HB

72

HEIN
FILE

HOUSE COMMITTEE REPORT

(1)

Date Referred: February 22, 1995 FURTHER REFERRALS:

Date of Committee Action: _____

The FINANCE Committee considered: HB 72

HOUSE BILL NO. 72 UNIFORM FRAUDULENT TRANSFER ACT

"An Act enacting the Uniform Fraudulent Transfer Act."

recommends it be replaced [ ] the same title
with the following committee substitute _____ [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____ [ ] fiscal note(s) _____

_____ _____

[ ] zero fiscal note(s) _____ [ ] zero fiscal note(s) _____

_____ _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM

Died in Committee

CHAIR'S SIGNATURE _____ _____

03/10/95 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150

13:39:28 PARTICIPANT LIST (ALL PARTICIPANTS) BY:ANC

TCN:50369 SCHEDULED FOR:03/10/95 13:30 TO 16:00 FOR:ANC

PUBLIC HEARING HOUSE FINANCE

LOCATION:ANCHORAGE

HB 20	TIM	TROLL		TESTIFY
HB 20	JIM	BARNETT		TESTIFY
HB 72	ROBERT	MANLEY		TESTIFY
HB 72	DAVID	SHAFTEL		TESTIFY
HB 72	JERRY	WEAVER		TESTIFY
HB 72	RICHARD	THWAITES		TESTIFY
HB 72	RUSSELL	NOGY		TESTIFY

03/10/95 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150

13:29:31 PARTICIPANT LIST (ALL PARTICIPANTS) BY:SIT

TCN:50369 SCHEDULED FOR:03/10/95 13:30 TO 16:00 FOR:SIT

PUBLIC HEARING HOUSE FINANCE

LOCATION:SITKA

HB 20	WELLS	WILLIAMS	CITY OF SITKA	TESTIFY

Rick Elliott HB 20 Anch

Alaska State Legislature

Representative Brian S. Porter

CHAIRMAN
HOUSE JUDICIARY COMMITTEE

MEMBER
HOUSE LABOR & COMMERCE COMMITTEE
SELECT COMMITTEE ON LEGISLATIVE ETHICS

MEMBER
FINANCE SUBCOMMITTEES
DEPARTMENT OF LAW
DEPARTMENT OF PUBLIC SAFETY
COURTS

DISTRICT 20

SESSION:
STATE CAPITOL, ROOM 118
JUNEAU, ALASKA 99801-1182
PHONE: (907) 465-4930
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INTERIM:
716 W. 4TH AVE., SUITE 640
ANCHORAGE, AK 99501-2133
PHONE: (907) 258-8197
FAX: (907) 258-5510

SPONSOR STATEMENT

HB 72 UNIFORM FRAUDULENT TRANSFER ACT

The Uniform Fraudulent Transfer Act (**UFTA**) provides **creditors** with a **remedy** when **debtors transfer or hide assets** that would otherwise be available to satisfy legitimate debts. HB 72 is modeled after the uniform law adopted by the National Conference of Commissioners on Uniform State Laws. The Attorney General of the State of Alaska is in support of this needed legislation.

Alaska law in this area was adopted in 1949 from the state of Oregon and has received little legislative attention. Yet, many changes in both state and federal law, particularly in the area of bankruptcy, and relationships between creditors and debtors have become more complex.

At this time, Alaska law provides that a conveyance of real or personal property will be void if it was made "with the **intent** to hinder, delay or defraud creditors." AS34.40.010. The existence of this fraudulent intent is a question of fact and the burden of proof is upon the creditor (Summers v. Hagen _ P.2d_, No.3961, May 28, 1993). This burden of proof can be extremely hard to prove. **UFTA would eliminate the present Alaskan necessity of finding actual intent** by a property transferor to hinder, delay or defraud a creditor in many situations where the transferor is obviously transferring assets solely to keep them out of the reach of transferor's creditors. UFTA sets out numerous **non-exclusive factors** to be considered by the court when determining if the debtor had "**actual intent**."

Thirty-two (32) states have adopted UFTA into their laws. Uniformity has become not only a question of law between states, but also between state and federal law. Without uniformity, credit becomes less available, and the credit mechanism is less reliable. The Uniform Fraudulent Transfer Act takes into account the current development in both law and practice in creditor-debtor relationships.

Alaska State Legislature

Representative Brian S. Porter

CHAIRMAN
HOUSE JUDICIARY COMMITTEE

MEMBER
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Representative Pete Kott, Chair
House Labor and Commerce Committee
State Capitol, Room 432
Juneau, Alaska 99801-1182

January 25, 1995

Dear Representative Kott:

I respectfully submit this request for hearing on HB72, an act enacting the Uniform Fraudulent Transfer Act. The purpose of this act provides creditors with a remedy when debtors transfer or hide assets that would otherwise be available to satisfy legitimate debts.

Your consideration of this request is appreciated.

Sincerely,

Representative Brian S. Porter, Chair
House Judiciary Committee

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 72

Revision Date:
Title: Uniform Fraudulent Transfer Act

Sponsor: Representative Porter
Requestor:

Department Affected: Commerce and Economic Development
BRU: Banking, Securities & Corporations
Component:

COMPONENT SERIAL NO. 1233

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

Estimate of current year (FY 95) cost: $ 0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Willis F. Kirkpatrick, Director
Division: Banking, Securities & Corporations

Phone: 465-2521
Date:

Approved by Commissioner: William L. Hensley
Agency: Commerce and Economic Development

Date: 1/23/95

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

No. 1
Bill Version: HB 72
(H) Publish Date: 2/3/95

Revision Date:
Title: Fraudulent Transfer Act
Sponsor: Representative Porter
Requestor:

Department Affected: Commerce and Economic Development
BRU: Banking, Securities & Corporations
Component:
COMPONENT SERIAL NO. 1233

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

Estimate of current year (FY 95) cost: $ 0

POSITIONS						
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Willis F. Kirkpatrick, Director
Division: Banking, Securities & Corporations
Phone: 465-2521
Date:

Approved by Commissioner: William L. Hensley
Agency: Commerce and Economic Development
Date: 1/23/95

COMMITTEE COPY

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

No. 2
Bill Version: HB 72
(H) Publish Date: 2/3/95

Revision Date:
Title: "An Act enacting the Uniform Fraudulent Transfer Act."
Sponsor: Representative Porter
Requester: Representative Porter

Dept. Affected: Department of Law
BRU: Legal Services
Component: Operations
COMPONENT SERIAL NO. 0093

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTAA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 34 to adopt the Uniform Fraudulent Transfer Act for Alaska. The uniform act is recommended by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Its purpose is to protect creditors against the fraudulent transfer of assets and fraudulent obligations that would otherwise work to defeat a creditor's interests. The proposed act includes personal as well as real property. Current law, which was adopted in the 1940's and is based on even older law, only addresses real property. Because the bill is a Uniform Act based on the NCCUSL model, it will conform to the requirements of most of the other states thus making its provisions (and protections) available for many interstate transactions. The bill deals primarily with private transactions. It will not have a fiscal impact for the Department of Law.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: 1/19/95

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 1/19/95

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Law Offices
DAVIS & GOERIG
405 West 36th Street, Suite 200
Anchorage, Alaska 99503
(907)561-4420

TELECOPY TRANSMITTAL COVER SHEET

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DATE: March 13, 1995

TIME: 3:52 pm

DELIVER TO: Honorable Mark Hanley

YOUR FAX NO: 465-2418

SENT BY: Trigg T. Davis

NO. OF PAGES: 3
(including cover sheet)

MESSAGE: Re: House Bill 72

Please distribute copies of this fax to the members of the House Finance Committee. Thank you. ✓ DONE

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Melinda Swihart
TELECOPY OPERATOR
OUR TELECOPY NO: (907) 562-7888

ALASKAN MARINE DEALERS ASSOCIATION

TO: WHOM IT MAY CONCERN

FROM: MEMBERS OF AMDA

RE: HOUSE BILL 72

Saturday evening was the 11th Annual Award Banquet and Meeting of the Alaskan Marine Dealers Association. Over 60 persons were in attendance representing at least two dozen Alaskan companies. We (see attachment) are hard working Alaskan business owners that work every day to provide a payroll and make an honest profit.

During the program House Bill 72 was brought to our attention. A robust discussion followed, and we want to inform you that the provisions in the Bill were opposed by every person at the meeting. It appears to us that this measure is being passed through the Legislative process without adequate input from Alaskans. It also appears to us that this measure is being championed by individuals from outside of the State whose only interest is to overturn a sensible statute that has already been upheld by the Alaska Supreme Court.

We understand that important action could be taken on House Bill 72 by Tuesday, March 14, 1995. We urge postponement of any action if at all possible.

In the meantime, specific list of amendments that we believe will improve House Bill 72 will be prepared and submitted by our Executive Director, Steve Morgheim.

Thank you in advance for diligently looking out for the well being of us and our families rather than the narrow interests of individuals and groups seem to have little concern for the damage that House Bill 72 could cause.

Suite 792, 2440 E. Tudor Road • Anchorage, Alaska 99507 • (907) 561-4554

I OPPOSE HOUSE BILL # 72

EGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 21, 1994

SUBJECT: Sectional Summary of Uniform Fraudulent Transfer Act. (Work Order No. 8-LS1461\A)

TO: Representative Brian Porter

FROM: David R. Dierdorff
Revisor of Statutes

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

This summary relies heavily on the prefatory notes and comments to the Uniform Act that were prepared by the National Conference of Commissioners on Uniform State Laws (NCCUSL). In most instances, the text will be that of the NCCUSL, with modifications only as necessary to correct section references and the like.

INTRODUCTION AND OVERVIEW

The Uniform Fraudulent Transfer Act was approved by the National Conference of Commissioners on Uniform State Laws in 1984 and by the American Bar Association on February 18, 1985. This Act was preceded by the Uniform Fraudulent Conveyance Act, promulgated by the Conference of Commissioners on Uniform State Laws in 1918 and adopted in 25 jurisdictions, including the Virgin Islands. The 1918 Act has also been adopted in the sections of the Bankruptcy Act of 1938 and the Bankruptcy Reform Act of 1978 that deal with fraudulent transfers and obligations.

Alaska did not adopt the earlier Act. Current Alaska law, found at AS 34.40, derives from late 19th century Oregon law, and has received little legislative attention. Even though Alaska did not enact the 1918 Act, the official commentary's references to it and to differences between the new Uniform Act and it, are helpful in understanding

the substantive effect of the bill. Consequently, this memorandum retains those references.

The 1918 Uniform Act was a codification of the "better" decisions applying the Statute of 13 Elizabeth. See Analysis of H.R. 12339, 74th Cong., 2d Sess. 213 (1936). The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of a fraudulent transfer was part of the law of every American jurisdiction (*c.f.* AS 34.40.010). Because the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on "badges of fraud." The weight given these badges varied greatly between jurisdictions, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on the evidence of actual intent. An important reform effected by the 1918 Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing an action to avoid a transfer as fraudulent. See American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 67 A.L.R. 244 (1929) (per C.J. Cardozo).

The NCCUSL was persuaded in 1979 to appoint a committee to undertake a study of the 1918 Uniform Act with a view to preparing the draft of a revision. The Conference was influenced by the following considerations:

(1) The Bankruptcy Reform Act of 1978 made numerous changes in the section of that Act dealing with fraudulent transfers and obligations, thereby substantially reducing the correspondence of the provisions of the federal bankruptcy law on fraudulent transfers with the Uniform Act.

(2) The Committee on Corporate Laws of the Section of Corporations, Banking & Business Law of the American Bar Association, engaged in revising the Model Corporation Act, suggested that the Conference review provisions of the Uniform Act with a view to determining whether the Acts are consistent in respect to the treatment of dividend distributions.

(3) The Uniform Commercial Code, enacted at least in part by all 50 states, had substantially modified related rules of law regulating transfers of personal property, notably by facilitating the making and perfection of security transfers against attack by unsecured creditors.

(4) Debtors and trustees in a number of cases have avoided foreclosure of security interests by invoking the fraudulent transfer section of the Bankruptcy Reform Act.

> (5) The Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, forbid a lawyer to counsel or to assist a client in conduct that the lawyer knows is fraudulent.

The drafting committee determined to rename the Act the Uniform Fraudulent Transfer Act in recognition of its applicability to transfers of personal property as well as real property, "conveyance" having a connotation restricting it to a transfer of personal property. This Act, like the original Uniform Act, does not purport to cover the whole law of voidable transfers and obligations. The limited scope of the original Act did not impair its effectiveness in achieving uniformity in the areas covered. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 405 (1933).

The basic structure and approach of the 1918 Act are preserved in the Uniform Fraudulent Transfer Act. There are two sections in the new Act delineating what transfers and obligations are fraudulent. Section 4(a) (Sec. 34.41.030(a)) is an adaptation of three sections of the 1918 Act; § 5(a) (Sec. 34.41.040(a)) is an adaptation of another section of that Act and § 5(b) (Sec. 34.41.040(b)) is new. One section of the 1918 Act (§ 8) is not carried forward into the new Act because it was believed to be redundant in part and in part susceptible of inequitable application. Both Acts declare a transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors to be fraudulent. Both Acts render a transfer made or obligation incurred without adequate consideration to be constructively fraudulent -- *ie.*, without regard to the actual intent of the parties -- under one of the following conditions:

> (1) the debtor was left by the transfer or obligation with unreasonably small assets for a transaction or the business in which the debtor was engaged;
>
> (2) the debtor intended to incur, or believed that the debtor would incur, more debts than the debtor would be able to pay; or
>
> (3) the debtor was insolvent at the time or as a result of the transfer or obligation.

As under the 1918 Act a transfer or obligation that is constructively fraudulent because insolvency concurs with or follows failure to receive adequate consideration is voidable only by a creditor in existence at the time the transfer occurs or the obligation is incurred. Either an existing or subsequent creditor may avoid a transfer or obligation for inadequate consideration when accompanied by the financial condition specified in Sec. 34.41.030(a)(2)(A) or the mental state specified in Sec. 34.41.030(a)(2)(B).

Reasonably equivalent value is required in order to constitute adequate consideration under the revised Act. The revision follows the Bankruptcy Code in eliminating good faith on the part of the transferee or obligee as an issue in the determination of whether adequate consideration is given by a transferee or obligee. The new Act, like the Bankruptcy Act, allows the transferee or obligee to show good faith in defense after a creditor establishes that a fraudulent transfer has been made or a fraudulent obligation has been incurred. Thus, a showing by a defendant that a reasonable equivalent has been given in good faith for a transfer or obligation is a complete defense although the debtor is shown to have intended to hinder, delay, or defraud creditors.

A good faith transferee or obligee who has given less than a reasonable equivalent is nevertheless allowed a reduction in a liability to the extent of the value given. The new Act, like the Bankruptcy Code, eliminates the provision of the 1918 Act that enables a creditor to attack a security transfer on the ground that the value of the property transferred is disproportionate to the debt secured. The premise of the new Act is that the value of the interest transferred for security is measured by and thus corresponds exactly to the debt secured. Foreclosure of a debtor's interest by a regularly conducted, noncollusive sale on default under a mortgage or other security agreement may not be avoided under the Act as a transfer for less than a reasonably equivalent value.

