

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1997

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Short Title: Uniform Fraudulent Transfer Act.

(Public)

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Sponsors:

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Referred to:

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March 5, 1997

1 A BILL TO BE ENTITLED  
2 AN ACT TO REPEAL THE CURRENT STATUTES REGARDING FRAUDULENT  
3 CONVEYANCES AND TO ADOPT THE UNIFORM FRAUDULENT TRANSFER  
4 ACT IN ORDER TO MODERNIZE NORTH CAROLINA LAW AND  
5 HARMONIZE OUR LAW ON THIS SUBJECT WITH THOSE STATES THAT  
6 HAVE ADOPTED THIS UNIFORM ACT.

7 The General Assembly of North Carolina enacts:

8 Section 1. Article 3 of Chapter 39 of the General Statutes is repealed.

9 Section 2. Chapter 39 of the General Statutes is amended by adding a new  
10 Article to read:

11 **“ARTICLE 3A.**

12 **“UNIFORM FRAUDULENT TRANSFER ACT.**

13 **“§ 39-23.1. Definitions.**

14 As used in this Article:

15 (1) ‘Affiliate’ means:

16 a. A person who directly or indirectly owns, controls, or holds with  
17 power to vote, twenty percent (20%) or more of the outstanding

- 1                    voting securities of the debtor, other than a person who holds the  
2                    securities,
- 3                    1.     As a fiduciary or agent without sole discretionary power  
4                    to vote the securities; or
- 5                    2.     Solely to secure a debt, if the person has not exercised the  
6                    power to vote;
- 7                    b.     A corporation twenty percent (20%) or more of whose  
8                    outstanding voting securities are directly or indirectly owned,  
9                    controlled, or held with power to vote, by the debtor or a person  
10                   who directly or indirectly owns, controls, or holds, with power to  
11                   vote, twenty percent (20%) or more of the outstanding voting  
12                   securities of the debtor, other than a person who holds the  
13                   securities,
- 14                   1.     As a fiduciary or agent without sole power to vote the  
15                   securities; or
- 16                   2.     Solely to secure a debt, if the person has not in fact  
17                   exercised the power to vote;
- 18                   c.     A person whose business is operated by the debtor under a lease  
19                   or other agreement, or a person substantially all of whose assets  
20                   are controlled by the debtor; or
- 21                   d.     A person who operates the debtor's business under a lease or  
22                   other agreement or controls substantially all of the debtor's  
23                   assets.
- 24                   (2)   'Asset' means property of a debtor, but the term does not include:
- 25                   a.     Property to the extent it is encumbered by a valid lien;
- 26                   b.     Property to the extent it is generally exempt under nonbankruptcy  
27                   law; or
- 28                   c.     An interest in property held in tenancy by the entirety to the  
29                   extent it is not subject to process by a creditor holding a claim  
30                   against only one tenant.
- 31                   (3)   'Claim' means a right to payment, whether or not the right is reduced to  
32                   judgment, liquidated, unliquidated, fixed, contingent, matured,  
33                   unmatured, disputed, undisputed, legal, equitable, secured, or  
34                   unsecured.
- 35                   (4)   'Creditor' means a person who has a claim.
- 36                   (5)   'Debt' means liability on a claim.
- 37                   (6)   'Debtor' means a person who is liable on a claim.
- 38                   (7)   'Insider' includes:
- 39                   a.     If the debtor is an individual,
- 40                   1.     A relative of the debtor or of a general partner of the  
41                   debtor;
- 42                   2.     A partnership in which the debtor is a general partner;

- 1                   3.     A general partner in a partnership in which the debtor is a  
2                   general partner; or  
3                   4.     A corporation of which the debtor is a director, officer, or  
4                   person in control;  
5                 b.     If the debtor is a corporation,  
6                   1.     A director of the debtor;  
7                   2.     An officer of the debtor;  
8                   3.     A person in control of the debtor;  
9                   4.     A partnership in which the debtor is a general partner;  
10                  5.     A general partner in a partnership in which the debtor is a  
11                  general partner; or  
12                  6.     A relative of a general partner, director, officer, or person  
13                  in control of the debtor;  
14                 c.     If the debtor is a partnership,  
15                   1.     A general partner in the debtor;  
16                   2.     A relative of a general partner in, a general partner of, or a  
17                   person in control of the debtor;  
18                   3.     Another partnership in which the debtor is a general  
19                   partner;  
20                   4.     A general partner in a partnership in which the debtor is a  
21                   general partner; or  
22                   5.     A person in control of the debtor;  
23                 d.     An affiliate, or an insider of an affiliate as if the affiliate were the  
24                   debtor; and  
25                 e.     A managing agent of the debtor.  
26         (8)     'Lien' means a charge against or an interest in property to secure  
27                 payment of a debt or performance of an obligation and includes a  
28                 security interest created by agreement, a judicial lien obtained by legal  
29                 or equitable process or proceedings, a common-law lien, or a statutory  
30                 lien.  
31         (9)     'Person' means an individual, partnership, corporation, association,  
32                 organization, government or governmental subdivision or agency,  
33                 business trust, estate, trust, or any other legal or commercial entity.  
34         (10)    'Property' means anything that may be the subject of ownership.  
35         (11)    'Relative' means an individual related by consanguinity within the third  
36                 degree as determined in accordance with G.S. 104A-1, a spouse, or an  
37                 individual related to a spouse within the third degree as so determined,  
38                 and includes an individual in an adoptive relationship within the third  
39                 degree.  
40         (12)    'Transfer' means every mode, direct or indirect, absolute or conditional,  
41                 voluntary or involuntary, of disposing of or parting with an asset or an  
42                 interest in an asset and includes payment of money, release, lease, and  
43                 creation of a lien or other encumbrance.

