

HOUSE BILL NO. 1135

Introduced by

Judiciary Committee

(At the request of the Commission on Uniform State Laws)

1 A BILL for an Act to create and enact sections 13-02.1-11, 13-02.1-12, and 13-02.1-13 of the
2 North Dakota Century Code, relating to the Uniform Voidable Transactions Act; to amend and
3 reenact sections 13-02.1-01, 13-02.1-02, 13-02.1-04, 13-02.1-05, 13-02.1-06, 13-02.1-07,
4 13-02.1-08, and 13-02.1-09 of the North Dakota Century Code, relating to renaming the Uniform
5 Fraudulent Transfers Act the Uniform Voidable Transactions Act and making revisions; and to
6 provide for application.

7 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

8 **SECTION 1. AMENDMENT.** Section 13-02.1-01 of the North Dakota Century Code is
9 amended and reenacted as follows:

10 **13-02.1-01. Definitions.**

11 As used in this chapter:

12 1. "Affiliate" means:

13 a. A person ~~who~~that directly or indirectly owns, controls, or holds with power to vote,
14 twenty percent or more of the outstanding voting securities of the debtor, other
15 than a person ~~who~~that holds the securities as:

16 (1) As a fiduciary or agent without sole discretionary power to vote the
17 securities; or ~~solely~~

18 (2) Solely to secure a debt, if the person has not in fact exercised the power to
19 vote;

20 b. A corporation or a limited liability company twenty percent or more of whose
21 outstanding voting securities are directly or indirectly owned, controlled, or held
22 with power to vote, by the debtor, or by a person ~~who~~that directly or indirectly
23 owns, controls, or holds with power to vote, twenty percent or more of the

1 outstanding voting securities of the debtor, other than a person ~~whethat~~ holds the
2 securities as:

3 (1) As a fiduciary or agent without sole discretionary power to vote the
4 securities; or ~~solely~~

5 (2) Solely to secure a debt, if the person has not in fact exercised the power to
6 vote;

7 c. A person whose business is operated by the debtor under a lease or other
8 agreement, or a person substantially all of whose assets are controlled by the
9 debtor; or

10 d. A person ~~whethat~~ operates the debtor's business under a lease or other
11 agreement or controls substantially all of the debtor's assets.

12 2. "Asset" means property of a debtor, excluding property to the extent it is encumbered
13 by a valid lien, property to the extent it is generally exempt under nonbankruptcy law,
14 or an interest in property held in tenancy by the entireties to the extent it is not subject
15 to process by a creditor holding a claim against only one tenant.

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

19 4. "Creditor" means a person ~~whethat~~ has a claim.

20 5. "Debt" means liability on a claim.

21 6. "Debtor" means a person ~~whethat~~ is liable on a claim.

22 7. "Electronic" means relating to technology having electrical, digital, magnetic, wireless,
23 optical, electromagnetic, or similar capabilities.

24 8. "Insider" ~~means~~includes:

25 a. If the debtor is an individual, ~~an "insider" includes a:~~

26 (1) A relative of the debtor or of a general partner of the debtor, ~~a;~~

27 (2) A partnership in which the debtor is a general partner, ~~a;~~

28 (3) A general partner in a partnership ~~in which the debtor is a general partner,~~
29 as described in paragraph 2; or