The definition of insolvency under the Act is adapted from the definition of the term in the Bankruptcy Code. Insolvency is presumed from proof of a failure generally to pay debts as they become due.

The new Act adds a new category of fraudulent transfer, namely, a preferential transfer by an insolvent insider to a creditor who had reasonable cause to believe the debtor to be insolvent. An insider is defined in much the same way as in the Bankruptcy Code and includes a relative, also defined as in the Bankruptcy Code, a director or officer of a corporate debtor, a partner, or a person in control of a debtor. This provision is available only to an existing creditor. Its premise is that an insolvent debtor is obliged to pay debts to creditors not related to the debtor before paying those who are insiders.

The new Act omits any provision directed particularly at transfers or obligations of insolvent partnership debtors. Under § 8 of the 1918 Act, any transfer made or obligation incurred by an insolvent partnership to a partner was deemed fraudulent without regard to intent or adequacy of consideration. So categorical a condemnation of a partnership transaction with a partner may unfairly prejudice the interests of a partner's separate creditors. The new Act also omits as redundant a provision in the 1918 Act that makes fraudulent a transfer made or obligation incurred by an insolvent partnership for less than a fair consideration to the partnership.

Section 34.41.060 lists the remedies available to creditors under the new Act. It eliminates as unnecessary and confusing a differentiation made in the 1918 Act between the remedies available to holders of matured claims and those holding unmatured claims. Since promulgation of the 1918 Act, the United States Supreme Court has imposed restrictions on the availability and use of prejudgment remedies. As a result many states have amended their statutes and rules applicable to such remedies, and it is frequently unclear whether a state's procedures include a prejudgment remedy against a fraudulent transfer or obligation. Paragraph (a)(2) is included in Sec. 34.41.060 to make such a remedy available.

Section 34.41.070 prescribes the measure of liability of a transferee or obligee under the Act and enumerates defenses. Defenses against avoidance of a preferential transfer to an insider under Sec. 34.41.040(b) include an adaptation of defenses available under § 547(c)(2) and (4) of the Bankruptcy Code when such a transfer is sought to be avoided as a preference by the trustee in bankruptcy. In addition a preferential transfer may be justified when shown to be made pursuant to a good faith effort to stave off forced liquidation and rehabilitate the debtor. Section 34.41.070 also precludes avoidance, as a constructively fraudulent transfer, of the termination of a lease on default or the enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code (AS 45.09).

The new Act includes a new section specifying when a transfer is made or an obligation is incurred. The section specifying the time when a transfer occurs is adapted from § 548(d) of the Bankruptcy Code. Its premise is that if the law prescribes a mode for making the transfer a matter of public record or notice, it is not deemed to be made for any purpose under the Act until it has become such a matter of record or notice.

The new Act also includes a statute of limitations that bars the right rather than the remedy on expiration of the statutory periods prescribed. The law governing limitations on actions to avoid fraudulent transfers among the states is unclear and full of diversity. The Act recognizes that laches and estoppel may operate to preclude a particular creditor from pursuing a remedy against a fraudulent transfer or obligation even though the statutory period of limitations has not run.

SECTIONAL ANALYSIS AND COMMENTARY

Section 1. Enacts the Uniform Fraudulent Transfer Act as a new chapter, AS 34.41. The chapter consists of the following provisions:

Sec. 34.41.010. This section sets out the circumstances under which a debtor is deemed to be insolvent.

OFFICIAL COMMENTARY

(1) Subsection (a) is derived from the definition of "insolvent" in § 101 (29)(A) of the Bankruptcy Code. The definition in subsection (a) and the correlated definition of partnership insolvency in subsection (c) contemplate a fair valuation of the debts as well as the assets of the debtor. As under the definition of the same term in § 2 of the 1918 Act, exempt property is excluded from the computation of the value of the assets. See Sec. 34.41.110(2). For similar reasons, interests in valid spendthrift trusts and interests in tenancies by the entireties that cannot be severed by a creditor of only one tenant are not included. See the comment to Sec. 34.41.110(2), *infra*. Since a valid lien also precludes an unsecured creditor from collecting the creditor's claim from the encumbered interest in a debtor's property, both the encumbered interest and the debt secured thereby are excluded from the computation of insolvency under this Act. See Sec. 34.41.110(2) and subsection (e) of this section.

(2) Subsection (b) establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. Such general nonpayment is a ground for the filing of an involuntary petition under § 303(h)(1) of the Bankruptcy Code. See also AS 45.01.201(24) (Uniform Commercial Code), which, in part, declares a person to be "insolvent" who "has ceased to pay the person's debts in the ordinary course of business or cannot pay the person's debts as they become due." The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency as defined in subsection (a) is more probable than its existence. See Uniform Rules of Evidence (1974 Act), Rule 310(a). The 1974 Uniform Rule 301(a) conforms to the Final Draft of Federal Rule 301 as submitted to the United States Supreme Court by the Advisory Committee on Federal Rules of Evidence. "The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed is rejected as according presumptions too 'slight and evanescent' an effect." Advisory Committee's Note to Rule 301. See also 1 J. Weinstein & M. Berger, Evidence (1982).

The presumption is established in recognition of the difficulties typically imposed on a creditor in proving insolvency in the bankruptcy sense, as provided in subsection (a). See generally Levit, The Archaic Concept of Balance-Sheet Insolvency, 47 Am.Bankr.L.J. 215 (1973). Not only is the relevant information in the possession of a noncooperative debtor but the debtor's records are more often than not incomplete and inaccurate. As a practical matter, insolvency is most cogently evidenced by a general cessation of payment of debts, as has long been recognized by the laws of other countries and is now reflected in the Bankruptcy Code. See Honsberger, Failure to Pay One's Debts Generally as They Become Due: The Experience of France and Canada, 54 Am.Bankr.L.J. 153 (1980); J. MacLachlan,

Bankruptcy 13, 63-64, 436 (1956). In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged. The case law that has developed under § 303(h)(1) of the Bankruptcy Code has not required a showing that a debtor has failed or refused to pay a majority in number and amount of the person's debts in order to prove general nonpayment of debts as they become due. See, *e.g.*, Hill v. Cargill, Inc. (*In re* Hill), 8 B.R. 779, 3 C.B.C.2d 920 (Bk.D.Minn.1981) (non-payment of three largest debts held to constitute general nonpayment, although small debts were being paid); *In re* All Media Properties, Inc., 5 B.R. 126, 6 B.C.D. 586, 2 C.B.C.2d 449 (Bk.S.D.Tex.1980) (missing significant number of payments or regularly missing payments significant in amount said to constitute general nonpayment; missing payments on more than 50% of aggregate of claims said not to be required to show general nonpayment; nonpayment for more than 30 days after billing held to establish nonpayment of a debt when it is due); *In re* Kreidler Import Corp., 4 B.R. 256, 6 B.C.D. 608 2 C.B.C.2d 159 (Bk.D.Md. 1980) (nonpayment of one debt constituting 97% of debtor's total indebtedness held to constitute general nonpayment). A presumption of insolvency does not arise from nonpayment of a debt as to which there is a genuine bona fide dispute, even though the debt is a substantial part of the debtor's indebtedness. *Cf.* 11 U.S.C. 303(h)(1), as amended by § 426(b) of Public Law No. 98-882, the Bankruptcy Amendments and Federal Judgeship Act of 1984.

(3) Subsection (c) is derived from the definition of partnership insolvency in § 101(29)(B) of the Bankruptcy Code. The definition conforms generally to the definition of the same term in § 2(2) of the 1918 Act.

(4) Subsection (d) follows the approach of the definition of "insolvency" in § 101(29) of the Bankruptcy Code by excluding from the computation of the value of the debtor's assets any value that can be realized only by avoiding a transfer of an interest formerly held by the debtor or by discovery or pursuit of property that has been fraudulently concealed or removed.

(5) Subsection (e) is new. It makes clear the purpose not to render a person insolvent under this section by counting as a debt an obligation secured by property of the debtor that is not counted as an asset. See also comments to subsection (a), *supra*, and Sec. 34.41.110(2), *infra*.

Sec. 34.41.020. This section defines "value" as used in various contexts in this Act, frequently with a qualifying adjective. The word appears in the following provisions:

Sec. 34.41.030(a)(2) ("reasonably equivalent value");
Sec. 34.41.030(b)(8) ("value ... reasonably equivalent");
Sec. 34.41.040(a) ("reasonably equivalent value");
Sec. 34.41.040(b) ("present, reasonably equivalent value");
Sec. 34.41.070(a) ("reasonably equivalent value");
Sec. 34.41.070(b), (c), (d), and (e) ("value");
Sec. 34.41.070(f)(1) ("new value"); and
Sec. 34.41.070(f)(3) ("present value").

OFFICIAL COMMENTARY

(1) Subsection (a) is adapted from § 548(d)(2)(A) of the Bankruptcy Code. See also § 3(a) of the 1918 Act. The definition in the section is not exclusive. "Value" is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. The definition does not specify all the kinds of consideration that do not constitute value for the purposes of this Act -- *e.g.*, love and affection. See, *e.g.*, United States v. West, 299 F.Supp. 661, 666 (D.Del. 1969).

(2) Subsection (a) does not indicate what is "reasonably equivalent value" for a transfer or obligation. Under this Act, as under § 548(a)(2) of the Bankruptcy Code, a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a discrepancy between the value of the asset transferred and the debt secured, since the amount of the debt is the measure of the value of the interest in the asset that is transferred. See, *e.g.*, Peoples-Pittsburgh Trust Co., v. Holy Family Polish Nat'l Catholic Church, Carnegie, Pa., 341 Pa. 390, 19 A.2d 360 (1941). If, however, a transfer purports to secure more than the debt actually incurred or to be incurred, it may be found to be for less than a reasonably equivalent value. See *e.g.*, *In re* Peoria Braumeister Co., 138 F.2d 520, 523 (7th Cir. 1943) (chattel mortgage securing a $3,000 note held to be fraudulent when the debt secured was only $2,500); Hartford Acc. & Indemnity Co. v. Jirasek, 254 Mich. 131, 140, 235 N.W. 836, 839 (1931) (quitclaim deed given as mortgage held to be fraudulent to the extent the value of the property transferred exceeded the indebtedness secured). If the debt is a fraudulent obligation under this Act, a transfer to secure it as well as the obligation would be vulnerable to attack as fraudulent. A transfer to satisfy or secure an antecedent debt owed an insider is also subject to avoidance under the conditions specified in Sec. 34.41.040(b).

(3) Section 3(a) of the 1918 Act has been thought not to recognize that an unperformed promise could constitute fair consideration. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L. Rev. 404, 414 (1933). Courts construing these provisions of the prior law nevertheless have held unperformed promises to constitute value in a variety of circumstances. See, *e.g.*, Harper v. Lloyd's Factors, Inc., 214 F.2d 662 (2d Cir. 1954) (transfer of money for promise of factor to discount transferor's purchase-money notes given to fur dealer); Schlecht v. Schlecht, 168 Minn. 168, 176-77, 209 N.W. 883, 886-87 (1926) (transfer for promise to make repairs and improvements on transferor's homestead); Farmer's Exchange Bank v. Oneida Motor Truck Co., 202 Wis. 266, 232 N.W. 536 (1930) (transfer in consideration of assumption of certain of transferor's liabilities); see also Hummel v. Cernocky, 161 F.2d 685 (7th Cir. 1947) (transfer in consideration of cash, assumption of a mortgage, payment of certain debts, and agreement to pay other debts). Likewise a transfer in consideration of a negotiable note discountable at a commercial bank, or the purchase from an established, solvent institution of an insurance policy, annuity, or contract to provide care and accommodations clearly appears to be for value. On the other hand, a transfer for an unperformed promise by an individual to support a parent or other transferor has generally been held voidable as a fraud on creditors of the transferor. See, *e.g.*, Springfield Ins. Co. v. Fry, 267 F.Supp. 693 (N.D.Okla. 1967); Sandler v. Parlapiano, 236 App.Div. 70, 258 N.Y.Supp. 88 (1st Dep't 1932); Warwick Municipal Employees Credit Union v. Higham, 106 R.I. 363, 259 A.2d 852 (1969); Hulsether v. Sanders, 54 S.D. 412, 223 N.W. 335 (1929); Cooper v. Cooper, 22 Tenn.App. 473, 477, 124 S.W.2d 264, 267 (1939); Note, Rights of Creditors in Property Conveyed in Consideration of Future Support, 45 Iowa L.Rev. 546, 550-62 (1960). This Act adopts the view taken in the cases cited in determining whether an unperformed promise is value.

(4) Subsection (b) rejects the rule of such cases as Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir.1980) (nonjudicial foreclosure of a mortgage avoided as a fraudulent transfer when the property of an insolvent mortgagor was sold for less than 70% of its fair value), and Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir.1981), cert. denied, 454 U.S. 1164 (1982) (nonjudicial foreclosure held to be fraudulent transfer if made without fair consideration). Subsection (b) adopts the view taken in Lawyers Title Ins. Corp. v. Madrid (*In re* Madrid), 21 B.R. 424 (B.A.P. 9th Cir.1982), aff'd on another ground, 725 F.2d 1197 (9th Cir.1984), that the price bid at a public foreclosure sale determines the fair value of the property sold. Subsection (b) prescribes the effect of a sale meeting its requirements, whether the asset sold is personal or real property. The rule of this subsection applies to a foreclosure by sale of the interest of a vendee under an installment land contract in accordance with applicable law that requires or permits the foreclosure to be effected by a sale in the same manner as the foreclosure of a mortgage. See G. Osborne, G. Nelson, & D. Whitman, Real Estate Finance Law 83-84, 95-97 (1979). The premise of the subsection is that "a sale of the collateral by the secured party as the normal

consequence of default ... [is] the safest way of establishing the fair value of the collateral ...." 2 G. Gilmore, Security Interests in Personal Property 1227 (1965).

If a lien given an insider for a present consideration is not perfected as against a subsequent bona fide purchaser or is so perfected after a delay following an extension of credit secured by the lien, foreclosure of the lien may result in a transfer for an antecedent debt that is voidable under Sec. 34.41.040(b), *infra*. Subsection (b) does not apply to an action under Sec. 34.41.030(a)(1) to avoid a transfer or obligation because made or incurred with actual intent to hinder, delay, or defraud any creditor.

(5) Subsection (c) is an adaptation of § 547(c)(1) of the Bankruptcy Code. A transfer to an insider for an antecedent debt may be voidable under Sec. 34.41.-040(b), *infra*.

Sec. 34.41.030. This section describes the transfers that are fraudulent as to present and future creditors and sets out factors that may be given consideration in determining whether the requisite intent to defraud was present.

OFFICIAL COMMENTARY

(1) Paragraph (a)(1) is derived from § 7 of the 1918 Act. Factors appropriate for consideration in determining actual intent under paragraph (a)(1) are specified in subsection (b).

(2) Paragraph (a)(2) is derived from §§ 5 and 6 of the 1918 Act but substitutes "reasonably equivalent value" for "fair consideration." The transferee's good faith was an element of "fair consideration" as defined in § 3 of the 1918 Act, and lack of fair consideration was one of the elements of a fraudulent transfer as defined in four sections of that Act. The transferee's good faith is irrelevant to a determination of the adequacy of the consideration under the new Act, but lack of good faith may be a basis for withholding protection of a transferee or obligee under Sec. 34.41.070, *infra*.