1           (13) 'Valid lien' means a lien that is effective against the holder of a judicial  
2           lien subsequently obtained by legal or equitable process or proceedings.

3 **"§ 39-23.2. Insolvency.**

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

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

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

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

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

17 **"§ 39-23.3. Value.**

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

22           (b) For the purposes of G.S. 39-23.4(a)(2) and G.S. 39-23.5, a person gives a  
23 reasonably equivalent value if the person acquires an interest of the debtor in an asset  
24 pursuant to a regularly conducted, nonexclusive foreclosure sale or execution of a power  
25 of sale for the acquisition or disposition of the interest of the debtor upon default under a  
26 mortgage, deed of trust, or security agreement.

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

30 **"§ 39-23.4. Transfers fraudulent as to present and future creditors.**

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

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

35           (2) Without receiving a reasonably equivalent value in exchange for the  
36 transfer or obligation, and the debtor:

37           a. Was engaged or was about to engage in a business or a  
38 transaction for which the remaining assets of the debtor were  
39 unreasonably small in relation to the business or transaction; or

40           b. Intended to incur, or believed that the debtor would incur, debts  
41 beyond the debtor's ability to pay as they became due.

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

- 1           (1)    The transfer or obligation was to an insider;
- 2           (2)    The debtor retained possession or control of the property transferred
- 3                   after the transfer;
- 4           (3)    The transfer or obligation was disclosed or concealed;
- 5           (4)    Before the transfer was made or obligation was incurred, the debtor had
- 6                   been sued or threatened with suit;
- 7           (5)    The transfer was of substantially all the debtor's assets;
- 8           (6)    The debtor absconded;
- 9           (7)    The debtor removed or concealed assets;
- 10          (8)    The value of the consideration received by the debtor was reasonably
- 11                   equivalent to the value of the asset transferred or the amount of the
- 12                   obligation incurred;
- 13          (9)    The debtor was insolvent or became insolvent shortly after the transfer
- 14                   was made or the obligation was incurred;
- 15          (10)   The transfer occurred shortly before or shortly after a substantial debt
- 16                   was incurred;
- 17          (11)   The debtor transferred the essential assets of the business to a lienor
- 18                   who transferred the assets to an insider of the debtor;
- 19          (12)   The debtor made the transfer or incurred the obligation without
- 20                   receiving a reasonably equivalent value in exchange for the transfer or
- 21                   obligation, and the debtor reasonably should have believed that the
- 22                   debtor would incur debts beyond the debtor's ability to pay as they
- 23                   became due; and
- 24          (13)   The debtor transferred the assets in the course of legitimate estate or tax
- 25                   planning.

26 **"§ 39-23.5. Transfers fraudulent as to present creditors.**

27       (a)    A transfer made or obligation incurred by a debtor is fraudulent as to a creditor

28 whose claim arose before the transfer was made or the obligation was incurred if the

29 debtor made the transfer or incurred the obligation without receiving a reasonably

30 equivalent value in exchange for the transfer or obligation, and the debtor was insolvent

31 at that time or the debtor became insolvent as a result of the transfer or obligation.

32       (b)    A transfer made by a debtor is voidable as to a creditor whose claim arose

33 before the transfer was made if the transfer was made to an insider for an antecedent debt,

34 the debtor was insolvent at that time, and the insider had reasonable cause to believe that

35 the debtor was insolvent.

36 **"§ 39-23.6. When transfer is made or obligation is incurred.**

37       For the purposes of this Article:

- 38           (1)    A transfer is made:
  - 39                   a.    With respect to an asset that is real property other than a fixture,
  - 40                           but including the interest of a seller or purchaser under a contract
  - 41                           for the sale of the asset, when the transfer is so far perfected that
  - 42                           a good-faith purchaser of the asset from the debtor against whom
  - 43                           applicable law permits the transfer to be perfected cannot acquire

1           an interest in the asset that is superior to the interest of the  
2           transferee; and

3           b.     With respect to an asset that is not real property or that is a  
4           fixture, when the transfer is so far perfected that a creditor on a  
5           simple contract cannot acquire a judicial lien otherwise than  
6           under this Article that is superior to the interest of the transferee.

