

STATE OF NEW YORK

4236

2019-2020 Regular Sessions

IN SENATE

March 5, 2019

Introduced by Sen. HOYLMAN -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the debtor and creditor law, the civil practice law and rules, the estates, powers and trusts law and the workers' compensation law, in relation to enacting the "uniform voidable transactions act"; and to repeal certain provisions of the debtor and creditor law relating to fraudulent conveyances

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Short title. This act shall be known and may be cited as
2 the "uniform voidable transactions act".

3 § 2. Article 10 of the debtor and creditor law is REPEALED and a new
4 article 10 is added to read as follows:

ARTICLE 10

UNIFORM VOIDABLE TRANSACTIONS ACT

Section 270. Definitions.

8 271. Insolvency.

9 272. Value.

10 273. Transfer or obligation voidable as to present or future
11 creditor.

12 274. Transfer or obligation voidable as to present creditor.

13 275. When transfer is made or obligation is incurred.

14 276. Remedies of creditor.

15 276-a. Attorney's fees in action or special proceeding under
16 this article to avoid a transfer or obligation.

17 277. Defenses, liability, and protection of transferee or
18 obligee.

19 278. Extinguishment of claim for relief.

20 279. Governing law.

21 280. Supplementary provisions.

22 281. Uniformity of application and construction.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD00878-01-9

281-a. Relation to electronic signatures in global and national commerce act.

§ 270. Definitions. As used in this article:

(a) "Affiliate" means:

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

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

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

(2) a corporation twenty percent or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with power to vote, by the debtor or a person that directly or indirectly owns, controls or holds, with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person that holds the securities:

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

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

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

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

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

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

(2) property to the extent it is generally exempt under non-bankruptcy law; or

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

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

(d) "Creditor" means a person that has a claim.

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

(f) "Debtor" means a person that is liable on a claim.

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

(h) "Insider" includes:

(1) if the debtor is an individual:

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

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

(iii) a general partner in a partnership described in subparagraph (i) of this paragraph; or

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

(2) if the debtor is a corporation:

(i) a director of the debtor;

(ii) an officer of the debtor;

(iii) a person in control of the debtor;

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

1 (v) a general partner in a partnership described in subparagraph (iv)
2 of this paragraph; or

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

5 (3) if the debtor is a partnership:

6 (i) a general partner in the debtor;

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

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

10 (iv) a general partner in a partnership described in subparagraph
11 (iii) of this paragraph; or

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

13 (4) an affiliate, or an insider of an affiliate as if the affiliate
14 were the debtor; and

15 (5) a managing agent of the debtor.

16 (i) "Lien" means a charge against or an interest in property to secure
17 payment of a debt or performance of an obligation, and includes a secu-
18 rity interest created by agreement, a judicial lien obtained by legal or
19 equitable process or proceedings, a common-law lien, or a statutory
20 lien.

21 (j) "Organization" means a person other than an individual.

22 (k) "Person" means an individual, estate, partnership, association,
23 trust, business or nonprofit entity, public corporation, government or
24 governmental subdivision, agency or instrumentality, or other legal or
25 commercial entity.

26 (l) "Property" means anything that may be the subject of ownership.

27 (m) "Record" means information that is inscribed on a tangible medium
28 or that is stored in an electronic or other medium and is retrievable in
29 perceivable form.

30 (n) "Relative" means an individual related by consanguinity within the
31 third degree as determined by the common law, a spouse or an individual
32 related to a spouse within the third degree as so determined, and
33 includes an individual in an adoptive relationship within the third
34 degree.

35 (o) "Sign" means, with present intent to authenticate or adopt a
36 record:

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

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

40 (p) "Transfer" means every mode, direct or indirect, absolute or
41 conditional, voluntary or involuntary, of disposing of or parting with
42 an asset or an interest in an asset, and includes payment of money,
43 release, lease, license, and creation of a lien or other encumbrance.

44 (q) "Valid lien" means a lien that is effective against the holder of
45 a judicial lien subsequently obtained by legal or equitable process or
46 proceedings.

47 § 271. Insolvency. (a) A debtor is insolvent if, at a fair valuation,
48 the sum of the debtor's debts is greater than the sum of the debtor's
49 assets.

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

55 (c) Assets under this section do not include property that has been
56 transferred, concealed or removed with intent to hinder, delay or

1 defraud creditors, or that has been transferred in a manner making the
2 transfer voidable under this article.

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

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

11 (b) For the purposes of paragraph two of subdivision (a) of section
12 two hundred seventy-three and section two hundred seventy-four of this
13 article, a person gives a reasonably equivalent value if the person
14 acquires an interest of the debtor in an asset pursuant to a regularly
15 conducted, noncollusive foreclosure sale or execution of a power of sale
16 for the acquisition or disposition of the interest of the debtor upon
17 default under a mortgage, deed of trust, or security agreement.