(3) Unlike the 1918 Act as originally promulgated, this Act does not prescribe different tests when a transfer is made for the purpose of security and when it is intended to be absolute. The premise of this Act is that when a transfer is for security only, the equity or value of the asset that exceeds the amount of the debt secured remains available to unsecured creditors and thus cannot be regarded as the subject of a fraudulent transfer merely because of the encumbrance resulting from an otherwise valid security transfer. Disproportion between the value of the asset securing the debt and the size of the debt secured does not, in the absence of circumstances indicating a purpose to hinder, delay, or defraud creditors, constitute

an impermissible hindrance to the enforcement of other creditors' rights against the debtor-transferor. *Cf.* AS 45.09.311 (Uniform Commercial Code).

(4) Subparagraph (a)(2)(A) of this section is an adaptation of § 5 of the 1918 Act, but substitutes "unreasonably small [assets] in relation to the business or transaction" for "unreasonably small capital." The reference to "capital" in the 1918 Act is ambiguous in that it may refer to net worth or to the par value of stock or to the consideration received for stock issued. The special meanings of "capital" in corporation law have no relevance in the law of fraudulent transfers. The subparagraph focuses attention on whether the amount of all the assets retained by the debtor was inadequate, *i.e.*, unreasonably small, in light of the needs of the business or transaction in which the debtor was engaged or about to engage.

(5) Subsection (b) is a nonexclusive catalogue of factors appropriate for consideration by the court in determining whether the debtor had an actual intent to hinder, delay, or defraud one or more creditors. Proof of the existence of any one or more of the factors enumerated in subsection (b) may be relevant evidence as to the debtor's actual intent, but does not create a presumption that the debtor has made a fraudulent transfer or incurred a fraudulent obligation. The list of factors includes most of the badges of fraud that have been recognized by the courts in construing and applying the Statute of 13 Elizabeth and § 7 of the 1918 Act. Proof of the presence of certain badges in combination establishes fraud conclusively -- *i.e.*, without regard to the actual intent of the parties -- when they concur as provided in (a)(2) of this section or in Sec. 34.41.040. The fact that a transfer has been made to a relative or to an affiliated corporation has not been regarded as a badge of fraud sufficient to warrant avoidance when unaccompanied by any other evidence of fraud. The courts have uniformly recognized, however, that a transfer to a closely related person warrants close scrutiny of the other circumstances, including the nature and extent of the consideration exchanged. See 1 G. Glenn, Fraudulent Conveyances and Preferences § 307 (Rev. ed. 1940). The second, third, fourth, and fifth factors listed are all adapted from the classic catalogue of badges of fraud provided by Lord Coke in Twyne's Case, 3 Coke 80b, 76 Eng.Rep. 809 (Star Chamber 1601). Lord Coke also included the use of a trust and the recitation in the instrument of transfer that it "was made honestly, truly, and bona fide," but the use of the trust is fraudulent only when accompanied by elements or badges specified in this Act, and recitals of "good faith" can no longer be regarded as significant evidence of a fraudulent intent.

(6) In considering the factors listed in subsection (b) a court should evaluate all the relevant circumstances involving a challenged transfer or obligation. Thus the court may appropriately take into account all indicia negativing as well as those suggesting fraud, as illustrated in the following reported cases:

(a) Whether the transfer or obligation was to an insider: Salomon v. Kaiser (*In re* Kaiser), 722 F.2d 1574, 1582-83 (2d Cir.1983) (insolvent debtor's

purchase of two residences in the name of his spouse and the creation of a dummy corporation for the purpose of concealing assets held to evidence fraudulent intent); Banner Construction Corp. v. Arnold, 128 So.2d 893 (Fla.Dist.App. 1961) (assignment by one corporation to another having identical directors and stockholders constituted a badge of fraud); Travelers Indemnity Co. v. Cormaney, 258 Iowa 237, 138 N.W.2d 50 (1965) (transfer between spouses said to be a circumstance that shed suspicion on the transfer and that with other circumstances warranted avoidance); Hatheway v. Hanson, 230 Iowa 386, 297 N.W. 824 (1941) (transfer from parent to child said to require a critical examination of surrounding circumstances, which, together with other indicia of fraud, warranted avoidance); Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (transfer from daughter to mother said to be indicative of fraud but transfer held not to be fraudulent due to adequacy of consideration and delivery of possession by transferor).

(b) Whether the transferor retained possession or control of the property after the transfer: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (retention of property by transferor said to be a badge of fraud and, together with other badges, to warrant avoidance of transfer); Stephens v. Reginstein, 89 Ala. 561, 8 So. 68 (1890) (transferor's retention of control and management of property and business after transfer held material in determining transfer to be fraudulent); Allen v. Massey, 84 U.S. (17 Wall.) 351 (1872) (joint possession of furniture by transferor and transferee considered in holding transfer to be fraudulent); Warner v. Norton, 61 U.S. (20 How.) 448 (1857) (surrender of possession by transferor deemed to negate allegations of fraud).

(c) Whether the transfer or obligation was concealed or disclosed: Walton v. First National Bank, 13 Colo. 265, 22 P. 440 (1889) (agreement between parties to conceal the transfer from the public said to be one of the strongest badges of fraud); Warner v. Norton, 61 U.S. (20 How.) 448 (1857) (although secrecy said to be a circumstance from which, when coupled with other badges, fraud may be inferred, transfer was held not to be fraudulent when made in good faith and transferor surrendered possession); W.T. Raleigh Co. v. Barnett, 253 Ala. 433, 44 So.2d 585 (1950) (failure to record a deed in itself said not to evidence fraud, and transfer held not to be fraudulent).

(d) Whether, before the transfer was made or obligation was incurred, a creditor sued or threatened to sue the debtor: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (transfer held to be fraudulent when causally connected to pendency of litigation and accompanied by other badges of fraud); Pergrem v. Smith, 255 S.W.2d 42 (Ky.App.1953) (transfer in anticipation of suit deemed to be a badge of fraud; transfer held fraudulent when accompanied by

insolvency of transferor who was related to transferee); Bank of Sun Prairie v. Hovig, 218 F.Supp. 769 (W.D.Ark.1963) (although threat or pendency of litigation said to be an indicator of fraud, transfer was held not to be fraudulent when adequate consideration and good faith were shown).

(e) Whether the transfer was of substantially all the debtor's assets: Walbrun v. Babbitt, 83 U.S. (16 Wall.) 577 (1872) (sale by insolvent retail shop owner of all of his inventory in a single transaction held to be fraudulent); Cole v. Mercantile Trust Co., 133 N.Y. 164, 30 N.E. 847 (1892) (transfer of all property before plaintiff could obtain a judgment held to be fraudulent); Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (although transfer of all assets said to indicate fraud, transfer held not to be fraudulent because full consideration was paid and transferor surrendered possession).

(f) Whether the debtor had absconded: *In re* Thomas, 199 F. 214 (N.D.N.Y.1912) (when debtor collected all of his money and property with the intent to abscond, fraudulent intent was held to be shown).

(g) Whether the debtor had removed or concealed assets: Bentley v. Young, 210 F. 202 (S.D.N.Y.1914), aff'd, 223 F. 536 (2d Cir.1915) (debtor's removal of goods from store to conceal their whereabouts and to sell them held to render sale fraudulent); Cioli v. Kenourgios, 59 Cal.App. 690, 211 P. 838 (1922) (debtor's sale of all assets and shipment of proceeds out of the country held to be fraudulent notwithstanding adequacy of consideration).

(h) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred: Toomay v. Graham, 151 S.W.2d 119 (Mo.App.1941) (although mere inadequacy of consideration said not to be a badge of fraud, transfer held to be fraudulent when accompanied by badges of fraud); Texas Sand Co. v. Shield, 381 S.W.2d 48 (Tex.1964) (inadequate consideration said to be an indicator of fraud, and transfer held to be fraudulent because of inadequate consideration, pendency of suit, family relationship of transferee, and fact that all non-exempt property was transferred); Weigel v. Wood, 355 Mo. 11, 194 S.W.2d 40 (1946) (although inadequate consideration said to be a badge of fraud, transfer held not to be fraudulent when inadequacy not gross and not accompanied by any other badge fact that transfer was from father to son held not sufficient to establish fraud).

(i) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation was incurred: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (insolvency of transferor said to be a badge of fraud and transfer held fraudulent when accompanied by other badges of fraud); Bank of Sun Prairie v. Hovig, 218 F.Supp. 769 (W.D.Ark.1963)

(although the insolvency of the debtor said to be a badge of fraud, transfer held not fraudulent when debtor was shown to be solvent, adequate consideration was paid, and good faith was shown, despite the pendency of suit); Wareheim v. Bayliss, 149 Md. 103, 131 A. 27 (1925) (although insolvency of debtor acknowledged to be an indicator of fraud, transfer held not to be fraudulent when adequate consideration was paid and whether debtor was insolvent in fact was doubtful).

(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred: Commerce Bank of Lebanon v. Halladale A Corp., 618 S.W.2d 288, 292 (Mo.App.1981) (when transferors incurred substantial debts near in time to the transfer, transfer was held to be fraudulent due to inadequate consideration, close family relationship, the debtor's retention of possession, and the fact that almost all the debtors' property was transferred).

(7) The effect of the two transfers described in paragraph (b)(11), if not avoided, may be to permit a debtor and a lienor to deprive the debtor's unsecured creditors of access to the debtor's assets for the purpose of collecting their claims while the debtor, the debtor's affiliate or insider, and the lienor arrange for the beneficial use or disposition of the assets in accordance with their interests. The kind of disposition sought to be reached here is exemplified by that found in Northern Pacific Co. v. Boyd, 228 U.S. 482 (1913), the leading case in establishing the absolute priority doctrine in reorganization law. There the court held that a reorganization whereby the secured creditors and the management-owners retained their economic interests in a railroad through a foreclosure that cut off claims of unsecured creditors against its assets was in effect a fraudulent disposition (*id.* at 502-05). See Frank, Some Realistic Reflections on Some Aspects of Corporate Reorganization, 19 Va.L.Rev. 541, 693 (1933). For cases in which an analogous injury to unsecured creditors was inflicted by a lienor and a debtor, see Jackson v. Star Sprinkler Corp. of Florida, 575 F.2d 1223, 1231-34 (8th Cir. 1978); Heath v. Helmick, 173 F.2d 157, 161-62 (9th Cir.1949); Toner v. Nuss, 234 F.S. 457, 461-62 (E.D.Pa.1964); and see *In re* Spotless Tavern Co., Inc., 4 F.Supp. 752, 753, 755 (D.Md.1933).

(8) Nothing in subsection (b) is intended to affect the application of AS 45.02.402(b), AS 45.09.205, or 45.09.301, or former AS 45.06.105 (Uniform Commercial Code). AS 45.02.402(b) recognizes the generally prevailing rule that retention of possession of goods by a seller may be fraudulent, but limits the application of the rule by negating any imputation of fraud from "retention of possession in good faith and current course of trade by a merchant seller for a commercially reasonable time after a sale or identification." AS 45.09.205 explicitly negates any imputation of fraud from the grant of liberty by a secured creditor to a debtor to use, commingle, or dispose of personal property collateral or to account for its proceeds. The section recognizes that it does not relax prevailing requirements

for delivery of possession by a pledgor. Moreover, the section does not mitigate the general requirement of AS 45.09.301(a)(2) that a nonpossessory security interest in personal property must be perfected to be effective against a levying creditor. Finally, like the 1918 Act, this Act does not pre-empt the statutes governing bulk transfers, such as former AS 45.06 of the Uniform Commercial Code. Compliance with the cited sections of the Uniform Commercial Code does not, however, insulate a transfer or obligation from avoidance. Thus a sale by an insolvent debtor for less than a reasonably equivalent value would be voidable under this Act notwithstanding compliance with the Uniform Commercial Code.

Sec. 34.41.040. This section describes the transfers that are fraudulent as to creditors whose claims arose before the transfer was made or obligation was incurred by the debtor.

OFFICIAL COMMENTARY

(1) Subsection (a) is derived from § 4 of the 1918 Act. It adheres to the limitation of the protection of that section to a creditor who extended credit before the transfer or obligation described. As pointed out in comment (2) accompanying Sec. 34.41.030, this Act substitutes "reasonably equivalent value" for "fair consideration."

(2) Subsection (b) renders a preferential transfer -- *i.e.*, a transfer by an insolvent debtor for or on account of an antecedent debt -- to an insider vulnerable as a fraudulent transfer when the insider had reasonable cause to believe that the debtor was insolvent. This subsection adopts for general application the rule of such cases as Jackson Sound Studios, Inc. v. Travis, 473 F.2d 503 (5th Cir. 1973) (security transfer of corporation's equipment to corporate principal's mother perfected on eve of bankruptcy of corporation held to be fraudulent); *In re* Lamie Chemical Co., 296 F. 24 (4th Cir 1924)(corporate preference to corporate officers and directors held voidable by receiver when corporation was insolvent or nearly so and directors had already voted for liquidation); Stuart v. Larson, 298 F. 223 (8th Cir 1924), noted 38 Harv.L.Rev. 521 (1925) (corporate preference to director held voidable). See generally 2 G. Glenn, Fraudulent Conveyances and Preferences 386 (Rev. ed 1940). Subsection (b) overrules such cases as Epstein v. Goldstein, 107 F.2d 755, 757 (2d Cir. 1939) (transfer by insolvent husband to wife to secure his debt to her sustained against attack by husband's trustee); Hartford Accident & Indemnity Co. v. Jirasek, 254 Mich. 131, 139, 235 N.W. 836, 839 (1931) (mortgage given by debtor to his brother to secure an antecedent debt owed the brother sustained as not fraudulent).

(3) Subsection (b) does not extend as far as § 8(a) of the 1918 Act and § 548(b) of the Bankruptcy Code in rendering voidable a transfer or obligation incurred by an insolvent partnership to a partner, who is an insider of the partnership. The transfer to the partner is not vulnerable to avoidance under subsection (b) unless the

transfer was for an antecedent debt and the partner had reasonable cause to believe that the partnership was insolvent. The cited provisions of the 1918 Act and the Bankruptcy Act make any transfer by an insolvent partnership to a partner voidable. Avoidance of the partnership transfer without reference to the partner's state of mind and the nature of the consideration exchanged would be unduly harsh treatment of the creditors of the partner and unduly favorable to the creditors of the partnership.

Sec. 34.41.050. This section defines the moments in time at which when a claim for relief or cause of action to avoid a transfer or obligation arises.