- 1 ~~8-9.~~ "Lien" means a charge against or an interest in property to secure payment of a debt
2 or performance of an obligation, and includes a security interest created by
3 agreement, a judicial lien, a common-law lien, or a statutory lien.
- 4 10. "Organization" means a person other than an individual.
- 5 ~~9-11.~~ "Person" means an individual, ~~partnership, corporation, limited liability company,~~
6 ~~association, organization~~estate, business or nonprofit entity, public corporation,
7 government or governmental subdivision or agency, ~~business trust, estate, trust or~~
8 instrumentality, or any other legal or commercial entity.
- 9 ~~10-12.~~ "Property" means anything that may be the subject of ownership.
- 10 13. "Record" means information that is inscribed on a tangible medium or that is stored in
11 an electronic or other medium and is retrievable in perceivable form.
- 12 ~~11-14.~~ "Relative" means an individual related by consanguinity within the third degree as
13 determined by the common law, a spouse, or an individual related to a spouse within
14 the third degree as so determined, and includes an individual in an adoptive
15 relationship within the third degree.
- 16 15. "Sign" means, with present intent to authenticate or adopt a record:
17 a. To execute or adopt a tangible symbol; or
18 b. To attach to or logically associate with the record an electronic symbol, sound, or
19 process.
- 20 ~~12-16.~~ "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or
21 involuntary, of disposing of or parting with an asset or an interest in an asset, and
22 includes payment of money, release, lease, license, and creation of a lien or other
23 encumbrance.
- 24 ~~13-17.~~ "Valid lien" means a lien that is effective against the holder of a judicial lien
25 subsequently obtained by legal process or proceedings.

26 **SECTION 2. AMENDMENT.** Section 13-02.1-02 of the North Dakota Century Code is
27 amended and reenacted as follows:

28 **13-02.1-02. Insolvency.**

- 29 1. A debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater than
30 ~~all the sum~~ of the debtor's assets ~~at a fair valuation~~.

1 2. A debtor ~~wh~~that is is generally not paying the debtor's debts as they become due
2 other than as a result of a bona fide dispute is presumed to be insolvent. A partnership
3 is insolvent if the sum of the partnership's debts is greater than the aggregate, at a fair
4 valuation, of all of the partnership's assets and the sum of the excess of the value of
5 each general partner's nonpartnership assets over the partner's nonpartnership
6 debts. The presumption imposes on the party against which the presumption is directed
7 the burden of proving that the nonexistence of insolvency is more probable than its
8 existence.

9 ~~2.3.~~ Assets under this section do not include property that has been transferred,
10 concealed, or removed with intent to hinder, delay, or defraud creditors or that has
11 been transferred in a manner making the transfer voidable under this chapter.

12 ~~3.4.~~ Debts under this section do not include an obligation to the extent it is secured by a
13 valid lien on property of the debtor not included as an asset.

14 **SECTION 3. AMENDMENT.** Section 13-02.1-04 of the North Dakota Century Code is
15 amended and reenacted as follows:

16 **13-02.1-04. ~~Transfers fraudulent~~Transfer or obligation voidable as to present andor**
17 **~~future creditors~~creditor.**

- 18 1. A transfer made or obligation incurred by a debtor is ~~fraudulent~~voidable as to a
19 creditor, whether the creditor's claim arose before or after the transfer was made or
20 the obligation was incurred, if the debtor made the transfer or incurred the obligation:
- 21 a. With actual intent to hinder, delay, or defraud any creditor of the debtor; or
 - 22 b. Without receiving a reasonably equivalent value in exchange for the transfer or
23 obligation, and the debtor was engaged or was about to engage in a business or
24 a transaction for which the remaining assets of the debtor were unreasonably
25 small in relation to the business or transaction or the debtor intended to incur, or
26 believed or reasonably should have believed that the debtor would incur, debts
27 beyond the debtor's ability to pay as they became due.
- 28 2. In determining actual intent under subdivision a of subsection 1, consideration may be
29 given, among other factors, to whether:
- 30 a. The transfer or obligation was to an insider;

- 1 b. The debtor retained possession or control of the property transferred after the
- 2 transfer;
- 3 c. The transfer or obligation was disclosed or concealed;
- 4 d. Before the transfer was made or obligation was incurred, the debtor had been
- 5 sued or threatened with suit;
- 6 e. The transfer was of substantially all the debtor's assets;
- 7 f. The debtor absconded;
- 8 g. The debtor removed or concealed assets;
- 9 h. The value of the consideration received by the debtor was reasonably equivalent
- 10 to the value of the asset transferred or the amount of the obligation incurred;
- 11 i. The debtor was insolvent or became insolvent shortly after the transfer was made
- 12 or the obligation was incurred;
- 13 j. The transfer occurred shortly before or shortly after a substantial debt was
- 14 incurred; and
- 15 k. The debtor transferred the essential assets of the business to a lienor ~~wh~~that
- 16 transferred the assets to an insider of the debtor.