7           (2)   If applicable law permits the transfer to be perfected as provided in  
8           subdivision (1) of this section and the transfer is not so perfected before  
9           the commencement of an action for relief under this Article, the transfer  
10           is deemed made immediately before the commencement of the action.

11           (3)   If applicable law does not permit the transfer to be perfected as provided  
12           in subdivision (1) of this section, the transfer is made when it becomes  
13           effective between the debtor and the transferee.

14           (4)   A transfer is not made until the debtor has acquired rights in the asset  
15           transferred.

16           (5)   An obligation is incurred:

17           a.     If oral, when it becomes effective between the parties; or

18           b.     If evidenced by a writing, when the writing executed by the  
19           obligor is delivered to or for the benefit of the obligee.

20    **"§ 39-23.7. Remedies of creditors.**

21           (a)   In an action for relief against a transfer or obligation under this Article, a  
22           creditor, subject to the limitations in G.S. 39-23.8, may obtain:

23           (1)   Avoidance of the transfer or obligation to the extent necessary to satisfy  
24           the creditor's claim;

25           (2)   An attachment or other provisional remedy against the asset transferred  
26           or other property of the transferee in accordance with the procedure  
27           prescribed by Article 35 of Chapter 1 of the General Statutes;

28           (3)   Subject to applicable principles of equity and in accordance with  
29           applicable rules of civil procedure,

30           a.     An injunction against further disposition by the debtor or a  
31           transferee, or both, of the asset transferred or of other property;

32           b.     Appointment of a receiver to take charge of the asset transferred  
33           or of other property of the transferee; or

34           c.     Any other relief the circumstances may require.

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

37    **"§ 39-23.8. Defenses, liability, and protection of transferee.**

38           (a)   A transfer or obligation is not voidable under G.S. 39-23.4(a)(1) against a  
39           person who took in good faith and for a reasonably equivalent value or against any  
40           subsequent transferee or obligee.

41           (b)   Except as otherwise provided in this section, to the extent a transfer is voidable  
42           in an action by a creditor under G.S. 39-23.7(a)(1), the creditor may recover judgment for  
43           the value of the asset transferred, as adjusted under subsection (c) of this section, or the

1 amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be  
2 entered against:

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

5 (2) Any subsequent transferee other than a good-faith transferee who took  
6 for value or from any subsequent transferee.

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

10 (d) Notwithstanding voidability of a transfer or an obligation under this Article, a  
11 good-faith transferee or obligee is entitled, to the extent of the value given the debtor for  
12 the transfer or obligation, to:

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

14 (2) Enforcement of any obligation incurred; or

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

16 (e) A transfer is not voidable under G.S. 39-23.4(a)(2) or G.S. 39-23.5 if the  
17 transfer results from:

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

20 (2) Enforcement of a security interest in compliance with Article 9 of  
21 Chapter 25 of the General Statutes, the Uniform Commercial Code.

22 (f) A transfer is not voidable under G.S. 39-23.5(b):

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

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

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

31 **"§ 39-23.9. Extinguishment of cause of action.**

32 A cause of action with respect to a fraudulent or voidable transfer or obligation under  
33 this Article is extinguished unless action is brought:

34 (1) Under G.S. 39-23.4(a)(1), within four years after the transfer was made  
35 or the obligation was incurred or, if later, within one year after the  
36 transfer or obligation was or could reasonably have been discovered by  
37 the claimant;

38 (2) Under G.S. 39-23.4(a)(2) or G.S. 39-23.5(a), within four years after the  
39 transfer was made or the obligation was incurred; or

40 (3) Under G.S. 39-23.5(b), within one year after the transfer was made or  
41 the obligation was incurred.

42 **"§ 39-23.10. Supplementary provisions.**

1        Unless displaced by the provisions of this Article, the principles of law and equity,  
2 including the law merchant and the law relating to principal and agent, estoppel, laches,  
3 fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or  
4 invalidating cause, supplement its provisions.

5 **"§ 39-23.11. Uniformity of application and construction.**

6        This act shall be applied and construed to effectuate its general purpose to make  
7 uniform the law with respect to the subject of this Article among states enacting it.

8 **"§ 39-23.12. Short title.**

9        This Article may be cited as the Uniform Fraudulent Transfer Act."

10        Section 3. The Revisor of Statutes shall cause to be printed with this act all  
11 relevant portions of the official comments to the Uniform Fraudulent Transfer Act and all  
12 explanatory comments of the drafters of this act, as the Revisor deems appropriate.

13        Section 4. This act is effective October 1, 1997, and applies to all transfers  
14 subject to this act made on or after that date.