OFFICIAL COMMENTARY

(1) One of the uncertainties in the law governing the avoidance of fraudulent transfers and obligations is the difficulty of determining when the claim for relief or cause of action arises. This section clarifies this point in time. For transfers of real estate, paragraph (1) fixes the time as the date of perfection against a good faith purchaser from the transferor. For transfers of fixtures and assets constituting personalty, the time is fixed under paragraph (1) as the date of perfection against a judicial lien creditor not asserting rights under this Act. Perfection typically is effected by notice-filing, recordation, or delivery of unequivocal possession. See AS 45.09.302, 45.09.304, and 45.09.305 (security interest in personal property perfected by notice-filing or delivery of possession to transferee); 4 American Law of Property §§ 17.10-17.12 (1952) (recordation of transfer or delivery of possession to grantee required for perfection against bona fide purchaser from grantor). The provision for postponing the time a transfer is made until its perfection is an adaptation of § 548(d)(1) of the Bankruptcy Code. When no steps are taken to perfect a transfer that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to avoid it; without such a provision to cover that eventuality, an unperfected transfer would arguably be immune to attack. Some transfers -- *e.g.*, an assignment of a bank account, creation of a security interest in money, or execution of a marital or premarital agreement for the disposition of property owned by the parties to the agreement -- may not be amenable to perfection as against a bona fide purchaser or judicial lien creditor. When a transfer is not perfectible as provided in paragraph (1), the transfer occurs for the purpose of this Act when the transferor effectively parts with an interest in the asset as provided in AS 45.41.110(12), *infra*.

(2) Paragraph (4) requires the transferor to have rights in the asset transferred before the transfer is made for the purpose of this section. This provision makes clear that its purpose may not be circumvented by notice-filing or recordation of a document evidencing an interest in an asset to be acquired in the future. *Cf.* Bankruptcy Code § 547(e); AS 45.09.203(a)(3).

(3) Paragraph (5) is new. It is intended to resolve uncertainty arising from Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 989-91, 997 (2d Cir.1981), insofar as that case holds that an obligation of guaranty may be deemed to be incurred when advances covered by the guaranty are made rather than when the guaranty first became effective between the parties. Compare Rosenberg, Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware, 125 U.Pa.L.Rev. 235, 256-57 (1976).

An obligation may be avoided as fraudulent under this Act if it is incurred under the circumstances specified in AS 34.41.030(a) or 34.41.040(a). The debtor may receive reasonably equivalent value in exchange for an obligation incurred even though the benefit to the debtor is indirect. See Rubin v. Manufacturers Hanover Trust Co., 661 F.2d at 991-92; Williams v. Twin City Co., 251 F.2d 678, 681 (9th Cir. 1958); Rosenberg, *supra* at 243-46.

Sec. 34.41.060. This section sets out the remedies available to creditors. The listing is not exclusive.

OFFICIAL COMMENTARY

(1) This section is derived from §§ 9 and 10 of the 1918 Act. Section 9 of that Act specified the remedies of creditors whose claims have matured, and § 10 enumerated the remedies available to creditors whose claims have not matured. A creditor holding an unmatured claim may be denied the right to receive payment for the proceeds of a sale on execution until the claim has matured, but the proceeds may be deposited in court or in an interest-bearing account pending the maturity of the creditor's claim. The remedies specified in this section are not exclusive.

(2) The availability of an attachment or other provisional remedy has been restricted by amendments of statutes and rules of procedure to reflect views of the United States Supreme Court expressed in Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969), and its progeny. This judicial development and the procedural changes that followed in its wake do not preclude resort to attachment by a creditor in seeking avoidance of a fraudulent transfer or obligation. See, *e.g.*, Britton v. Howard Sav. Bank, 727 F.2d 315, 317-20 (3d Cir.1984); Computer Sciences Corp. v. Sci-Tek Inc., 367 A.2d 658, 661 (Del. Super. 1976); Great Lakes Carbon Corp. v. Fontana, 54 A.D.2d 548, 387 N.Y.S.2d 115 (1st Dep't 1976). Paragraph (a)(2) continues the authorization for the use of attachment contained in § 9(b) of the 1918 Act, or of a similar provisional remedy, when the state's procedure provides therefor, subject to the constraints imposed by the due process clauses of the United States and state constitutions.

(3) Subsections (a) and (b) of § 10 of the 1918 Act authorized the court, in an action on a fraudulent transfer or obligation, to restrain the defendant from

disposing of the defendant's property, to appoint a receiver to take charge of the property, or to make any order the circumstances may require. Section 10, however, applied only to a creditor whose claim was unmatured. There is no reason to restrict the availability of these remedies to such a creditor, and the courts have not so restricted them. See, *e.g.*, Lipskey v. Voloshen, 155 Md. 139, 143-45, 141 Atl. 402, 404-05(1928) (judgment creditor granted injunction against disposition of property by transferee, but appointment of receiver denied for lack of sufficient showing of need for such relief); Matthews v. Schusheim, 36 Misc.2d 918, 922-23, 235 N.Y.S.2d 973, 976-77, 991-92 (Sup.Ct. 1962) (injunction and appointment of receiver granted to holder of claims for fraud, breach of contract, and alimony arrearages, whether creditor's claim was mature said to be immaterial); Oliphant v. Moore, 155 Tenn. 359, 362-63, 293 S.W. 541, 542 (1927) (tort creditor granted injunction restraining alleged tort feasor's disposition of property).

(4) As under the 1918 Act, a creditor is not required to obtain a judgment against the debtor-transferor or to have a matured claim in order to proceed under subsection (a). See Sec. 34.41.110(3) & (4), *infra*; American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929); 1 G. Glenn, Fraudulent Conveyances and Preferences 129 (Rev.ed. 1940).

(5) The provision in subsection (b) for a creditor to levy execution on a fraudulently transferred asset continues the availability of a remedy provided in § 9(b) of the 1918 Act. See *e.g.*, Doland v. Burns Lbr. Co., 156 Minn. 238, 194 N.W. 636 (1923); Montana Ass'n of Credit Management v. Hergert, 181 Mont. 442, 449, 453, 593 P.2d 1059, 1063, 1065 (1979); Corbett v. Hunter, 292 Pa.Super. 123, 128, 436 A.2d 1036, 1038 (1981); see also American Surety Co. v. Conner, 251 N.Y. 1, 6, 166 N.E. 783, 784, 65 A.L.R. 244, 247 (1929) ("In such circumstances he [the creditor] might find it necessary to indemnify the sheriff and, when the seizure was erroneous, assumed the risk of error"); McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L. Rev. 404, 441-42 (1933).

(6) The remedies specified in this section, like those enumerated in §§ 9 and 10 of the 1918 Act, are cumulative. Lind v. O. N. Johnson Co., 204 Minn. 30, 40, 282 N.W 661, 667, 119 A.L.R. 940 (1939) (Uniform Fraudulent Conveyance Act held not to impair or limit availability of the "old practice" of obtaining judgment and execution returned unsatisfied before proceeding in equity to set aside a transfer); Conemaugh Iron Works Co. v. Delano Coal Co., Inc., 298 Pa. 182, 186, 148 A. 94, 95 (1929) (Uniform Fraudulent Conveyance Act held to give an "additional optional remedy" and not to "deprive a creditor of the right, as formerly, to work out his remedy at law"); 1 G. Glenn, Fraudulent Conveyances and Preferences 120, 130, 150 (Rev.ed. 1940).

Sec. 34.41.070. This section sets out the defenses available to, the potential liability of, and protections available for, a transferee.

OFFICIAL COMMENTARY

(1) Subsection (a) states the rule that applies when the transferee establishes a complete defense to the action for avoidance based on Sec. 34.41.030(a)(1). The subsection is an adaptation of the exception stated in § 9 of the 1918 Act. The person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. Chorost v. Grand Rapids Factory Showrooms, Inc., 77 F.Supp. 276, 280 (D.N.J. 1948), affd 172 F.2d 327, 329 (3d Cir. 1949).

(2) Subsection (b) is derived from § 550(a) of the Bankruptcy Code. The value of the asset transferred is limited to the value of the leviable interest of the transferor, exclusive of any interest encumbered by a valid lien. See Sec. 34.41.-110(2), *infra*.

The requirement of § 550(b)(1) of the Bankruptcy Code that a transferee be "without knowledge of the voidability of the transfer" in order to be protected has been omitted as inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee. Knowledge of the voidability of a transfer would seem to involve a legal conclusion. Determination of the voidability of the transfer ought not to require the court to inquire into the legal sophistication of the transferee.

(3) Subsection (c) is new. The measure of the recovery of a defrauded creditor against a fraudulent transferee is usually limited to the value of the asset transferred at the time of the transfer. See, *e.g.*, United States v. Fetnon, 640 F.2d 609, 611 (5th Cir. 1981); Hamilton Nat'l Bank of Boston v. Halstead, 134 N.Y. 520, 31 N.E. 900 (1892); *cf.* Buffum v. Peter Barceloux Co., 289 U.S. 227 (1932) (transferee's objection to trial court's award of highest value of asset between the date of the transfer and the date of the decree of avoidance rejected because an award measured by value as of time of the transfer plus interest from that date would have been larger). The premise of subsection (c) is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor's recovery. Circumstances may require a departure from that measure of the recovery, however, as the cases decided under the 1918 Act and other laws derived from the Statute of 13 Elizabeth illustrate. Thus, if the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by improvements of the asset transferred or discharge of liens on the property, a good faith transferee should be reimbursed for the outlay for such a purpose to the extent the sale proceeds were increased thereby. See Bankruptcy Code § 550(d); Janson v. Schier, 375 A.2d 1159,1160 (N.H. 1977), Anno. 8 A.L.R. 527 (1920). If the value of the asset has been diminished by severance and disposition of timber or minerals or fixtures, the transferee should be liable for the amount of the resulting reduction. See Damazo v. Wahby, 269 Md. 252, 257, 305 A.2d 138, 142 (1973). If the transferee

has collected rents, harvested crops, or derived other income from the use or occupancy of the asset after the transfer, the liability of the transferee should be limited in any event to the net income after deduction of the expense incurred in earning the income. Anno., 60 A.L.R.2d 593 (1958). On the other hand, adjustment for the equities does not warrant an award to the creditor of consequential damages alleged to accrue from mismanagement of the asset after the transfer.

(4) Subsection (d) is an adaption of § 548(c) of the Bankruptcy Code. An insider who receives property or an obligation from an insolvent debtor as security for or in satisfaction of an antecedent debt of the transferor or obligor is not a good faith transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or the obligation was incurred.

(5) Paragraph (e)(1) rejects the rule adopted in Darby v. Atkinson (*In re* Farris), 415 F.Supp. 33, 39-41 (W.D.Okla. 1976) that termination of a lease on default in accordance with its terms and applicable law may constitute a fraudulent transfer. Paragraph (e)(2) protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement of a secured creditor's rights pursuant to and in compliance with the provisions of Part 5 of Article 9 of the Uniform Commercial Code (AS 45.09.501 - 45.09.507). *Cf.* Calaiaro v. Pittsburgh Nat'l Bank (*In re* Ewing), 33 B.R. 288, 9 C.B.C.2d 526, CCH B.L.R. ¶ 69,460 (Bk.W.D.Pa. 1983) (sale of pledged stock held subject to avoidance as fraudulent transfer in 548 of the Bankruptcy Code), rev'd, 36 B.R. 476 (W.D.Pa. 1984) (transfer held not voidable because deemed to have occurred more than one year before bankruptcy petition filed). Although a secured creditor may enforce rights in collateral without a sale under AS 45.09.502 or 45.09.505, the creditor must proceed in good faith (AS 45.09.103) and in a "commercially reasonable" manner. The "commercially reasonable" constraint is explicit in AS 45.09.502(b) and is implicit in AS 45.09.505. See 2 G. Gilmore, Security Interests in Personal Property 1224-27 (1965).

(6) Subsection (f) provides additional defenses against the avoidance of a preferential transfer to an insider under Sec. 34.41.040(b).

Paragraph (f)(1) is adapted from § 547(c)(4) of the Bankruptcy Code, which permits a preferred creditor to set off the amount of new value subsequently advanced against the recovery of a voidable preference by a trustee in bankruptcy to the debtor without security. The new value may consist not only of money, goods, or services delivered on unsecured credit but also of the release of a valid lien. See *e.g.*, *In re* Ira Haupt & Co., 424 F.2d 722, 124 (2d Cir. 1970); Baranow v. Gibraltor Factors Corp. (*In re* Hygrade Envelope Co.), 393 F.2d 60, 65-67 (2d Cir.), cert. denied, 393 U.S. 837 (1968); *In re* John Morrow & Co., 134 F. 686, 688 (S.D.Ohio 1901). It does not include an obligation substituted for a prior obligation. If the insider receiving the preference thereafter extends new credit to the debtor but also

takes security from the debtor, the injury to the other creditors resulting from the preference remains undiminished by the new credit. On the other hand, if a lien taken to secure the new credit is itself voidable by a judicial lien creditor of the debtor, the new value received by the debtor may appropriately be treated as unsecured and applied to reduce the liability of the insider for the preferential transfer.

Paragraph (f)(2) is derived from § 547(c)(2) of the Bankruptcy Code, which excepts certain payments made in the ordinary course of business or financial affairs from avoidance by the trustee in bankruptcy as preferential transfers. Whether a transfer was in the "ordinary course" requires a consideration of the pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer challenged under Sec. 34.41.040(b). See Tait & Williams, Bankruptcy Preference Laws: The Scope of Section 547(c)(2), 99 Banking L.J. 55, 63-66 (1982). The defense provided by paragraph (f)(2) is available, irrespective of whether the debtor or the insider or both are engaged in business, but the prior conduct or practice of both the debtor and the insider-transferee is relevant.

Paragraph (f)(3) is new and reflects a policy judgment that an insider who has previously extended credit to a debtor should not be deterred from extending further credit to the debtor in a good faith effort to save the debtor from a forced liquidation in bankruptcy or otherwise. A similar rationale has sustained the taking of security from an insolvent debtor for an advance to enable the debtor to stave off bankruptcy and extricate itself from financial stringency. Blackman v. Bechtel, 80 F.2d 505, 508-09 (8th Cir. 1935); Olive v. Tyler (*In re* Chelan Land Co.), 257 F. 497, 5 A.L.R. 561 (9th Cir. 1919); *In re* Robin Bros. Bakeries, Inc., 22 F.S. 662, 663-64 (N.D.Ill. 1937); see Dean v. Davis, 242 U.S. 438, 444 (1917). The amount of the present value given, the size of the antecedent debt secured, and the likelihood of success for the rehabilitative effort are relevant considerations in determining whether the transfer was in good faith.

Sec. 34.41.080. This section makes it clear that failure to take action within the statutory time limits bars the right of action.

OFFICIAL COMMENTARY

(1) This section is new. Its purpose is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy. See Restatement of Conflict of Laws 2d § 143 Comments (b) & (c) (1971). The section rejects the rule applied in United States v. Gleneagles Inv. Co., 565 F.S. 556, 583 (M.D.Pa. 1983) (state statute of limitations held not to apply to action by United States based on Uniform Fraudulent Conveyance Act).

(2) Statutes of limitations applicable to the avoidance of fraudulent transfers and obligations vary widely from state to state and are frequently subject to

uncertainties in their application. See Hesson, The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations, 32 Cornell L.Q. 222 (1946); Annos., 76 A.L.R. 864 (1932), 128 A.L.R. 1289 (1940), 133 A.L.R. 1311 (1941), 14 A.L.R.2d 598 (1950), and 100 A.L.R.2d 1094 (1965). Together with Sec. 34.41.050, this section should mitigate the uncertainty and diversity that have characterized the decisions applying statutes of limitations of actions to fraudulent transfers and obligations. The periods prescribed apply, whether the action under this Act is brought by the creditor defrauded or by a purchaser at a sale on execution levied pursuant to Sec. 34.41.060(b) and whether the action is brought against the original transferee or subsequent transferee. The prescription of statutory periods of limitation does not preclude the barring of an avoidance action for laches. See Sec. 34.41.090 and the accompanying comment, *infra*.

