

HB

295

Alaska State Legislature

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Representative Tom Anderson
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Sponsor Statement HB 295

As the credit system has evolved over the years there have been many changes made to address concerns that have arisen. One of those concerns was the right of creditors to protect themselves from debtors who attempt to defraud them through manipulation of their assets. For example, if a person knows they will be unable to pay their obligations and "sells" their assets to a family member or friend for a nominal sum in order to protect those assets how will a creditor prove a fraud has been committed?

In 1918 the National Conference of Commissioners on Uniform State Laws (ULC) proposed the Uniform Fraudulent Conveyance Act (UFCA) to answer that question. That Act was adopted in 25 jurisdictions. In 1984, the 1918 Act was revised and renamed the Uniform Fraudulent Transfer Act (UFTA). The new act's intent is the same as the 1918 Act but the language has been updated and changes have been made to bring it into compliance with the Bankruptcy Reform Act of 1978 which made several significant changes to federal fraudulent transfer law.

The 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 when the result is to make the debtor's assets unreasonably small in relation to the business or transaction in question.

The availability and viability of credit providers in this country requires national standards. 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.

As well as the issue of uniformity there is the issue of modernity. The UFCA, which the UFTA replaces, was created 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 Transfer Act answers that immediate need.

I strongly believe that Alaska should join with the 41 other states which have passed this Act.

I urge your support for this bill.

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Fraudulent Transfers

This page covers fraudulent transfer law, primarily the U.S. Uniform Fraudulent Transfers Act ("UFTA") and the cases interpreting the Act.

The glitz and glamour of offshore trust planning has overshadowed the practical fact that most asset protection cases are won or lost by commercial litigators in post-judgment collection and enforcement hearings in the local state and federal courts. These debtor-creditor disputes rarely focus upon the structure created by the debtor to shield his assets; instead, the salient issues almost inevitably concern the method of transfer of the assets into the structure. If the transfer is defensible, the structure is largely irrelevant (so long as the debtor has no ownership or control of that structure). But the converse isn't true: If the structure is defensible, the transfer to the structure may still be set aside as a fraudulent transfer.

Questions of whether particular transfers are or are not fraudulent transfers represent some of the most important questions in asset protection planning. These issues are resolved by reference to the UFTA in the 41 states that have adopted it. Thus, the study of the UFTA, its history, and the cases that have interpreted the Act, will provide the broadest overview in most U.S. states as to what type of transactions will, or will not, stand up to creditor scrutiny.

Uniform acts are, of course, anything but uniform. The UFTA, like the other "uniform" acts, was drafted by the National Conference of Commissioners of Uniform State Laws a/k/a Uniform Law Commissioners - a completely voluntary group of law professors, former judges, and lawyers who simply have an interest in this area of practice. The Uniform Law Commissioners propose uniform laws to the states, but the individual state legislatures must independently ratify the Act. Of course, it is in this ratification that local politicking in favor of special interests causes slight changes to the language of the Act ultimately enacted for that state - slight changes to language that can be enormous in their practical effect.

Additionally, in each state the UFTA will sometimes be interpreted with reference to "other law" in that state, and such interpretation can dramatically change the impact of the Act. Thus, what would be a fraudulent transfer in Ohio might be a protected transaction in Florida. And what would be brilliant planning for a debtor in Texas might be a misdemeanor in California.

As we are limited in our resources and the time that we can spend on this project, we will not seek to keep up with the changes or variations from state to state except as where noted. This website is meant to give an overview of the UFTA and fraudulent transfer law in general, but not to answer specific questions in a specific state as to what is or isn't a fraudulent transfer. An attorney seeking resolutions to such questions in a particular state must consult the particular Act for that state and the cases cited thereunder.



NATIONAL CONFERENCE
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Uniform Fraudulent Transfer Act State Adoptions
May 9, 2005

