furnish support to
9 the debtor or another person.

10 (b) For the purposes of AS 34.41.030(a)(2) and 34.41.040, a person gives a
11 reasonably equivalent value if the person acquires an interest of the debtor in an asset
12 pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a
13 power of sale for the acquisition or disposition of the interest of the debtor upon
14 default under a mortgage, deed of trust, or security agreement.

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

18 Sec. 34.41.030. TRANSFERS FRAUDULENT AS TO PRESENT AND
19 FUTURE CREDITORS. (a) A transfer made or obligation incurred by a debtor is
20 fraudulent as to a creditor, whether the creditor's claim arose before or after the
21 transfer was made or the obligation was incurred, if the debtor made the transfer or
22 incurred the obligation

23 (1) with actual intent to hinder, delay, or defraud a creditor of the
24 debtor; or

25 (2) without receiving a reasonably equivalent value in exchange for the
26 transfer or obligation, and the debtor

27 (A) was engaged or was about to engage in a business or a
28 transaction for which the remaining assets of the debtor were unreasonably
29 small in relation to the business or transaction; or

30 (B) intended to incur, or believed or reasonably should have
31 believed that the debtor would incur, debts beyond the debtor's ability to pay

1 as they became due.

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

4 (1) the transfer or obligation was to an insider;

5 (2) the debtor retained possession or control of the property transferred
6 after the transfer;

7 (3) the transfer or obligation was disclosed or concealed;

8 (4) before the transfer was made or obligation was incurred, the debtor
9 had been sued or threatened with suit;

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

11 (6) the debtor absconded;

12 (7) the debtor removed or concealed assets;

13 (8) the value of the consideration received by the debtor was reasonably
14 equivalent to the value of the asset transferred or the amount of the obligation
15 incurred;

16 (9) the debtor was insolvent or became insolvent shortly after the
17 transfer was made or the obligation was incurred;

18 (10) the transfer occurred shortly before or shortly after a substantial
19 debt was incurred; and

20 (11) the debtor transferred the essential assets of the business to a
21 lienor who transferred the assets to an insider of the debtor.

22 **Sec. 34.41.040. TRANSFERS FRAUDULENT AS TO PRESENT**
23 **CREDITORS.** (a) A transfer made or obligation incurred by a debtor is fraudulent
24 as to a creditor whose claim arose before the transfer was made or the obligation was
25 incurred if the debtor made the transfer or incurred the obligation without receiving
26 a reasonably equivalent value in exchange for the transfer or obligation and the debtor
27 was insolvent at that time or the debtor became insolvent as a result of the transfer or
28 obligation.

29 (b) A transfer made by a debtor is fraudulent as to a creditor whose claim
30 arose before the transfer was made if the transfer was made to an insider for an
31 antecedent debt, the debtor was insolvent at that time, and the insider had reasonable

1 cause to believe that the debtor was insolvent.

2 **Sec. 34.41.050. WHEN TRANSFER IS MADE OR OBLIGATION IS**
3 **INCURRED.** For the purposes of this chapter,

4 (1) a transfer is made with respect to an asset that is

5 (A) real property other than a fixture, but including the interest
6 of a seller or purchaser under a contract for the sale of the asset, when the
7 transfer is so far perfected that a good faith purchaser of the asset from the
8 debtor against whom applicable law permits the transfer to be perfected cannot
9 acquire an interest in the asset that is superior to the interest of the transferee;
10 and

11 (B) not real property or that is a fixture, when the transfer is so
12 far perfected that a creditor on a simple contract cannot acquire a judicial lien
13 otherwise than under this chapter that is superior to the interest of the
14 transferee;

15 (2) if applicable law permits the transfer to be perfected as provided
16 in (1) of this section and the transfer is not so perfected before the commencement of
17 an action for relief under this chapter, the transfer is deemed made immediately before
18 the commencement of the action;

19 (3) if applicable law does not permit the transfer to be perfected as
20 provided in (1) of this section, the transfer is made when it becomes effective between
21 the debtor and the transferee;

22 (4) a transfer is not made until the debtor has acquired rights in the
23 asset transferred;

24 (5) an obligation is incurred

25 (A) if oral, when it becomes effective between the parties; or

26 (B) if evidenced by a writing, when the writing executed by the
27 obligor is delivered to or for the benefit of the obligee.

28 **Sec. 34.41.060. REMEDIES OF CREDITORS.** (a) In an action for relief
29 against a transfer or obligation under this chapter, a creditor, subject to the limitations
30 in AS 34.41.070, may obtain

31 (1) avoidance of the transfer or obligation to the extent necessary to

1 satisfy the creditor's claim;

2 (2) an attachment or other provisional remedy against the asset
3 transferred or other property of the transferee in accordance with the procedures
4 prescribed by the Alaska Rules of Civil Procedure;

5 (3) subject to applicable principles of equity and in accordance with
6 applicable rules of civil procedure,

7 (A) an injunction against further disposition by the debtor or a
8 transferee, or both, of the asset transferred or of other property;

9 (B) appointment of a receiver to take charge of the asset
10 transferred or of other property of the transferee; or

11 (C) other relief the circumstances may require.

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

15 Sec. 34.41.070. DEFENSES, LIABILITY, AND PROTECTION OF
16 TRANSFEREE. (a) A transfer or obligation is not voidable under AS 34.41.030(a)(1)
17 against a person who took in good faith and for a reasonably equivalent value or
18 against a subsequent transferee or obligee.

19 (b) Except as otherwise provided in this section, to the extent a transfer is
20 voidable in an action by a creditor under AS 34.41.060(a)(1), the creditor may recover
21 judgment for the value of the asset transferred, as adjusted under (c) of this section,
22 or the amount necessary to satisfy the creditor's claim, whichever is less. The
23 judgment may be entered against

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

26 (2) a subsequent transferee other than a good faith transferee who took
27 for value or from a subsequent transferee.