Sec. 34.41.090. This section provides that other applicable principles of law supplement the provisions of this chapter.

OFFICIAL COMMENTARY

This section is derived from § 11 of the 1918 Act and § 1-103 of the Uniform Commercial Code (AS 45.01.103). The section adds a reference to "laches" in recognition of the particular appropriateness of the application of this equitable doctrine to an untimely action to avoid a fraudulent transfer. See Louis Dreyfus Corp. v. Butler, 496 F.2d 806, 808 (6th Cir. 1974) (action to avoid transfers to debtor's wife when debtor was engaged in speculative business held to be barred by laches or applicable statutes of limitations); Cooch v. Grier, 30 Del.Ch. 255, 265-66, 59 A.2d 282, 287-88 (1948) (action under the Uniform Fraudulent Conveyance Act held barred by laches when the creditor was chargeable with inexcusable delay and the defendant was prejudiced by the delay).

Sec. 34.41.100. This section is the standard statement of the purpose of a uniform law and serves as a guide to courts that may be interpreting the law.

Sec. 34.41.110. This section sets out the definitions for the chapter.

OFFICIAL COMMENTARY

(1) The definition of "affiliate" is derived from § 101(2) of the Bankruptcy Code.

(2) The definition of "asset" is substantially to the same effect as the definition of "assets" in § 1 of the 1918 Act. The definition in this Act, unlike that in the earlier Act, does not, however, require a determination that the property is liable for the debts of the debtor. Thus, an unliquidated claim for damages resulting from personal

injury or a contingent claim of a surety for reimbursement, contribution, or subrogation may be counted as an asset for the purpose of determining whether the holder of the claim is solvent as a debtor under Sec. 34.41.010, although applicable law may not allow such an asset to be levied on and sold by a creditor. *Cf.* Manufacturers & Traders Trust Co. v. Goldman (*In re* Ollag Construction Equipment Corp.), 578 F.2d 904, 907-09 (2d Cir.1978).

Subparagraphs (2)(A) - (C) provide clarification by excluding from the term not only generally exempt property but also an interest in a tenancy by the entirety in many states and an interest that is generally beyond reach by unsecured creditors because subject to a valid lien. This Act, like its predecessor and the Statute of 13 Elizabeth, declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims. The laws protecting valid liens against impairment by levying creditors, exemption statutes, and the rules restricting leviability of interest in entireties property are limitations on the rights and remedies of unsecured creditors, and it is therefore appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of "asset" for the purposes of this Act.

A creditor of a joint tenant or tenant in common may ordinarily collect a judgment by process against the tenant's interest, and in some states a creditor of a tenant by the entirety may likewise collect a judgment by process against the tenant's interest. See 2 American Law of Property 10, 22, 28-32 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 98 Am.Bankr. L.J. 255, 258-59 (1974). The leviable interest of such a tenant is included as an asset under this Act.

The definition of "assets" in the 1918 Act excluded property that is exempt from liability for debts. The definition did not, however, exclude all property that can not be reached by a creditor through judicial proceedings to collect a debt. Thus, it included the interest of a tenant by the entirety although in nearly half the states such an interest can not be subjected to liability for a debt unless it is an obligation owned jointly by the debtor with the debtor's cotenant by the entirety. See 2 American Law of Property 29 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 48 Am.Bankr.L.J. 255, 258 (1974). The definition in this Act requires exclusion of interests in property held by tenants by the entirety that are not subject to collection process by a creditor without a right to proceed against both tenants by the entirety as joint debtors.

The reference to "generally exempt" property in subparagraph (2)(B) recognizes that all exemptions are subject to exceptions. Creditors having special rights against generally exempt property typically include claimants for alimony, taxes, wages, the purchase price of the property, and labor or materials that improve the property. See Uniform Exemptions Act § 10 and the accompanying Comment. The fact that a particular creditor may reach generally exempt property by resorting to

PAGE 24 OF LAA SECTIONAL ANALYSIS

DATED JANUARY 21, 1994, IS MISSING

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differs from the definition in the Bankruptcy Code in omitting the reference in 11 U.S.C. 101(28)(D) to an elected official or relative of such an official as an insider of a municipality. As in the Bankruptcy Code (see 11 U.S.C. 102 (3)), the word "includes" is not limiting, however. See also AS 01.10.040(b). Thus, a court may find a person living with an individual for an extended time in the same household or as a permanent companion to have the kind of close relationship intended to be covered by the term "insider." Likewise, a trust may be found to be an insider of a beneficiary.

(8) The definition of "lien" is derived from paragraphs (30), (31), (43), and (45) of § 101 of the Bankruptcy Code, which define "judicial lien," "lien," "security interest," and "statutory lien" respectively.

(9) The definition of "person" is adapted from paragraphs (28) and (30) of § 1-201 of the Uniform Commercial Code (AS 45.01.201(29) and (31) in the Alaska Statutes), defining "organization" and "person" respectively, and has been modified to incorporate by reference those items already provided for in AS 01.10.060.

(10) The definition of "property" is derived from § 1-201(33) of the Uniform Probate Code (AS 13.06.050(33) in the Alaska Statutes). Property includes both real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable.

(11) The definition of "relative" is derived from § 101(37) of the Bankruptcy Code but is explicit in its references to the spouse of a debtor in view of uncertainty as to whether the common law determines degrees of relationship by affinity.

(12) The definition of "transfer" is derived principally from § 101(48) of the Bankruptcy Code. The definition of "conveyance" in § 1 of the 1918 Act was similarly comprehensive and the references in this Act to "payment of money, release, lease, and the creation of a lien or incumbrance" are derived from the 1918 Act. While the definition in the 1918 Act did not explicitly refer to an involuntary transfer, the decisions under that Act were generally consistent with an interpretation that covered such a transfer. See, *e.g.* Hearn 45 St. Corp. v. Jano, 283 N.Y. 139, 27 N.E.2d 814, 128 A.L.R. 1285 (1940) (execution and foreclosure sales); Lefkowitz v. Finkelstein Trading Corp., 14 F.Supp. 898, 899 (S.D.N.Y. 1936) (execution sale); Langan v. First Trust & Deposit Co., 277 App.Div. 1090, 101 N.Y.S.2d 36 (4th Dept. 1950), aff'd 302 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); Catabene v. Wallner, 16 N.J.Super. 597, 602, 85 A.2d 300, 302 (1951) (mortgage foreclosure).

(13) The definition of "valid lien" is new. A valid lien includes an equitable lien that may not be defeated by a judicial lien creditor. See, *e.g.*, Pearlman v. Reliance Insurance Co., 371 U.S. 132, 136 (1962) (upholding a surety's equitable lien in respect to a fund owing a bankrupt contractor).

Sec. 34.41.120. The short title by which the chapter may be cited.

Sec. 2. Repeals the existing Alaska law on fraudulent conveyances generally (AS 34.40).

If I may be of further assistance, please advise.

DRD:pl
94-052.plm

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

LSK

RECEIVED

AUG 30 1993

BURR, PEASE & KURTZ

WALTER J. HICKEL, GOVERNOR

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August 26, 1993

Lloyd S. Kurtz, Jr., Esq.
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NO DOCKET DATE
DOCKETED

Dear Jerry:

At my request, Assistant Attorney General Mary Ellen Beardsley reviewed the Uniform Fraudulent Transfer Act (UFTA). Ms. Beardsley has a background in tax and bankruptcy law. She concludes that UFTA would be an improvement over existing Alaska law.

I thought that all of the Alaska Uniform Law Commissioners might want to review her memorandum in advance of our September teleconference.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Assistant Attorney General

DEB:cl

03.CSLH

MEMORANDUM

RECEIVED
AUG 30 1993
BURR, PEASE & KURTZ

State of Alaska
Department of Law

TO Deborah Behr
Assistant Attorney General
Legislation/Regulation Section

DATE August 24, 1993

FILE NO

TEL NO 269-5201

SUBJECT UFTA

RECEIVED
Department of Law
AUG 30 1993
AM 7 8 9 10 11 12 1 2 3 4 5 6 PM

FROM Mary Ellen Beardsley MEB
Assistant Attorney General
Commercial Section-Anchorage

You have asked me to comment on the Uniform Fraudulent Transfer Act ("UFTA"), and whether it might be beneficial for Alaska to adopt the UFTA. After reviewing the material you provided as well as AS 34.40.010 - .130, Alaska's fraudulent conveyances statute, and the headnotes of cases dealing with fraudulent conveyances in Alaska, I conclude that the UFTA would be an improvement over Alaska's existing law.

As noted in Summers v. Hagen, ____ P.2d ____, No. 3961, May 28, 1993, at fn. 5 pg. 8, Alaska has not adopted the predecessor to the UFTA, the Uniform Fraudulent Conveyance Act ("UFCA"). Alaska's law was adopted in 1949, and has seen very little change since its adoption. However, since 1949, many changes in both state and federal law have occurred, particularly in the area of bankruptcy, and relationships between creditors and debtors have become more complex. Debtors, in particular, have found new and more imaginative ways of hiding assets from their creditors.

The Alaska law provides in general that a conveyance, whether in writing or otherwise, of real or personal property will be void if it was made "with the intent to hinder, delay or defraud creditors." (Emphasis added) AS 34.40.010. The cases cited under this statute (as well as AS 34.40.090) indicate that the existence of this fraudulent intent is a question of fact, that the court will never presume fraud and that the burden of proof is upon the plaintiff. This burden of proof can be extremely hard to prove. The only exception to this is found in AS 09.25.060 which creates a prima facia presumption of fraud when personal property is sold and the vendee does not take immediate delivery and does not have continued possession.

The UFTA, on the other hand, not only considers a transfer fraudulent if the debtor made the transfer with the intent to hinder, delay, or defraud any creditor (whether present or future), but, in certain cases, it mandates that the intent exists if the facts are as stated in the UFTA. The UFTA also sets out numerous non-exclusive factors to be considered by the court when

determining if the debtor had "actual intent." Proof of several of these factors will be strong evidence of the debtor's intent. The Court in Summers requires the plaintiff to establish "the specific intent of each participant in the scheme to hinder, delay or defraud." (Emphasis added) Id., at 8. Under the UFTA, the transferee's intent does not appear to be a factor in determining whether the transfer was fraudulent. In addition, when determining if adequate consideration was exchanged, the transferee's good faith is irrelevant. Finally, another important distinction is that under the UFTA a transfer to an "insider" will be considered per se fraudulent if the debtor was insolvent at the time and the "insider" had reason to believe that the debtor was insolvent.

Cases under the Alaska law also hold that an insolvent debtor may convey all or some of his property to one creditor and the conveyance will not be considered fraudulent. It is not improper nor unlawful to give preference to one creditor.

The UFTA differs substantially from the Alaska law for it considers as one of the badges of fraud the fact that the debtor was insolvent at the time of the transfer or that he became insolvent as a result of the transfer. The UFTA defines insolvency and even establishes a rebuttable presumption of insolvency if the debtor is not paying his debts as they become due.

The UFTA clearly outlines the remedies available to creditors, including attachment, injunctive relief, appointment of a receiver, or even execution against the property if the creditor's claim has been reduced to a judgment. The UFTA makes no distinction between whether the creditors' claims have matured or not. On the hand, the Court in Summers, Id., at fn. 6, pg. 9, indicated that general creditors will have a cause of action but they "must reduce their claims to judgments before asserting this cause of action. Prior to judgment, general creditors have no legal right to the property fraudulently conveyed."

Finally, Alaska law does not address the statute of limitations as to when a fraudulent conveyance action will be precluded. AS 09.10.070 establishes a two year statute of limitations for all tort actions, which is what a fraudulent conveyance would fall under. The UFTA specifically establishes statutes of limitations and sets out when the time period begins to run depending on which section of the UFTA the action is being brought under.

I have attempted to outline some of the differences between the UFTA and Alaska law. In conclusion, the UFTA is a modernization of the UFCA and incorporates the many changes which

have occurred over time in the area of fraudulent transfers. It conforms state law with applicable federal law (in particular, bankruptcy law) and overcomes potential problems that could arise because of the 5th Circuit case of Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980). It also eases the burden of proof upon the plaintiff slightly and places some responsibility upon the debtor to show why the transfer should not be voided. It may also make it more difficult for debtors to successfully hide or transfer their assets as a means of becoming judgment proof.

I hope this memo regarding the UFTA is of some assistance to you. If I can be of further assistance, please do not hesitate to contact me.

MEB:amh

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September 17, 1993

Representative Brian Porter
716 West Fourth Avenue, #640
Anchorage, AK 99501

HAND DELIVERED

Re: Uniform Fraudulent Transfer Act

Dear Representative Porter:

As promised in our telephone conversation today, I am forwarding two copies of the 1984 Uniform Fraudulent Transfer Act (UFTA) drafted by the National Conference of Commissioners on Uniform State Laws, two copies of Alaska's present law concerning fraudulent transfers, and a copy of a Department of Law Memorandum concerning the UFTA. Also enclosed are copies of a map and a chart from the Uniform Law Commission showing the 30 states which already have adopted the UFTA.

The heart of the UFTA is in section 4, which covers and augments the ground covered by existing Alaska Statutes 34.40.010. Section 4(a)(2) of the UFTA would eliminate the present Alaskan necessity of finding actual intent by a property transferor to hinder, delay or defraud a creditor in many situations where the transferor is obviously transferring assets solely to keep them out of the reach of the transferor's creditors.

Several Uniform Law Commissioners from Alaska agree with me that you are an ideal person to sponsor enactment of the UFTA in Alaska because of your related law enforcement and business background and because the legislation is desirable from the standpoint of legitimate business people and will cost the State of Alaska nothing. In fact, it is certain to help the State of Alaska loan programs in dealing with unscrupulous borrowers. When you return to Anchorage, I would appreciate having the opportunity to review the UFTA further with you.

In closing, the only parties I am representing in connection with this matter are the commissioners appointed by the State of Alaska to the Uniform Law Commission and myself. I have represented numerous parties (both debtors and creditors) in situations involving fraudulent or allegedly fraudulent transfers, and I am convinced the UFTA should be enacted in Alaska. Our present law technically was adopted in 1949 as noted in the Department of Law Memorandum, but the substance of it goes back to May 17, 1884, when the civil laws of Oregon were put in place in the State of Alaska. Looking back at Alaska Compiled Laws of 1949, 1933, and 1913, and Carter's Annotated Alaska Codes of 1900, I find no substantive changes in this area of law since the Oregon laws were installed here.

Please call me when you have had a chance to review these materials. Thank you for your time on the telephone today.

Sincerely,

BURR, PEASE & KURTZ

L. S. Kurtz, Jr.

dms
Enclosures as noted.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

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ANCHORAGE, ALASKA 99501-1994
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☐ *KEY BANK BUILDING*
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE (907) 451-2811
FAX (907) 451-2816

☒ *P.O. BOX 110300-DIMOND COURTHOUSE*
JUNEAU, ALASKA 99811-0300
PHONE (907) 465-3600
FAX (907) 465-6735

January 23, 1995

Hon. Brian Porter, Chair
House Judiciary Committee
State Capitol, Room 118
Juneau, Alaska 99801-1182

Re: Material on Uniform Fraudulent Transfer Bill (HB 72)

Dear Representative Porter:

Per your staff's request, enclosed are informational materials on HB 72 concerning the Uniform Fraudulent Transfer Act. The bill is modeled after the uniform law adopted by the National Conference of Commissioners on Uniform State Laws.

