



Michigan Enacts the New Uniform Voidable Transactions Act

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On July 16, 2014, the Uniform Law Commission (the "Commission") approved a series of changes to the Uniform Fraudulent Transfer Act (the "UFTA"). The UFTA had previously been adopted by most states in the country, including Michigan. The Commission's amendments included changing the name of the law from the UFTA to the Uniform Voidable Transactions Act (the "UVTA").

On January 6, 2017, Governor Snyder signed into law Public Act 552, which replaced the UFTA with the UVTA in Michigan. 14 states have now enacted the UVTA. The UVTA is not a wholesale rewrite of the UFTA, but it does significantly amend prior law. Key changes in the UVTA are aimed at (1) clarifying language and terms used in the statute to better conform the UVTA with with other statutes such as the Bankruptcy Code and Uniform Commercial Code (the "UCC"), (2) addressing choice of law issues to make the law governing a particular transaction more clear and predictable for the parties, (3) providing litigants with clear evidentiary standards, and (4) clarifying defenses to avoidance.

Some of the noteworthy changes are explained below.

NEW LANGUAGE

Throughout the UVTA, the term "fraudulent transfer" is replaced with the term "voidable transaction." The use of the word "fraudulent" in the UFTA was leading to errors in which courts would apply the heightened pleading requirement for "fraud" to complaints alleging the existence of a fraudulent transfer. The new UVTA more clearly addresses the concept of "constructive fraud," which allows for the avoidance of transfers made or of obligations incurred by an insolvent debtor in exchange for less than reasonably equivalent value. The words "fraud" and "fraudulent" don't exist in the UVTA.

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CHOICE OF LAW

The UVTA addresses the issue of “choice of law” by making governing law consistent with how the issue is dealt with under Article 9 of the UCC. Specifically, the law of a business debtor’s place of business or, if business is conducted in more than one state, the place in which the business had its chief executive office, at the time that a transfer was made, applies to suits brought under the UVTA. The practical impact of this provision is that parties who conduct business with a debtor should understand the potential voidability of the transaction at issue under the laws of the jurisdiction where the debtor is based.

BURDEN OF PROOF

The UVTA also clarifies the burden of proof required to support a claim. The UVTA provides that the creditor-claimant has the burden to establish its claim by a “preponderance of the evidence,” rather than the higher “clear and convincing” standard.

In addition, the UFTA provided a rebuttable presumption that a debtor is insolvent if it fails to pay debts as they mature. The UVTA refines this presumption in two meaningful ways. First, the UVTA makes clear that, consistent with the Bankruptcy Code (11 U.S.C. § 303(h)(1)), nonpayments of debts that are the subject of a “bona fide dispute” are not presumptive of insolvency. Second, the UVTA expressly provides that the burden to rebut this presumption rests with the debtor, which is consistent with the Uniform Rules of Evidence.

DEFENSES

The UFTA protects from avoidance transfers that resulted from the enforcement of a security interest in accordance with Article 9 of the UCC. However, the UVTA carves out “strict foreclosures” from this defense to a voidable transaction action. “Strict foreclosures” are consented to by a debtor, post-default, and involve the secured party accepting collateral in full or partial satisfaction of the obligations secured by the collateral, without a public sale or judicial foreclosure. Secured creditors may, however, prevent avoidance by showing that a foreclosure sale was conducted in good faith and in a commercially reasonable manner.

If you have any questions about Michigan’s enactment of the UVTA, please contact Scott Chernich at 517.371.8133 or schernich@fosterswift.com.