17 3. A creditor making a claim for relief under subsection 1 has the burden of proving the
18 elements of the claim for relief by a preponderance of the evidence.

19 **SECTION 4. AMENDMENT.** Section 13-02.1-05 of the North Dakota Century Code is
20 amended and reenacted as follows:

21 **13-02.1-05. ~~Transfers fraudulent~~Transfer or obligation voidable as to present**
22 **~~creditors~~creditor.**

- 23 1. A transfer made or obligation incurred by a debtor is ~~fraudulent~~voidable as to a creditor
- 24 whose claim arose before the transfer was made or the obligation was incurred if the
- 25 debtor made the transfer or incurred the obligation without receiving a reasonably
- 26 equivalent value in exchange for the transfer or obligation and the debtor was
- 27 insolvent at that time or the debtor became insolvent as a result of the transfer or
- 28 obligation.
- 29 2. A transfer made by a debtor is ~~fraudulent~~voidable as to a creditor whose claim arose
- 30 before the transfer was made if the transfer was made to an insider for an antecedent

1 debt, the debtor was insolvent at that time, and the insider had reasonable cause to
2 believe that the debtor was insolvent.

3 3. Subject to subsection 2 of section 13-02.1-02, a creditor making a claim for relief
4 under subsection 1 or 2 has the burden of proving the elements of the claim for relief
5 by a preponderance of the evidence.

6 **SECTION 5. AMENDMENT.** Section 13-02.1-06 of the North Dakota Century Code is
7 amended and reenacted as follows:

8 **13-02.1-06. When transfer is made or obligation is incurred.**

9 For the purposes of this chapter:

- 10 1. A transfer is made with respect to an asset that is real property other than a fixture, but
11 including the interest of a seller or purchaser under a contract for the sale of the asset,
12 when the transfer is so far perfected that a good-faith purchaser of the asset from the
13 debtor against ~~whom~~which applicable law permits the transfer to be perfected cannot
14 acquire an interest in the asset that is superior to the interest of the transferee. A
15 transfer is made with respect to an asset that is not real property or that is a fixture,
16 when the transfer is so far perfected that a creditor on a simple contract cannot
17 acquire a judicial lien otherwise than under this chapter that is superior to the interest
18 of the transferee.
- 19 2. If applicable law permits the transfer to be perfected as provided in subsection 1 and
20 the transfer is not so perfected before the commencement of an action for relief under
21 this chapter, the transfer is deemed to have been made immediately before the
22 commencement of the action.
- 23 3. If applicable law does not permit the transfer to be perfected as provided in
24 subsection 1, the transfer is made when it becomes effective between the debtor and
25 the transferee.
- 26 4. A transfer is not made until the debtor has acquired rights in the asset transferred.
- 27 5. An oral obligation is incurred when it becomes effective between the parties. An
28 obligation evidenced by a ~~writing~~record is incurred when the ~~writing-executed~~record
29 signed by the obligor is delivered to or for the benefit of the obligee.

30 **SECTION 6. AMENDMENT.** Section 13-02.1-07 of the North Dakota Century Code is
31 amended and reenacted as follows:

1 **13-02.1-07. Remedies of creditors creditor.**

2 1. In an action for relief against a transfer or obligation under this chapter, a creditor,
3 subject to the limitations in section 13-02.1-08, may obtain:

4 a. Avoidance of the transfer or obligation to the extent necessary to satisfy the
5 creditor's claim;

6 b. Attachment or other provisional remedy against the asset transferred or other
7 property of the transferee ~~in accordance with the procedure prescribed by~~
8 ~~chapter 32-08.1~~ if available under applicable law; or

9 c. Subject to applicable principles of equity and in accordance with applicable rules
10 of civil procedure, ~~an~~:

11 (1) An injunction against further disposition by the debtor or a transferee, or
12 both, of the asset transferred or of other property, ~~an appointment~~;

13 (2) Appointment of a receiver to take charge of the asset transferred or of other
14 property of the transferee; ~~or any~~

15 (3) Any other relief the circumstances may require.