As you know, this bill would bring Alaska's law into conformity with 33 other states that have enacted these provisions of the uniform Act. Also, since Alaska law has not been updated for many years, this bill would update our state law to handle significant problems with our existing statutes concerning the sale or exchange of personal property done fraudulently to avoid payment to creditors.

If you need additional information, please let me know.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Assistant Attorney General

RECEIVED
JAN 23 1994
Rep. Brian Porter

DEB:cl

DURRETT, THE UNIFORM FRAUDULENT TRANSFER ACT, AND FEDERAL BANKRUPTCY LAW - SORTING OUT CONFUSION

There has been much confusion over the relationship of mortgage foreclosures, however done, and fraudulent conveyance statutes, including the 1984 Uniform Fraudulent Transfer Act (UFTA). The confusion results from a single, now notorious case, Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980). The Court, in Durrett, held a noncollusive mortgage foreclosure conducted pursuant to Texas law a constructively fraudulent transfer under Section 67d of the Bankruptcy Act. The Bankruptcy Act has fraudulent transfer provisions directly analogous to the UFTA.

Durrett has not been followed in all circuits of the federal courts. It has been directly rejected in the Sixth and Ninth Circuits, for example. Its influence on state law in the interpretation of the 1918 Uniform Fraudulent Conveyance Act (UFCA) and those states still following the common law is not yet clear. Much speculation attends the possibilities in that regard, however.

Why is Durrett so important? Its holding calls the validity of the bulk of mortgage foreclosure sales into question. Almost never do such sales realize the current market price for real estate bought and sold in the ordinary course. A key element in fraudulent conveyance analysis is the concept of "fair consideration" or "reasonably equivalent value." In Durrett, the foreclosure sale realized less than 70% of the alleged market value, and was a fraudulent transfer for that fact.

As a result of Durrett, buyers in foreclosure sales lose assurance of title. Lenders cannot be sure of lending practices. The uncertainty that Durrett forecasts has large economic impact in real estate markets.

UFTA attempts to alleviate the difficulties that Durrett suggests. In Section 3(b), value is "reasonably equivalent value" if given in "a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement." Adoption of this provision would preclude a Durrett type of holding in any state adopting UFTA. Only private, non-public types of transfers, such as some kinds of deed in lieu of foreclosure, would be vulnerable. But these are exactly the kinds of transfers UFTA is designed to remedy anyway. UFTA Section 3(b) removes the uncertainty that Durrett has created, insofar as state law is concerned.

We must be clear, however, on the distinction between federal and state law, the Bankruptcy Act and state fraudulent conveyance law. Durrett still applies in federal bankruptcy law,

MAR 2 1995

February 21, 1995

The Honorable Mark Hanley
Co-Chairman, Finance Committee
Alaska State Legislature
State Capital
Juneau, Alaska 99801

Re: **House Bill 72 - Opposition to the Proposed Uniform Fraudulent Transfer Act**

Dear Chairman Hanley:

The undersigned members of the Alaska Bar Association, Estate Planning Section and Business Section, individually recommend that House Bill 72, as presently drafted, **not** be enacted into law. This bill, as presently drafted, would substantially change the fraudulent transfer law in Alaska. The primary defect of the proposed Act is that it applies to claims of future creditors, as well as to those of present creditors.

For example, a typical family planning approach would be for parents to annually gift $10,000 to an irrevocable trust for their children. Over a number of years enough funds would accumulate to pay for the children's college educations. The trust would be irrevocable, that is, after the parents contributed the funds to the trust the parents could not get the funds back. Assume that years after these contributions had been made to the trust, the parents suffered a business failure and a large judgment was obtained against them. Under the proposed Act, this future creditor, whose claim did not exist at the time the gifts were made to the trust, could void the transfers and obtain the trust funds in order to satisfy his judgment. This proposed power of a future creditor to set aside irrevocable past gifts is not the present law in Alaska nor in many other states.

If this proposed legislation is enacted, then Alaska families will be denied the family planning certainty and protection which is enjoyed by families in many other states. Families will not be able to set aside funds for children, grandchildren, or elderly parents, with the certainty that the funds will be there when needed. In addition, this proposed "future creditor" provision will substantially increase litigation in this area.

This "future creditor" provision should be clearly differentiated from a present creditor who has a claim at the time the transfer was made. The undersigned have no objection to a present creditor being able to set aside transfers, whether to family trusts or otherwise, which are made with an intention of evading satisfaction of the present creditor's claim. For example, if the business failure had already occurred in the example discussed above, and then the parents transferred the funds to the trust for their children with an intent to evade collection of the claim from the business failure, the present creditor should be able to set aside such transfers. This is our understanding of present Alaska law (A.S. 34.40), and the law in most other states.

Several alternatives are available with respect to this proposed legislation:

1. The legislature may choose not to pass this legislation at all. Alaska already has a detailed statute (which contains 13 sections) which invalidates transfers with an intent to defraud present creditors. (A.S. 34.40.)

2. Alternatively, this proposed legislation should be amended to eliminate its application to future creditors. We have attached to this letter changes which would limit and clarify that this Act only applies to present creditors.

Either of the above alternatives would assure that Alaskans are allowed the family planning certainty that is enjoyed by families in many other states. At the same time, present creditors' claims would be protected.

Thank you very much for your consideration of this request.

Sincerely,

Peter B. Brautigam
Hartig, Rhodes, Norman,
Mahoney & Edwards

Robert C. Brink
Attorney

Brian J. Brundin
Hughes, Thorsness, Gantz
Powell & Brundin

Brian W. Durrell
Bogle & Gates

Trigg T. Davis
Davis & Goerig

Peter C. Ginder
Kemppel, Huffman & Ginder

George E. Goerig, Jr.
Davis & Goerig

John L. Hoffer, Jr.
Attorney

Rodney G. Kleedehn
Attorney

Robert L. Manley
Hughes, Thorsness, Gantz
Powell & Brundin

Russell A. Nogg
Attorney

Steven T. O'Hara
Bankston & McCollum

Deborah H. Randall
Davis & Goerig

John H. Raforth
Partnow, Sharrock & Tindall

Charles F. Schuetze
Davis & Goerig

David G. Shaftel
Law Offices of David G. Shaftel

Richard S. Thwaites, Jr.
Attorney

Tonya Woelber
Attorney

Garret S. Wong

Susan Behlke Foley
Foley & Foley

Jim Thiele, CFP
Financial Network Investment Co.

Robert R. Daniel, CPA

Leona B. Baldwin, CLU

Nancy Blunck, CFP

Walter B. Baldwin, CLU

Ame W. Ivanov
Attorney

Michael A. Morrison

Rodney G. Kleedehn
Attorney

Karen A. Jordan, CPC
Alaska Pension Services, Ltd.

Duane L. Mayer, FSA, EA
Alaska Pension Services, Ltd.

or that has been transferred in a manner making the transfer voidable under this chapter.

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

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

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

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

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

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

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

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

~~(B) 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.~~

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

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

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

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

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

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

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

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

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

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

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

All sections should be renumbered.

Amend

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

Amend

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

ALASKA CREDIT UNION LEAGUE

SUITE 650, 4000 CREDIT UNION DRIVE
ANCHORAGE, ALASKA 99503-6647
(907) 562-1255

February 17, 1995

Representative Brian Porter
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Representative Porter:

Alaska's credit unions would like to go on record supporting House Bill 72, the Uniform Fraudulent Transfer Act.

During the recession in the 1980's, there was a significant increase in the number of bankruptcies as shown by the attached graph. It became evident that a number of these insolvent debtors had, in effect, transferred assets based on a comparison of the loan applications on file and the bankruptcy financial statements that were filed with the Court. Unless a creditor was very aggressive in attending the hearings and persuading the Trustees that this was a fraudulent filing, the creditors were forced to write-off these debts.

Passage of this legislation will allow creditors to obtain satisfaction of unsecured debts where the debtor has in fact transferred assets fraudulently.

Sincerely,

Sharon Kelly -by D.L.

Sharon Kelly, Chair
Bankruptcy Committee

LAW OFFICES
DILLON & FINDLEY
A PROFESSIONAL CORPORATION

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350 North Franklin Street
Juneau, Alaska 99801
Telephone (907) 586-4000
Facsimile (907) 586-3777

D - For bill files - BP

January 31, 1995

Hon. Pete Kott, Chair
House Labor & Commerce Committee
Alaska State Legislature
Room 432, State Capitol
Juneau, Alaska 99801-1182

HAND-DELIVERED

Re: HB 72 (Uniform Fraudulent Transfer Act)

Dear Representative Kott:

I understand that HB 72, proposing the Uniform Fraudulent Transfer Act, is scheduled for a hearing in your committee tomorrow, and I wanted to express my strong support for this bill. I urge your committee's favorable action on it.

HB 72 updates Alaska law that was borrowed from Oregon for Alaska back in the 1800's. We did not even enact the 1918 predecessor to this Uniform Act (the Uniform Fraudulent Conveyance Act).

By enacting HB 72, Alaska will finally update its law, making significant improvements in the process, and will join at least 33 other states in enacting this modern version. The bill's handling of fraudulent transfers will help assure the smooth flow of business transactions in the state and between this state and other states.

If you have any question about it, please let me know. I should mention that, among Alaska's uniform law commissioners, Jerry Kurtz (276-6100) is the most knowledgeable about HB 72.

Thank you.

Yours truly,

Art Peterson

Arthur H. Peterson
Uniform Law Commissioner
for Alaska

cc: Hon. Brian Porter, Chair
House Judiciary Committee

Rest of Alaska's ULC Delegation

AlaskaUSA
Federal Credit Union

February 17, 1995

Representative Brian Porter
State House of Representatives
State Capitol
Juneau, Alaska 99801

Dear Representative Porter:

On behalf of Alaska USA Federal Credit Union, I would like to express support for H.B.72, the Uniform Fraudulent Transfer of Debt Act.

There are two primary reasons for this support. First, it is important to keep updated the financial management tools available to both consumers and lenders. Our economy is dynamic and undergoes dramatic swings. Only by keeping pace can lending institutions maintain a responsive and appropriate availability of credit to fuel our economy and serve Alaska's consumers. H.B. 72 serves to accomplish this. It brings Alaska into parity with a growing number of states who recognize that the rules of the early half of this century no longer assure a proper balance between debtor and lender.

Second, H.B. 72 recognizes that the costs associated with bankruptcy are not merely to the lender, but to all consumers who desire access to credit. As a financial cooperative, Alaska USA is particularly sensitive to effects of one members' behavior on other members' ability to access credit. For example, during the period of 1990 to 1994, 3,031 accounts were the subject of bankruptcy proceedings. This resulted in a total loss to the credit union of $7,570,991; or over $42 per member. The credit union's staff who deal daily with these issues estimate 30% of the losses were the result of debtors abusing bankruptcy protection. Alaska cannot afford a system that penalizes the conscientious and rewards the abuser. H.B. 72 provides a reasonable approach to assuring that this does not happen.

Thank you for the opportunity to write in support of this legislation and for your intitative in introducing it to the Legislature again this session.

Sincerely,

William B. Eckhardt
President

PO Box 196613 • Anchorage, Alaska 99519-6613
Member Service Center 1-800-525-9094 • TDD/Hearing Impaired: 1-800-742-7054 • Administrative Offices: 907-563-4567

Law Offices
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405 West 36th Street, Suite 200
Anchorage, Alaska 99503
(907)561-4420

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(including cover sheet)

MESSAGE: Re: House Bill 72

Please make sure that everyone on the House Finance Committee and Representative Brian Porter get a copy of this fax.

Thank you.

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Melinda Swihart
TELECOPY OPERATOR
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I OPPOSE HOUSE BILL # 72

Eileen Herman

Alvin E. Haynes

Judy Benson

Dick Fahlsing

Paul E. Lee

Doyle W. Klein

Kathryn F. Johnston

Helen L. Hewett

Carol A. Boyt

Thomas Davis

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Thomas W. Barber

Robert L. Knowlton

Floyd L. Coffing

Leona J. Coffing

THE UNIFORM FRAUDULENT TRANSFER ACT

CONTENTS

A Few Facts About

THE UNIFORM FRAUDULENT TRANSFER ACT

PURPOSE: Providing a creditor with the capacity to procure assets a debtor has transferred to another person to keep them from being used to satisfy the debt.

ORIGIN: The Uniform Fraudulent Transfer Act, completed by the Uniform Law Commissioners in 1984, revises the Uniform Fraudulent Conveyance Act of 1918.

ENDORSED BY: American Bar Association

STATE ADOPTIONS:

Alabama	Maine	Ohio
Arizona	Minnesota	Oklahoma
Arkansas	Missouri	Oregon
California	Montana	Rhode Island
Colorado	Nebraska	South Dakota
Connecticut	Nevada	Texas
Florida	New Hampshire	Utah
Hawaii	New Jersey	Washington
Idaho	New Mexico	West Virginia
Illinois	North Dakota	Wisconsin

1993 INTRODUCTIONS: Virginia

For any further information regarding the Uniform Fraudulent Transfer Act, please contact John McCabe or Katie Robinson at 312-915-0195.

(4/15/93)

UNIFORM FRAUDULENT TRANSFER ACT

When we say a person "owns" something, we tend to think in all or nothing terms. Whatever a person owns is at that person's disposal - to sell, to give, to abandon, or to pledge as security for a debt. But relationships between people over property are never so simple or so unqualified. A creditor-debtor relationship, for example, may materially change an owner's power over the property owned. A mortgage, clearly, restricts what an owner may do with mortgaged real estate. The creditor has legally protected rights in the real estate securing the debt. Under Article 9 of the Uniform Commercial Code, secured creditors, also, obtain rights in collateral that are protected.

A less clear category, but important to the maintenance of credit, is that of the unsecured creditor-debtor relationship in which the debtor manipulates property to defeat the creditor's interest solely for that purpose and for no other. Perhaps the debtor foresees insolvency and tries to conceal property that a creditor might use to satisfy the debt. Perhaps the debtor never intends to satisfy the debt and manipulates property to make himself judgment-proof. Should the creditor be without recourse, and should the debtor's rights to deal with property be unrestricted in these kinds of cases?

The National Conference of Commissioners on Uniform State Laws (ULC) proposed the Uniform Fraudulent Conveyance Act (UFCA) in 1918 as an answer to that question. It was created to supersede the Statute of 13 Elizabeth which was enacted in some form by many states, and which introduced the concept of the fraudulent conveyance into the law of every American jurisdiction, with or without enactment. The UFCA was adopted in twenty-six states, and its provisions were incorporated into the Federal Bankruptcy Act.