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

31 (d) Notwithstanding voidability of a transfer or an obligation under this

1 chapter, a good faith transferee or obligee is entitled, to the extent of the value given
2 the debtor for the transfer or obligation, to

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

4 (2) enforcement of an obligation incurred; or

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

6 (e) A transfer is not voidable under AS 34.41.030(a)(2) or 34.41.040 if the
7 transfer results from

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

10 (2) enforcement of a security interest in compliance with AS 45.09.

11 (f) A transfer is not voidable under AS 34.41.040(b)

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

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

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

19 Sec. 34.41.080. EXTINGUISHMENT OF CLAIM FOR RELIEF. A claim for
20 relief with respect to a fraudulent transfer or obligation under this chapter is
21 extinguished unless action is brought under

22 (1) AS 34.41.030(a)(1), within four years after the transfer was made
23 or the obligation was incurred or, if later, within one year after the transfer or
24 obligation was or could reasonably have been discovered by the claimant;

25 (2) AS 34.41.030(a)(2) or 34.41.040(a), within four years after the
26 transfer was made or the obligation was incurred; or

27 (3) AS 34.41.040(b), within one year after the transfer was made or the
28 obligation was incurred.

29 Sec. 34.41.090. SUPPLEMENTARY PROVISIONS. Unless displaced by the
30 provisions of this chapter, the principles of law and equity, including the law merchant
31 and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation,

1 duress, coercion, mistake, insolvency, or other validating or invalidating cause,
2 supplement its provisions.

3 **Sec. 34.41.100. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**

4 This chapter shall be applied and construed to effectuate its general purpose to make
5 uniform the law with respect to the subject of this chapter among states enacting it.

6 **Sec. 34.41.110. DEFINITIONS.** In this chapter,

7 (1) "affiliate" means a

8 (A) person who directly or indirectly owns, controls, or holds
9 with power to vote, 20 percent or more of the outstanding voting securities of
10 the debtor, other than a person who holds the securities,

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

13 (ii) solely to secure a debt if the person has not
14 exercised the power to vote;

15 (B) corporation 20 percent or more of whose outstanding voting
16 securities are directly or indirectly owned, controlled, or held with power to
17 vote, by the debtor or a person who directly or indirectly owns, controls, or
18 holds, with power to vote, 20 percent or more of the outstanding voting
19 securities of the debtor, other than a person who holds the securities,

20 (i) as a fiduciary or agent without sole power to vote the
21 securities; or

22 (ii) solely to secure a debt if the person has not in fact
23 exercised the power to vote;

24 (C) person whose business is operated by the debtor under a
25 lease or other agreement, or a person substantially all of whose assets are
26 controlled by the debtor; or

27 (D) person who operates the debtor's business under a lease or
28 other agreement or controls substantially all of the debtor's assets;

29 (2) "asset" means property of a debtor, but does not include

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

31 (B) property to the extent it is generally exempt under

1 nonbankruptcy law; or

2 (C) an interest in property held in tenancy by the entireties to
3 the extent it is not subject to process by a creditor holding a claim against only
4 one tenant;

5 (3) "claim" means a right to payment, whether or not the right is
6 reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured,
7 disputed, undisputed, legal, equitable, secured, or unsecured;

8 (4) "creditor" means a person who has a claim;

9 (5) "debt" means liability on a claim;

10 (6) "debtor" means a person who is liable on a claim;

11 (7) "insider" includes,

12 (A) if the debtor is an individual, a

13 (i) relative of the debtor or of a general partner of the
14 debtor;

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

16 (iii) general partner in a partnership described in (ii) of
17 this subparagraph; or

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

20 (B) if the debtor is a corporation,

21 (i) a director of the debtor;

22 (ii) an officer of the debtor;

23 (iii) a person in control of the debtor;

24 (iv) a partnership in which the debtor is a general
25 partner;

26 (v) a general partner in a partnership described in (iv)
27 of this subparagraph; or

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

30 (C) if the debtor is a partnership,

31 (i) a general partner in the debtor;

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

3 (iii) another partnership in which the debtor is a general
4 partner;

5 (iv) a general partner in a partnership described in (iii)
6 of this subparagraph; or

7 (v) a person in control of the debtor;

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

10 (E) a managing agent of the debtor;

11 (8) "lien" means a charge against or an interest in property to secure
12 payment of a debt or performance of an obligation, and includes a security interest
13 created by agreement, a judicial lien obtained by legal or equitable process or
14 proceedings, a common law lien, or a statutory lien;

15 (9) "person" has the meaning given in AS 01.10.060 and includes an
16 estate, government or governmental subdivision or agency, trust, or another legal or
17 commercial entity;

18 (10) "property" means anything that may be the subject of ownership;

19 (11) "relative" means an individual related by consanguinity within the
20 third degree as determined under common law, a spouse, or an individual related to
21 a spouse within the third degree as determined under common law, and includes an
22 individual in an adoptive relationship within the third degree;

23 (12) "transfer" means every mode, direct or indirect, absolute or
24 conditional, voluntary or involuntary, of disposing of or parting with an asset or an
25 interest in an asset, and includes payment of money, release, lease, and creation of a
26 lien or other encumbrance;

27 (13) "valid lien" means a lien that is effective against the holder of a
28 judicial lien subsequently obtained by legal or equitable process or proceedings.

29 Sec. 34.41.120. **SHORT TITLE.** This chapter may be cited as the Uniform
30 Fraudulent Transfer Act.

31 * Sec. 2. AS 34.40 is repealed.