16 2. If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the
17 court so orders, may levy execution on the asset transferred or its proceeds.

18 **SECTION 7. AMENDMENT.** Section 13-02.1-08 of the North Dakota Century Code is
19 amended and reenacted as follows:

20 **13-02.1-08. Defenses - Liability - Protection of transferee or obligee.**

21 1. A transfer or obligation is not voidable under subdivision a of subsection 1 of section
22 13-02.1-04 against a person ~~wh~~that took in good faith and for a reasonably
23 equivalent value given the debtor or against any subsequent transferee or obligee.

24 2. To the extent a transfer is avoidable in an action by the creditor under subdivision a of
25 subsection 1 of section 13-02.1-07, the following rules apply:

26 a. Except as otherwise provided in this section, ~~to the extent a transfer is voidable in~~
27 ~~an action by a creditor under subdivision a of subsection 1 of section 13-02.1-07,~~
28 the creditor may recover judgment for the value of the asset transferred, as
29 adjusted under subsection 3, or the amount necessary to satisfy the creditor's
30 claim, whichever is less. The judgment may be entered against the;

- 1 (1) The first transferee of the asset or the person for whose benefit the transfer
2 was made; or any subsequent transferee
- 3 (2) An immediate or mediate transferee of the first transferee, other than a:
4 (a) A good-faith transferee who~~that~~ took for value; or from any-
5 subsequent transferee
- 6 (b) An immediate or mediate good-faith transferee of a person described
7 in subparagraph a.
- 8 b. Recovery pursuant to subdivision a of subsection 1 of section 13-02.1-07 or
9 subsection 2 of section 13-02.1-07 of or from the asset transferred or its
10 proceeds, by levy or otherwise, is available only against a person described in
11 paragraph 1 or 2 of subdivision a.
- 12 3. If the judgment under subsection 2 is based upon the value of the asset transferred,
13 the judgment must be for an amount equal to the value of the asset at the time of the
14 transfer, subject to adjustment as the equities may require.
- 15 4. Notwithstanding voidability of a transfer or an obligation under this chapter, a
16 good-faith transferee or obligee is entitled, to the extent of the value given the debtor
17 for the transfer or obligation, to a:
- 18 a. A lien on or a right to retain any~~an~~ interest in the asset transferred; enforcement;
19 b. Enforcement of any~~an~~ obligation incurred;; or a
20 c. A reduction in the amount of the liability on the judgment.
- 21 5. A transfer is not voidable under subdivision b of subsection 1 of section 13-02.1-04 or
22 section 13-02.1-05 if the transfer results from termination of a lease upon default by
23 the debtor when the termination is pursuant to the lease and applicable law or
24 enforcement of a security interest in compliance with chapter 41-09, other than
25 acceptance of collateral in full or partial satisfaction of the obligation it secures.
- 26 6. A transfer is not voidable under subsection 2 of section 13-02.1-05:
- 27 a. To the extent the insider gave new value to or for the benefit of the debtor after
28 the transfer was made unless, except to the extent the new value was secured by
29 a valid lien;
- 30 b. If made in the ordinary course of business or financial affairs of the debtor and
31 the insider; or

1 c. If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer
2 secured present value given for that purpose as well as an antecedent debt of
3 the debtor.

4 7. The following rules determine the burden of proving matters referred to in this section:

5 a. A party that seeks to invoke subsection 1, 4, 5, or 6 has the burden of proving the
6 applicability of that subsection.

7 b. Except as otherwise provided in subdivision c or d, the creditor has the burden of
8 proving each applicable element of subsection 2 or 3.

9 c. The transferee has the burden of proving the applicability to the transferee of
10 subparagraph a or b of paragraph 2 of subdivision a of subsection 2.

11 d. A party that seeks adjustment under subsection 3 has the burden of proving the
12 adjustment.