In 1984, this 1918 Act was revised and renamed the Uniform Fraudulent Transfer Act (UFTA). The intent of the UFTA is the same as the UFCA - it classifies a category of transfers as fraudulent to creditors and provides creditors with a remedy for such transfers. The fundamental remedy is the recovery of the property for the creditor. Why a new Act at this time? The terminology of the UFCA had become considerably archaic, and needed to be modernized. The Bankruptcy Reform Act of 1978 changed the federal law on fraudulent transfers in significant ways, and made it imperative to reconsider state law. And creditor-debtor relationships have changed and become more complicated, so that the whole issue of fraudulent transfers needed rethinking. In 1984, the UFTA is ready to promote the modernization of this subject area of law.

UFTA creates a right of action for any creditor against any debtor and any other person who has received property from the debtor in a fraudulent transfer. A fraudulent transfer occurs when a debtor intends to hinder, delay, or defraud a creditor, or transfers property under certain conditions to another person without receiving reasonably equivalent value in return. But not all such transfers are fraudulent to every creditor.

UFTA distinguishes between present and future creditors, and specifies the kinds of transfers that are fraudulent to each of the two categories of creditors. Both present and future creditors may recover property when there is a transfer with intent to defraud. Both may recover when a transfer is made without receiving reasonably equivalent value when the result is to make the debtor's assets unreasonably small in relation to the business or transaction in which the debtor is engaged or about to be engaged. Also, present and future creditors can both recover when a debtor transfers property without receiving reasonably equivalent value when intending to incur debts beyond the ability to pay.

Present creditors, however, can recover property when it is transferred by a debtor to another person without receiving reasonably equivalent value if the debtor is insolvent or becomes insolvent as a result of the transfer. A transfer to an "insider" without receiving reasonably equivalent value when the debtor is insolvent, is also fraudulent to present creditors. The term "insider" is defined, and is someone with a special relationship to the debtor. Examples are relatives or business partners (when the debtor is a partner). To be liable, an "insider" must have reasonable cause to believe that the debtor is insolvent.

The fundamental relief for a creditor when there is a fraudulent transfer is recovery of the property from the person to whom it has been transferred. UFTA allows "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim...." Whatever is necessary to obtain the property is provided for, including attachment, injunctive relief, appointment of a receiver, or "any other relief the circumstances may require." If the creditor has reduced the claim to a judgment, the court may levy execution against the recovered assets. This means that the property can be sold to satisfy the amount of the judgment.

Much of the UFTA resembles the UFCA, its predecessor. What, then, are some of the differences? (A more detailed comparison is available from the ULC.) To begin with, the term "transfer" taken from the Federal Bankruptcy Act replaces the term "conveyance." UFCA uses the term "fair consideration" instead of "reasonably equivalent value." "Reasonably equivalent value" does not include the element of good faith as "fair consideration" does, and is more sharply defined than "fair consideration" is in the UFCA. UFTA overcomes the problem raised in the case of

Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), a case that jeopardized mortgage foreclosure sales. Under UFTA, a properly conducted foreclosure sale is not a fraudulent transfer, notwithstanding the fact that it does not recover an amount somewhat near the actual market value of the property. The concept of the "insider" is new in the UFTA. UFTA provides for defenses of transferees and for a statute of limitations. Both issues are not addressed in the UFCA.

The Uniform Fraudulent Transfer Act continues the concept of a civil action for transfers fraudulent to creditors first created in the Statute of 13 Elizabeth, and comprehensively continued in the Uniform Fraudulent Conveyance Act. The new Act takes into account the considerable development in both law and practice in creditor-debtor relationships since 1918. The ULC hopes that it will be adopted uniformly in all states.

WHY STATES SHOULD ADOPT
THE UNIFORM FRAUDULENT TRANSFER ACT

Are we only as good as the extent to which we honor our obligations? Many would argue for this proposition. And when our obligations are financial, the argument is reinforced by law. It is to this proposition that the Uniform Fraudulent Transfer Act is addressed. If we have acquired debt we should not be able to manipulate our assets so that creditors will be deprived of their value when we default on our debt. We should not be able to plan an artificial insolvency by transferring assets to others against the interests of our creditors.

The Uniform Fraudulent Transfer Act works as a deterrent, preventing such transgressions against obligations incurred, and provides creditors with a remedy when debtors transfer or hide assets that would otherwise be available to satisfy legitimate debts.

While the issue of obligation is preeminent, the economic issue is no less important. Credit is essential to the economic life of this country. Consumer credit, commercial credit, secured and unsecured credit enter into our lives, everyday. Credit remains available so long as those who extend it are given certain assurances about their rights at default. The Uniform Fraudulent Transfer Act provides assurances to creditors that help make credit available to all of us.

This economic issue leads directly to the issue of uniformity. The availability and the health of the credit mechanism require national standards. The principles of the old Uniform Fraudulent Conveyance Act became applicable to every person in every state because it was incorporated into the Federal Bankruptcy Act. Much of what is in the newer Fraudulent Transfer Act duplicates the Bankruptcy Reform Act of 1978. Uniformity has become not only a question of law between states, but also between state and federal law. Without uniformity, credit becomes less available, and the credit mechanism is less reliable. To avoid confusion and expense, the same rules must apply throughout the country. Public expectations are the same in every state and jurisdiction.

Associated with the issue of uniformity is the issue of modernity. The original Fraudulent Conveyance Act, which the Fraudulent Transfer Act replaces, was promulgated in 1918. Changes in federal bankruptcy law, in creditor-debtor relations in general, even in the rules governing the conduct of lawyers, make it clear that a modernization is overdue. The Uniform Fraudulent Transfers Act answers that immediate need.

THE UNIFORM FRAUDULENT TRANSFER ACT

by

FRED H. MILLER
Professor of Law at the University of Oklahoma

Section by Section Analysis of the Act

Section 1 contains definitions. Section 2 also contains the definition of "insolvent," and Section 3 the definition of "value." The definition of "asset" in Section 2(2), together with the latter definitions of "insolvent" and "value," in a general sense formulate the core concept of the act: the transfer of an asset (or incurring an obligation) for inadequate value by an insolvent debtor or one rendered insolvent by the transaction is a fraudulent transfer. Subsection 3(B) is worth particular note in this respect because it overrules for state law the controversial holding in Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980), that a regularly conducted mortgage foreclosure that produces a price "too low" may be avoided as a fraudulent conveyance. By clouding property titles the Durrett rule virtually is a self-fulfilling prophecy.

Section 4 Subsection a(1) states the basic rule of the act: a transfer made or an obligation incurred with actual intent to hinder, delay or defraud creditors is actionable by creditors. How does a creditor prove the debtor's actual intent? Subsection b sets out "badges of fraud" if several of these appear it is strong evidence. Subsection a(2), on the other hand, sets out two cases where the law decrees the intent exists if the facts are as stated.

Section 5 states two further cases where the law decrees the transaction is fraudulent, but only as to present creditors and not also as to creditors arising later as is the case for transfers covered by Section 5.

Section 6 defines when a transaction occurs. It occurs when it can prejudice the rights of third parties, and not when it actually occurs between the parties to it. For example, a creditor does not need this act to set aside a fraudulent security interest that is never filed; the creditor can defeat that interest under the Uniform Commercial Code. Subsection 5 of this Section also states the time when an obligation is incurred.

Section 7 describes the remedies a creditor has to attack and avoid a fraudulent transfer or obligation.

Section 8, however, protects a good faith purchaser for reasonably equivalent value who did not share in the debtor's fraudulent purpose and subsequent good faith transferees for value who are sufficiently remote. Subsection (d) also gives a good faith transferee or obligee against whom the transaction can be avoided protection for any value given.

Subsection (e) is important as protecting lease terminations and security interest enforcement against "Durrett type" attacks, and Subsection (f) allows "workouts" and the like to occur.

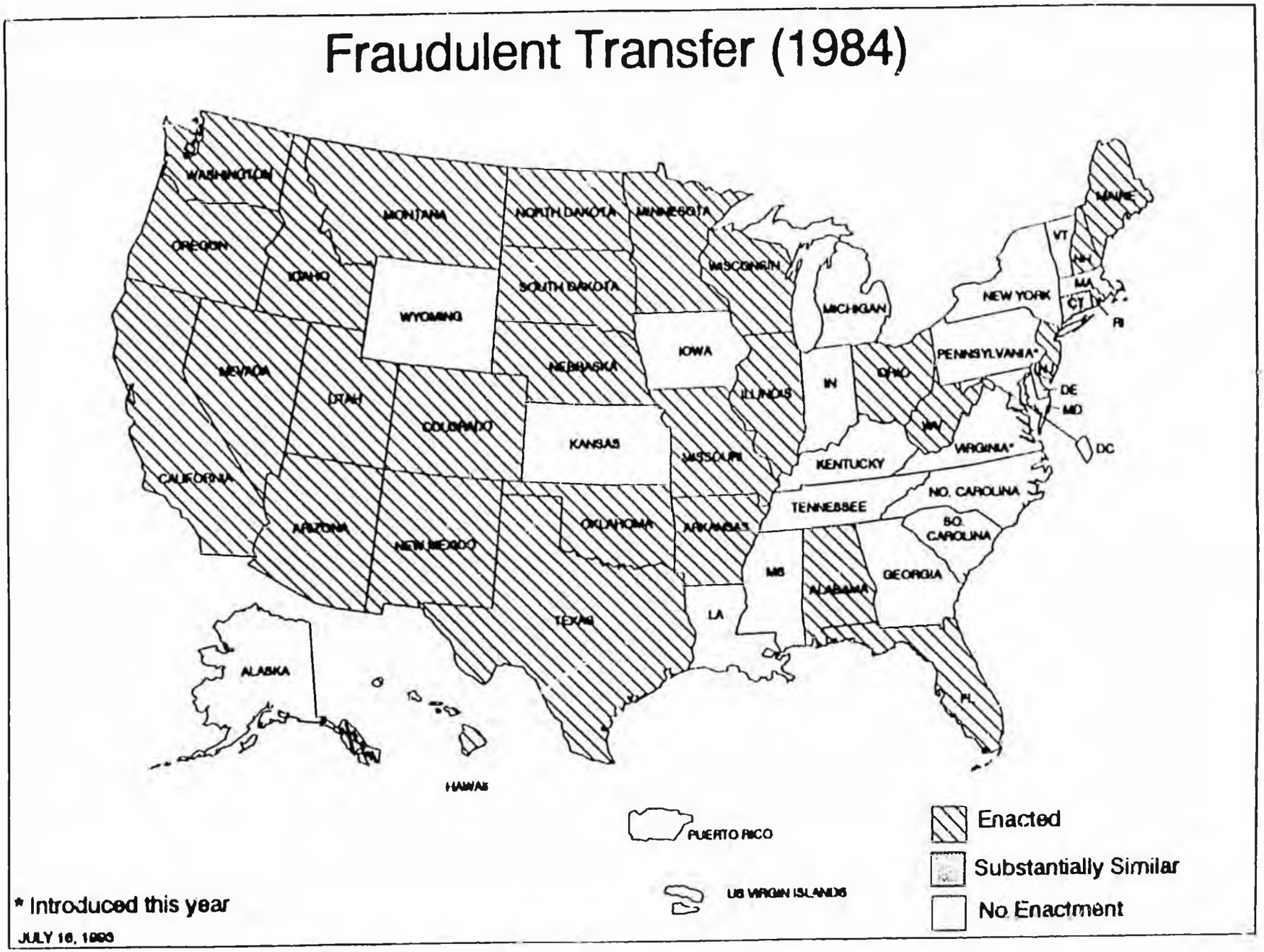
Section 9 prescribes statutes of limitation specifically for the act.

Section 10 states the act is supplemented by other law and Section 11 specifies that in interpreting the act, precedent from other states that have enacted it should be used to maintain uniformity.

Section 12 provides the title.

Section 13 repeals the current statutes on the subject, including any old predecessor versions of this act.

Fraudulent Transfer (1984)



* Introduced this year

JULY 16, 1993

NOTES TO DECISIONS

The safe and proper rule of construction of mechanic's lien statutes is that, while the remedial portions of the statutes should be liberally construed, with a view to avoid defeating the purpose of the statute, yet these parts upon which the right to the existence of a lien depends, being in derogation of the common law, should be strictly construed. Sullens & Hoss, Inc. v. Farvour, 14 Alaska 492, 117 F. Supp. 535 (D. Alaska 1954).

Applied in Fjeldahl v. Homer Co-Op. Ass'n, 11 Alaska 112 (1946); Stephenson v. Ketchikan Spruce Mills, Inc., 412 P.2d 496 (Alaska 1966).

Quoted in Mitchell v. Beaver Dredging Co., 8 Alaska 566 (1935); Gleason v. Diamond, 9 Alaska 621 (1939); Clay v. Sandal, 369 P.2d 890 (Alaska 1962); Moores v. Alaska Metal Bldgs., Inc., 448 P.2d 881 (Alaska 1968).

Chapter 40. Fraudulent Transfers, Revocations, and Trusts.

Sec. 34.40.010. Invalidity generally. A conveyance or assignment, in writing or otherwise, of an estate or interest in land, or in goods, or things in action, or of rents or profits issuing from them or a charge upon land, goods, or things in action, or upon the rents or profits from them, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, or a bond or other evidence of debt given, action commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded is void. (§ 22-4-1 ACLA 1949)

NOTES TO DECISIONS

Common law. — Under the common law, a transfer by an insolvent debtor to pay or to secure an antecedent debt has never been treated as a transfer to hinder, delay, or defraud creditors, although it is self-evident that other creditors are necessarily hindered and delayed by such a transfer. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

At common law it was not illegal for a debtor to pay one of his creditors in full, even though he did not have enough left to pay his other creditors in full or even in part. Such a payment was not, and is not now, a fraudulent conveyance. The payment is merely the performance of an existing legal duty. Nor is it illegal for the debtor to transfer property as security for an existing debt; the value of the property in excess of the debt remains available to other creditors. The conveyance of property to a creditor in satisfaction of an ex-

iating debt is a fraudulent conveyance only in case its value is in excess of the debt and the purpose of the debtor is to keep that excess out of the hands of his other creditors. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

This section provides Alaska's basic prohibition against transactions in fraud of creditors. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

And AS 34.40.090 complements this basic prohibition by providing that the existence of fraudulent intent is a question of fact. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

The court never presumes fraud. Matheson v. Patenaude, 8 Alaska 238 (1930).

Under normal circumstances, fraud will not be presumed. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

And the burden of proof under this section is on the plaintiff. Matheson v. Patenaude, 8 Alaska 238 (1930).

Fraud is established by preponderance of evidence; clear and convincing proof is not required. Gabaig v. Gabaig, 717 P.2d 836 (Alaska 1986).