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

21 § 273. Transfer or obligation voidable as to present or future credi-
22 tor. (a) A transfer made or obligation incurred by a debtor is voidable
23 as to a creditor, whether the creditor's claim arose before or after the
24 transfer was made or the obligation was incurred, if the debtor made the
25 transfer or incurred the obligation:

26 (1) with actual intent to hinder, delay or defraud any creditor of the
27 debtor; or

28 (2) without receiving a reasonably equivalent value in exchange for
29 the transfer or obligation, and the debtor:

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

33 (ii) intended to incur, or believed or reasonably should have believed
34 that the debtor would incur, debts beyond the debtor's ability to pay as
35 they became due.

36 (b) In determining actual intent under paragraph one of subdivision
37 (a) of this section, consideration may be given, among other factors, to
38 whether:

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

40 (2) the debtor retained possession or control of the property trans-
41 ferred after the transfer;

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

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

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

46 (6) the debtor absconded;

47 (7) the debtor removed or concealed assets;

48 (8) the value of the consideration received by the debtor was reason-
49 ably equivalent to the value of the asset transferred or the amount of
50 the obligation incurred;

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

53 (10) the transfer occurred shortly before or shortly after a substan-
54 tial debt was incurred; and

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

1 (c) A creditor making a claim for relief under subdivision (a) of this
2 section has the burden of proving the elements of the claim for relief
3 by a preponderance of the evidence.

4 § 274. Transfer or obligation voidable as to present creditor. (a) A
5 transfer made or obligation incurred by a debtor is voidable as to a
6 creditor whose claim arose before the transfer was made or the obli-
7 gation was incurred if the debtor made the transfer or incurred the
8 obligation without receiving a reasonably equivalent value in exchange
9 for the transfer or obligation and the debtor was insolvent at that time
10 or the debtor became insolvent as a result of the transfer or obli-
11 gation.

12 (b) A transfer made by a debtor is voidable as to a creditor whose
13 claim arose before the transfer was made if the transfer was made to an
14 insider for an antecedent debt, the debtor was insolvent at that time,
15 and the insider had reasonable cause to believe that the debtor was
16 insolvent.

17 (c) Subject to subdivision (b) of section two hundred seventy-one of
18 this article, a creditor making a claim for relief under subdivision (a)
19 or (b) of this section has the burden of proving the elements of the
20 claim for relief by a preponderance of the evidence.

21 § 275. When transfer is made or obligation is incurred. For the
22 purposes of this article:

23 (a) a transfer is made:

24 (1) with respect to an asset that is real property other than a
25 fixture, but including the interest of a seller or purchaser under a
26 contract for the sale of the asset, when the transfer is so far
27 perfected that a good-faith purchaser of the asset from the debtor
28 against which applicable law permits the transfer to be perfected cannot
29 acquire an interest in the asset that is superior to the interest of the
30 transferee; and

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

35 (b) if applicable law permits the transfer to be perfected as provided
36 in subdivision (a) of this section and the transfer is not so perfected
37 before the commencement of an action for relief under this article, the
38 transfer is deemed made immediately before the commencement of the
39 action;

40 (c) if applicable law does not permit the transfer to be perfected as
41 provided in subdivision (a) of this section, the transfer is made when
42 it becomes effective between the debtor and the transferee;

43 (d) a transfer is not made until the debtor has acquired rights in the
44 asset transferred; and

45 (e) an obligation is incurred:

46 (1) if oral, when it becomes effective between the parties; or

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

49 § 276. Remedies of creditor. (a) In an action for relief against a
50 transfer or obligation under this article, a creditor, subject to the
51 limitations in section two hundred seventy-seven of this article, may
52 obtain:

53 (1) avoidance of the transfer or obligation to the extent necessary to
54 satisfy the creditor's claim;

1 (2) an attachment or other provisional remedy against the asset trans-
2 ferred or other property of the transferee if available under applicable
3 law; and

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

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

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

10 (iii) any other relief the circumstances may require.

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

14 § 276-a. Attorney's fees in action or special proceeding under this
15 article to avoid a transfer or obligation. In an action or special
16 proceeding under this article in which a judgment creditor who has been
17 awarded by court order or agreement or has waived attorney's fees avail-
18 able to prevailing parties by the terms of the statute under which the
19 creditor's underlying claim arose, or representative asserting the
20 rights of such judgment creditor, recovers judgment avoiding any trans-
21 fer or obligation, the justice or surrogate presiding at the trial shall
22 fix the reasonable attorney's fees of the creditor, or creditor repre-
23 sentative, incurred in such action or special proceeding under this
24 article as an additional amount required to satisfy the creditor's
25 claim, and the creditor, or creditor representative, shall have judgment
26 therefor against the debtor and, subject to the defenses and protections
27 in section two hundred seventy-seven of this article, against any trans-
28 feree (or person for whose benefit the transfer was made) against whom
29 relief is ordered, in addition to the other relief granted by the judg-
30 ment. The fee so fixed shall be without regard, or prejudice, to any
31 agreement, express or implied, between the creditor, or the creditor
32 representative, and his or her attorney with respect to the compensation
33 of such attorney.