13 8. The standard of proof required to establish matters referred to in this section is
14 preponderance of the evidence.

15 **SECTION 8. AMENDMENT.** Section 13-02.1-09 of the North Dakota Century Code is
16 amended and reenacted as follows:

17 **13-02.1-09. Extinguishment of claim for relief.**

18 A claim for relief with respect to a ~~fraudulent~~ transfer or obligation under this chapter is
19 extinguished unless action is brought:

20 1. Under subdivision a of subsection 1 of section 13-02.1-04, ~~withi~~not later than four
21 years after the transfer was made or the obligation was incurred or, if later, ~~withi~~not
22 later than one year after the transfer or obligation was or could reasonably have been
23 discovered by the claimant;

24 2. Under subdivision b of subsection 1 of section 13-02.1-04 or subsection 1 of section
25 13-02.1-05, ~~withi~~not later than four years after the transfer was made or the
26 obligation was incurred; or

27 3. Under subsection 2 of section 13-02.1-05, ~~withi~~not later than one year after the
28 transfer was made ~~or the obligation was incurred.~~

29 **SECTION 9.** Section 13-02.1-11 of the North Dakota Century Code is created and enacted
30 as follows:

1 **13-02.1-11. Governing law.**

2 1. In this section, the following rules determine a debtor's location:

3 a. A debtor who is an individual is located at the individual's principal residence.

4 b. A debtor that is an organization and has only one place of business is located at
5 its place of business.

6 c. A debtor that is an organization and has more than one place of business is
7 located at its chief executive office.

8 2. A claim for relief in the nature of a claim for relief under this chapter is governed by the
9 local law of the jurisdiction in which the debtor is located when the transfer is made or
10 the obligation is incurred.

11 **SECTION 10.** Section 13-02.1-12 of the North Dakota Century Code is created and enacted
12 as follows:

13 **13-02.1-12. Application to series organization.**

14 1. In this section:

15 a. "Protected series" means an arrangement, however denominated, created by a
16 series organization that, pursuant to the law under which the series organization
17 is organized, has the characteristics set forth in subdivision b.

18 b. "Series organization" means an organization that, pursuant to the law under
19 which it is organized, has the following characteristics:

20 (1) The organic record of the organization provides for creation by the
21 organization of one or more protected series, however denominated, with
22 respect to specified property of the organization, and for records to be
23 maintained for each protected series that identify the property of or
24 associated with the protected series.

25 (2) Debt incurred or existing with respect to the activities of, or property of or
26 associated with, a particular protected series is enforceable against the
27 property of or associated with the protected series only, and not against the
28 property of or associated with the organization or other protected series of
29 the organization.

30 (3) Debt incurred or existing with respect to the activities or property of the
31 organization is enforceable against the property of the organization only.

1 and not against the property of or associated with a protected series of the
2 organization.

3 2. A series organization and each protected series of the organization is a separate
4 person for purposes of this chapter, even if for other purposes a protected series is not
5 a person separate from the organization or other protected series of the organization.

6 **SECTION 11.** Section 13-02.1-13 of the North Dakota Century Code is created and enacted
7 as follows:

8 **13-02.1-13. Relation to Electronic Signatures in Global and National Commerce Act.**

9 This chapter modified, limits, or supersedes the federal Electronic Signatures in Global and
10 National Commerce Act [Pub. L. 106-229; 114 Stat. 464; 15 U.S.C. 7001 et seq.], but does not
11 modify, limit, or supersede section 101(c) of that Act [15 U.S.C. 7001(c)], or authorize electronic
12 delivery of any of the notices described in section 103(b) of that Act [15 U.S.C. 7003(b)].

13 **SECTION 12. APPLICATION.** This Act applies to a transfer made or obligation incurred on
14 or after the effective date of this Act. This Act does not apply to a transfer made or obligation
15 incurred before the effective date of this Act. This Act does not apply to a right of action that has
16 accrued before the effective date of this Act. For the foregoing purposes a transfer is made and
17 an obligation is incurred at the time provided in section 5 of this Act.