State:	Statutory Citation:
Alabama	Ala Code §8-9A-1 <i>et seq.</i>
Arizona	Ariz. Rev. Stat. Ann. §44-1001 <i>et seq.</i>
Arkansas	Ark. Stat. Ann. §4-59-201 <i>et seq.</i>
California	Cal. Civil Code §3439 <i>et seq.</i>
Colorado	Colo. Rev. Stat. §38-8-101 <i>et seq.</i>
Connecticut	Conn. Gen. Stat. §52-552 <i>et seq.</i>
Delaware	Del. Code Ann. tit. 6, §1301 <i>et seq.</i>
District of Columbia	D.C. Code Ann. §28-3101 <i>et seq.</i>
Florida	Fla. Stat. §726.101 <i>et seq.</i>
Georgia	Ga. Code §18-2-70 <i>et seq.</i>
Hawaii	Hawaii Rev. Stat. §651C-1 <i>et seq.</i>
Idaho	Idaho Code §55-910 <i>et seq.</i>
Illinois	Ill. Rev. Stat. ch. 740, §160/1 <i>et seq.</i>
Indiana	Ind. Code §38-18-2a1 <i>et seq.</i>
Iowa	Iowa Code §684.1 <i>et seq.</i>
Kansas	Kan. Stat. Ann. §33-201 <i>et seq.</i>
Maine	Me. Rev. Stat. Ann. tit. 14, §3571 <i>et seq.</i>
Massachusetts	Mass. Gen. Laws. Ann. ch. 109A, §1 <i>et seq.</i>
Michigan	Mich. Comp. Laws §566.31 <i>et seq.</i>
Minnesota	Minn. Stat. §513.41 <i>et seq.</i>
Missouri	Mo. Rev. Stat. §428.005 <i>et seq.</i>
Montana	Mont. Code Ann. §31-2-326 <i>et seq.</i>
Nebraska	Neb. Rev. Stat. §36-701 <i>et seq.</i>
Nevada	Nev. Rev. Stat. §112.140 <i>et seq.</i>
New Hampshire	N.H. Rev. Stat. Ann. §545-A:1 <i>et seq.</i>
New Jersey	N.J. Rev. Stat. §25:2-20 <i>et seq.</i>
New Mexico	N.M. Stat. Ann. §56-10-14
North Carolina	N.C. Gen. Stat. §39-23.1 <i>et seq.</i>
North Dakota	N.D. Cent. Code §13-02.1-01 <i>et seq.</i>
Ohio	Ohio Rev. Code Ann. §1336.01 <i>et seq.</i>

Oklahoma	Okl. Stat. tit. 24, §112 <i>et seq.</i>
Oregon	Or. Rev. Stat. §95.200 <i>et seq.</i>
Pennsylvania	Pa. Cons. Stat. tit. 12, §5101 <i>et seq.</i>
Rhode Island	R.I. Gen. Laws §6-16-1 <i>et seq.</i>
South Dakota	S.D. Codified Laws Ann. §54-8A-1 <i>et seq.</i>
Tennessee	Tenn. Code Ann. §66-3-301 <i>et seq.</i>
Texas	Tex. Business & Commerce Code Ann. §24.001 <i>et seq.</i>
Utah	Utah Code Ann. §25-6-1 <i>et seq.</i>
Vermont	Vt. Stat. Ann. tit. 9, §2285 <i>et seq.</i>
Washington	Wash. Rev. Code §19.40.011 <i>et seq.</i>
West Virginia	W. Va. Code §40-1A-1 <i>et seq.</i>
Wisconsin	Wis. Stat. §242.01



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.

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SUMMARY

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 26 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.

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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	Iowa	North Dakota
Arizona	Kansas	Ohio
Arkansas	Maine	Oklahoma
California	Massachusetts	Oregon
Colorado	Michigan	Pennsylvania
Connecticut	Minnesota	Rhode Island
Delaware	Missouri	South Dakota
District of Columbia	Montana	Tennessee
Florida	Nebraska	Texas
Georgia	Nevada	Utah
Hawaii	New Hampshire	Vermont
Idaho	New Jersey	Washington
Illinois	New Mexico	West Virginia
Indiana	North Carolina	Wisconsin

2005 INTRODUCTIONS:

Alaska
Mississippi

For any further information regarding the Uniform Fraudulent Transfer Act, please contact

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FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB295-LAW-C&FB-1-19
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title "An Act adopting the Uniform Fraudulent RDU CIVIL
Transfer Act and relating to fraudulent transfers of property." Component Commercial and Fair Business
 Sponsor Representative Anderson
 Requester House Labor and Commerce Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 This bill creates the Uniform Fraudulent Transfer Act in statute and conforms it with applicable federal law. The current set of statutes, AS 34.40 relating to fraudulent transfers have not been modernized since they were created in 1949. This bill will assist creditors in collecting debts from debtors who have found new and more imaginative ways of hiding assets. The Act sets out numerous factors to be considered in determining whether there is fraudulent intent on the part of the debtor. The current law requires proof of the actual existence of the fraudulent intent which can only be done through circumstantial evidence. The bill also provides numerous remedies to creditors which are not available under the current law.

 Passage of this legislation will have no foreseeable impact on the Department of Law.

Prepared by: Kathryn Daughhetee, Director Phone 465-3673
 Division Administrative Services Division Date/Time 1/19/06 10:33 AM
 Approved by: Kathryn Daughhetee for David Márquez, Attorney General Date 1/19/2006
 Agency Department of Law