34 § 277. Defenses, liability, and protection of transferee or obligee.
35 (a) A transfer or obligation is not voidable under paragraph one of
36 subdivision (a) of section two hundred seventy-three of this article
37 against a person that took in good faith and for a reasonably equivalent
38 value given the debtor or against any subsequent transferee or obligee.

39 (b) To the extent a transfer is avoidable in an action by a creditor
40 under paragraph one of subdivision (a) of section two hundred seventy-
41 six of this article the following rules apply:

42 (1) Except as otherwise provided in this section, the creditor may
43 recover judgment for the value of the asset transferred, as adjusted
44 under subdivision (c) of this section, or the amount necessary to satis-
45 fy the creditor's claim, whichever is less. The judgment may be entered
46 against:

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

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

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

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

54 (2) Recovery pursuant to paragraph one of subdivision (a) or subdivi-
55 sion (b) of section two hundred seventy-six of this article of or from
56 the asset transferred or its proceeds, by levy or otherwise, is avail-

1 able only against a person described in subparagraph (i) or (ii) of
2 paragraph one of this subdivision.

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

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

10 (1) a lien on or a right to retain an interest in the asset trans-
11 ferred;

12 (2) enforcement of an obligation incurred; or

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

14 (e) A transfer is not voidable under paragraph two of subdivision (a)
15 of section two hundred seventy-three or section two hundred seventy-four
16 of this article if the transfer results from:

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

19 (2) enforcement of a security interest in compliance with article nine
20 of the uniform commercial code, other than acceptance of collateral in
21 full or partial satisfaction of the obligation it secures.

22 (f) A transfer is not voidable under subdivision (b) of section two
23 hundred seventy-four of this article:

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

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

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

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

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

37 (2) Except as otherwise provided in paragraphs three and four of this
38 subdivision, the creditor has the burden of proving each applicable
39 element of subdivision (b) or (c) of this section.

40 (3) The transferee has the burden of proving the applicability to the
41 transferee of clause (A) or (B) of subparagraph (ii) of paragraph one of
42 subdivision (b) of this section.

43 (4) A party that seeks adjustment under subdivision (c) of this
44 section has the burden of proving the adjustment.

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

47 § 278. Extinguishment of claim for relief. A claim for relief with
48 respect to a transfer or obligation under this article is extinguished
49 unless action is brought:

50 (a) under paragraph one of subdivision (a) of section two hundred
51 seventy-three of this article, not later than four years after the
52 transfer was made or the obligation was incurred or, if later, not later
53 than one year after the transfer or obligation was or could reasonably
54 have been discovered by the claimant;

55 (b) under paragraph two of subdivision (a) of section two hundred
56 seventy-three or subdivision (a) of section two hundred seventy-four of

1 this article, not later than four years after the transfer was made or
2 the obligation was incurred; or

3 (c) under subdivision (b) of section two hundred seventy-four of this
4 article, not later than one year after the transfer was made.

5 § 279. Governing law. (a) In this section, the following rules deter-
6 mine a debtor's location:

7 (1) A debtor who is an individual is located at the individual's prin-
8 cipal residence.

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

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

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

17 § 280. Supplementary provisions. Unless displaced by the provisions of
18 this article, the principles of law and equity, including the law
19 merchant and the law relating to principal and agent, estoppel, laches,
20 fraud, misrepresentation, duress, coercion, mistake, insolvency, or
21 other validating or invalidating cause, supplement its provisions.

22 § 281. Uniformity of application and construction. This article shall
23 be applied and construed to effectuate its general purpose to make
24 uniform the law with respect to the subject of this article among states
25 enacting it.

26 § 281-a. Relation to electronic signatures in global and national
27 commerce act. This article modifies, limits, or supersedes the Electron-
28 ic Signatures in Global and National Commerce Act, 15 U.S.C. Section
29 7001 et seq., but does not modify, limit, or supersede Section 101(c) of
30 that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of
31 any of the notices described in Section 103(b) of that act, 15 U.S.C.
32 Section 7003(b).

33 § 3. Paragraph 5 of subdivision (c) of section 5205 of the civil prac-
34 tice law and rules, as amended by chapter 93 of the laws of 1995, is
35 amended to read as follows:

36 5. Additions to an asset described in paragraph two of this subdivi-
37 sion shall not be exempt from application to the satisfaction of a money
38 judgment if (i) made after the date that is ninety days before the
39 interposition of the claim on which such judgment was entered, or (ii)
40 deemed to be [~~fraudulent conveyances~~] voidable transactions under arti-
41 cle ten of the debtor and creditor law.