AS 09.25.060 qualifies the provisions of this section and AS 34.40.090 by erecting a prima facie presumption of fraud in cases where a sale of personal property is not "accompanied by the immediate delivery and the actual and continued possession" by the vendee. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

Where the creditor offered a satisfactory explanation for his failure to take more overt steps in attempting to reestablish possession of a vessel, and where he further showed that the quitclaim deed delivered by the debtor was issued in exchange for valuable consideration, the trial court was unjustified in relying on the statutory presumption to invalidate as fraudulent the conveyance in question. Under these circumstances, the trial court should have considered the validity of the transaction as a question of fact pursuant to this section and AS 34.40.090. Accordingly, the court should have ruled on the issue whether, in the conveyance of the vessel to the creditor, there was an actual, as opposed to a presumed intent to hinder, delay, or defraud other creditors. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

The badges of fraud here are as clearly apparent as they are multitudinous. The compelling ones in terms of long-recognized indicia of fraud are: (1) The consideration is inadequate. (2) The transfer of the property was in anticipation of a pending suit. (3) The transferor debtor was insolvent. (4) There was a failure to record the instrument within a reasonable length of time. (5) The conveyance was a transfer of all or substantially all the debtor's property. (6) The retention of possession of the premises by the grantor from the date of the execution of the deed stands unexplained. (7) The transfer so completely depleted the assets of the debtor that his creditor, the plaintiff, has thereby been hindered and delayed in recovering any part of his judgment. (8) The relationship of the parties becomes an additional badge of fraud when there also appear other circumstances which of themselves incite distrust and suspicion. First Nat'l Bank v. Enzler, 537 P.2d 517 (Alaska 1975).

When a conveyance is alleged to have been made fraudulently, the court may consider whether the disparity between the true value and the price paid is so great as to shock the conscience and strike the understanding at once with the conviction that such transfer never could have been made in good faith. Gransbury v. United Bldg. Supply, Inc., 531 P.2d 1247 (Alaska 1975).

Badges of fraud at most are only evidentiary facts tending to prove the ultimate fact, which is that fraud was intended. Matheson v. Patenaude, 8 Alaska 238 (1930); Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

Badges of fraud must be viewed within the context of each particular case, and, where their presence is satisfactorily accounted for, or where their existence is not inconsistent with a construction of the transaction as a valid one, they deserve to be accorded little weight. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971); First Nat'l Bank v. Enzler, 537 P.2d 517 (Alaska 1975).

Where the totality of the circumstances surrounding a transaction has failed to indicate fraud, or where a strong showing of good faith in a transaction has been made, courts have frequently discounted the significance of badges of fraud as indicia of the character of the transaction. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

Evidence of post-transfer events is

clearly admissible to show intent at an earlier point in time, although the probative value of the evidence decreases as the elapsed time increases. Gabaig v. Gabaig, 717 P.2d 835 (Alaska 1986).

Hasty and unexplained departure of seller after sale of lots as evidence that conveyance was fraudulent. — See Gransbury v. United Bldg. Supply, Inc., 531 P.2d 1247 (Alaska 1975).

Decree only avoids conveyance as to creditor who is party. — When fraud has been established as to one creditor, it has not the effect to vitiate the conveyance as to all other creditors. The decree in such a suit merely avoids the conveyance as to the plaintiff therein, and as to all the other creditors it remains as though no proceedings had been taken. Ellis v. Reed, 238 F. 341 (9th Cir. 1917).

Debtor-creditor relationship necessary. — The acts condemned by this section are, by the terms of the statute, dependent upon the existence of debtor-creditor relationship. First Nat'l Bank v. Enzler, 537 P.2d 517 (Alaska 1975).

A contingent debt may be the basis of a debtor-creditor relationship under this section. First Nat'l Bank v. Enzler, 537 P.2d 517 (Alaska 1975).

Although the liability for a debt in the interim period before the collateral is sold at an execution sale is contingent in that it will only arise should the collateral sell for less than the amount owing, this fact does not preclude the present existence of a debt owed by the contingently liable party to the secured creditor. First Nat'l Bank v. Enzler, 537 P.2d 517 (Alaska 1975).

Distinction between transfer by contingent debtor and transfer by debtor anticipating suit. — In the context of proving an intent to defraud creditors, there must be a distinction made between the transfer of property by a contingent debtor who, while aware of the possibility of owing a debt at some future time, reasonably concludes that that possibility will not arise, and the debtor who believes a suit is in the offing and who, in anticipation thereof, conveys property. The bona fide nature of the transfer in the former case is significantly less subject to suspicion than in the latter. First Nat'l Bank v. Enzler, 537 P.2d 517 (Alaska 1975).

A preferential transfer does not constitute a fraudulent conveyance. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

A preferential payment to one of several creditors by an insolvent debtor is not in itself an unlawful or fraudulent act. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

In the absence of bankruptcy laws or express statutory prohibition, an insolvent debtor may convey property to one creditor, even if it means that the debtor's assets will thereby be depleted, and the claims of other creditors will be defeated. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

Barring the applicability of bankruptcy laws or similar statutory provisions insuring equal distribution of an insolvent debtor's assets among all general creditors, there is nothing improper or unlawful about a preference being given to one creditor, even if it means that other creditors will be precluded from recovery. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

A bona fide preference of one creditor over others will be upheld even where the debtor is or will be rendered insolvent, or where other creditors are threatening suit, or where the preferred creditor is aware of the debtor's insolvency. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

For a list of cases upholding the right of a debtor to prefer one among his creditors, see Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

The rule against fraudulent conveyances may be availed of by a single creditor. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

Effect of permitting single creditor to set aside preferential transfer. — To allow a single creditor, acting in his own interest alone, to set aside a preferential transfer as one in fraud of creditors would amount to substituting that creditor as the person preferred in place of the creditor chosen by the debtor. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

Conveyance of marital property in anticipation of divorce. — Husband's secret conveyance of his interest in a bar to his brother three days after receiving service of divorce papers was intended to defraud the wife of her fair share of a primary marital asset. Pattee v. Pattee, 744 P.2d 658 (Alaska 1987). See also Gabaig v. Gabaig, 717 P.2d 835 (Alaska 1986).

Transfer by husband of all assets to wife held not void under this section. — See First Nat'l Bank v. Enzler, 537 P.2d 517 (Alaska 1975).

Applied in Rollins v. Leibold, 512 P.2d 937 (Alaska 1973).

Quoted in Dean v. Firor, 681 P.2d 321 (Alaska 1984).

Collateral references. — 37 Am. Jur. 2d, Fraudulent Conveyances, § 1 et seq.

37 C.J.S., Fraudulent Conveyances, § 1 et seq.

Right to relief as affected by fact that parties are not in pari delicto. 7 ALR 150.

Estoppel to claim invalidity. 9 ALR 358.

Fraudulent conveyance as cloud on title. 78 ALR 250.

Liability of one who assists or encourages in making fraudulent reasonable to a third person. 112 ALR 1250.

Purpose to defraud as defense to suit to recover property. 117 ALR 1464.

Right as between creditors of grantor or transferor and those of grantee or transferee. 148 ALR 520.

Right of creditor to set aside transfer of property as fraudulent as affected by the fact that his claim is barred by statute of limitations. 14 ALR2d 598.

Sec. 34.40.020. Invalidity as against purchasers. A conveyance of an interest in land, or the rents or profits of it, or a charge upon land or upon the rents and profits thereof, that is made or created with the intent to defraud prior or subsequent purchasers for a valuable consideration of the land, rents, or profits, as against these purchasers, is void. (§ 22-4-2 ACLA 1949)

NOTES TO DECISIONS

Applied in Crossly v. Campion Min. Co., 1 Alaska 391 (1901).

Sec. 34.40.030. Purchasers with notice. A conveyance or charge is not considered fraudulent in favor of a subsequent purchaser who has actual or legal notice of it at the time of the purchase, unless it appears that the grantee in the conveyance, or person to be benefited by the charge, was privy to the fraud intended. (§ 22-4-3 ACLA 1949)

NOTES TO DECISIONS

Applied in Crossly v. Campion Min. Co., 1 Alaska 391 (1901).

Cited in Walker v. Fairbanks Inv. Co., 268 F.2d 48 (9th Cir. 1959).

Collateral references. — 37 Am. Jur. 2d, Fraudulent Conveyances, §§ 152-154.

Sec. 34.40.040. Invalidating effect of provision for revocation, determination, or alteration. A conveyance or charge of or upon an estate or interest in land containing a provision for the revocation, determination, or alteration of the estate or interest, or a part of it, at the will of the grantor, is void as against subsequent purchasers from the grantor for a valuable consideration of an estate or interest liable to be revoked or determined, although the estate or interest is not expressly revoked, determined, or altered by the grantor by virtue of

the power reserved or expressed in a prior conveyance or charge. (§ 22-4-4 ACLA 1949)

Sec. 34.40.050. Conveyance in exercise of power to revoke and reconvey. Where a power to revoke a conveyance of land, or the rents and profits from it, and to reconvey the land or the rents and profits is given to a person other than the grantor in the conveyance, and the person subsequently conveys the land, rents, or profits to a purchaser for a valuable consideration, the subsequent conveyance is valid in the same manner and to the same extent as if the power of revocation were recited in it and the intent to revoke the former conveyance expressly declared. (§ 22-4-5 ACLA 1949)

Sec. 34.40.060. Conveyance before accrual of right to execute power of revocation. If a conveyance to a purchaser under either AS 34.40.040 or 34.40.050 is made before the person making the conveyance is entitled to execute the power of revocation, it nevertheless is valid from the time the power of revocation actually vests in the person, in the same manner and to the same extent as if then made. (§ 22-4-6 ACLA 1949)

Sec. 34.40.070. Requirement of writing for grant or assignment of trust. A grant or assignment of an existing trust in land, goods, or things in action, unless the grant or assignment is in writing, subscribed by the person making it, or a lawfully authorized agent of the person, is void. (§ 22-4-7 ACLA 1949)

Sec. 34.40.080. Invalidity against heirs, successors, representatives, or assigns. A conveyance, charge, instrument, or proceeding declared by law to be void as against the creditors, purchasers, or mortgagees is equally void as against the heirs, successors, personal representatives, or assigns of the creditors, purchasers, or mortgagees. (§ 22-4-8 ACLA 1949)

Sec. 34.40.090. Fraudulent intent question of fact. The question of fraudulent intent in a case arising under the provisions of this chapter is a question of fact, and not of law. (§ 22-4-9 ACLA 1949)

NOTES TO DECISIONS

AS 34.40.010 provides Alaska's basic prohibition against transactions in fraud of creditors. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

And this section complements that basic prohibition by providing that the existence of fraudulent intent is a question of fact. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

AS 09.25.060 qualifies the provisions of this section and AS 34.40.010 by erecting a prima facie presumption of fraud in cases where a sale of personal property is not "accompanied by the immediate delivery and the actual and con-

tinued possession" by the vendee. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

Where the creditor offered a satisfactory explanation for his failure to take more overt steps in attempting to reestablish possession of a vessel, and where he further showed that the quitclaim deed delivered by the debtor was issued in exchange for valuable consideration, the trial court was unjustified in relying on the statutory presumption to invalidate as fraudulent the conveyance in question. Under these circumstances, the trial court should have considered the validity of the transaction as a question of fact pursuant to this section and AS 34.40.010. Accordingly, the court should have ruled on the issue whether, in the conveyance of the vessel to the creditor, there was an actual, as opposed to a presumed intent to hinder, delay or defraud other creditors. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

Fraud is not presumed. — Fraud, not shown by the evidence to have existed, will not be presumed. Courtnay v. Brenneman, 6 Alaska 233 (1920).

Under normal circumstances, fraud will not be presumed. Blumenstein v. Phillips Ins. Center, Inc., 490 P.2d 1213 (Alaska 1971).

The intent to defraud will not be presumed. Rather, it is a question of fact usually to be proved by circumstantial evidence. First Nat'l Bank v. Enzler, 537 P.2d 517 (Alaska 1975).

General allegations of fraud must be supported by specific allegations. — The general words of fraud and conspiracy can have no more force and effect towards rendering a mortgage void than the truth as disclosed by the specific allegations will warrant. Schwabacher Bros. Co. v. Palmer, 4 Alaska 75 (1910).

Applied in Matheson v. Patenzude, 8 Alaska 238 (1930).

Sec. 34.40.100. When title of purchaser for value not affected. The provisions of AS 34.40.010 and 34.40.070 — 34.40.130 may not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration unless it appears that the purchaser had previous notice of the fraudulent intent of the purchaser's immediate grantor, or of the fraud rendering void the title of the grantor. (§ 22-4-10 ACLA 1949; am § 52 ch 21 SLA 1985)

Cross references. — For provisions relating to purchasers from distributees of an estate, see AS 13.16.680.

Collateral references. — 37 Am. Jur. 2d, Fraudulent Conveyances, § 152 et seq.

Sec. 34.40.110. Invalidity of transfers of personal property in trust. A deed of gift, a conveyance, or a transfer or assignment, oral or written, of goods and chattels or things in action made in trust for the person making the deed, conveyance, transfer, or assignment is void as against the creditors, existing or subsequent, of the person. (§ 22-4-13 ACLA 1949)

NOTES TO DECISIONS

Chattel mortgage allowing mortgagor to treat property as own is void. — If a chattel mortgage is coupled with a condition or agreement that the mortgagor may treat the goods as if he were the owner of them, that is, may sell them at his option and receive the proceeds to his own use, such condition or agreement avoids the mortgage. In legal effect it is a sham, a nullity, a mere shadow of a mortgage, only calculated to ward off other creditors, and is a conveyance in trust for the benefit of the person making it, and therefore void as against creditors. In re Minkove, 6 Alaska 68 (1918).

Sec. 34.40.120. "Land" and "estate and interest in land" defined. The term "land" as used in AS 34.40.010 and 34.40.070 — 34.40.130, shall be construed as coextensive in meaning with "lands, tenements, and hereditaments," and the term "estate and interest in land" shall be construed to embrace every interest, freehold, and chattel, legal and equitable, present and future, vested and contingent in land as defined in this section. (§ 22-4-11 ACLA 1949)

Collateral references. — 28 Am. Jur. 2d, Estates, §§ 1, 2.

Sec. 34.40.130. "Conveyance" defined. The term "conveyance," as used in AS 34.40.010 and 34.40.070 — 34.40.130, shall be construed to embrace every instrument in writing except a last will and testament, of whatever form and by whatever name it may be known in law, by which an estate or interest in lands is created, aliened, assigned, or surrendered. (§ 22-4-12 ACLA 1949)

Chapter 45. Unclaimed Property.

Article
1. Consignees and Bailees (§§ 34.45.010 — 34.45.080)
2. Personal Property Presumed Abandoned; General Rules (§§ 34.45.110 — 34.45.120)
3. Conditions Leading to Presumption of Abandonment of Particular Types of Personal Property (§§ 34.45.140 — 34.45.260)
4. Reporting and Disposition of Personal Property (§§ 34.45.280 — 34.45.340)
5. Administration of Abandoned Property (§§ 34.45.360 — 34.45.430)
6. Enforcement and Penalties (§§ 34.45.450 — 34.45.470)
7. General Provisions (§§ 34.45.700 — 34.45.780)

Article 1. Consignees and Bailees.

Section
10. Record of consignee or bailee
20. Consignee's or bailee's notice to owner
30. Sale
40. Presale inventory and notice
50. Order of sale
60. Sale at public auction
70. Proceeds of sale
80. Sale of perishable property

Revisor's notes. — Pursuant to § 3, ch. 24, SLA 1966, in AS 34.45.010 — 34.45.090 "district magistrate" was changed to "district judge" and "deputy magistrate" was changed to "magistrate".

Sec. 34.45.010. Record of consignee or bailee. When personal property is consigned to or deposited with a forwarding merchant, wharf, warehouse, or tavern keeper, or the keeper of a depot for the reception and storage of trunks, baggage, merchandise, or other personal property, the consignee or bailee shall immediately record a