42 § 4. Subdivision (g) of section 5519 of the civil practice law and
43 rules, as added by chapter 184 of the laws of 1988, is amended to read
44 as follows:

45 (g) Appeals in medical, dental or podiatric malpractice judgments. In
46 an action for medical, dental or podiatric malpractice, if an appeal is
47 taken from a judgment in excess of one million dollars and an undertak-
48 ing in the amount of one million dollars or the limit of insurance
49 coverage available to the appellant for the occurrence, whichever is
50 greater, is given together with a joint undertaking by the appellant and
51 any insurer of the appellant's professional liability that, during the
52 period of such stay, the appellant will make no [~~fraudulent conveyance~~
53 without fair consideration] voidable transaction as described in
54 [~~section two hundred seventy-three-a~~] article ten of the debtor and
55 creditor law, the court to which such an appeal is taken shall stay all
56 proceedings to enforce the judgment pending such appeal if it finds that

1 there is a reasonable probability that the judgment may be reversed or
2 determined excessive. In making a determination under this subdivision,
3 the court shall not consider the availability of a stay pursuant to
4 subdivision (a) or (b) of this section. Liability under such joint
5 undertaking shall be limited to [~~fraudulent conveyances~~] voidable trans-
6 actions made by the appellant subsequent to the execution of such under-
7 taking and during the period of such stay, but nothing herein shall
8 limit the liability of the appellant for [~~fraudulent conveyances~~] voida-
9 ble transactions pursuant to article ten of the debtor and creditor law
10 or any other law. An insurer that pays money to a beneficiary of such a
11 joint undertaking shall thereupon be subrogated, to the extent of the
12 amount to be paid, to the rights and interests of such beneficiary, as a
13 judgment creditor, against the appellant on whose behalf the joint
14 undertaking was executed.

15 § 5. Subparagraph 4 of paragraph (b) of section 7-3.1 of the estates,
16 powers and trusts law, as amended by chapter 206 of the laws of 1998, is
17 amended to read as follows:

18 (4) Additions to an asset described in subparagraph one of this para-
19 graph shall not be exempt from application to the satisfaction of a
20 money judgment if (i) made after the date that is ninety days before the
21 interposition of the claim on which such judgment was entered, or (ii)
22 deemed to be [~~fraudulent conveyances~~] voidable transactions under arti-
23 cle ten of the debtor and creditor law.

24 § 6. Paragraph 3 of subdivision 3-a of section 50 of the workers'
25 compensation law, as amended by chapter 139 of the laws of 2008, is
26 amended to read as follows:

27 (3) A member's participation in a group self-insurer shall not relieve
28 it of its liability for compensation prescribed by this chapter except
29 by the payment thereof by the group self-insurer or by itself. Each
30 member shall be responsible, jointly and severally, for all liabilities
31 of the group self-insurer provided for by this chapter occurring during
32 its respective period of membership, and such liability shall attach to
33 any recipient of a conveyance of assets made in violation of subdivision
34 (a) of section two hundred [~~seventy-three~~] seventy-four of the debtor
35 and creditor law. As between the employee and the group self-insurer,
36 notice to or knowledge of the occurrence of the injury on the part of
37 the member shall be deemed notice or knowledge, as the case may be, on
38 the part of the group self-insurer; jurisdiction of the member shall,
39 for the purpose of this chapter, be jurisdiction of the group self-in-
40 surer and such group self-insurer shall in all things be bound by and
41 subject to the orders, findings, decisions or awards rendered against
42 the participating member for the payment of compensation under the
43 provisions of this chapter. The insolvency or bankruptcy of a partic-
44 ipating member shall not relieve the group self-insurer from the payment
45 of compensation for injuries or death sustained by an employee during
46 the time the member was a participant in such group self-insurer. Notice
47 of termination of a participating member shall not be effective until at
48 least ten days after notice of such termination, on a prescribed form,
49 has been either filed in the office of the chair or sent by certified or
50 registered letter, return receipt requested, and also served in like
51 manner upon the member. In the event such termination is due to a
52 member's failure to pay required contributions, such member's termi-
53 nation shall not be rescinded more than three times.

54 § 7. This act shall take effect one hundred twenty days after it shall
55 have become a law, and shall apply to a transfer made or obligation
56 incurred on or after such effective date, but shall not apply to a

1 transfer made or obligation incurred before such effective date, nor
2 shall it apply to a right of action that has accrued before such effec-
3 tive date. For the purposes of this act, a transfer is made and an obli-
4 gation is incurred at the time provided in section 275 of the debtor and
5 creditor law, as added by section two of this act.