

ACT #2018-163

1 SB152
2 188961-2
3 By Senator Smitherman
4 RFD: Banking and Insurance
5 First Read: 11-JAN-18



1 SB152

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4 ENROLLED, An Act,

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To adopt the Alabama Uniform Voidable Transactions Act; to establish procedures by which a creditor may reach assets a debtor has transferred to another person in order to prevent the assets from being used to settle a debt; and to specify that the act would apply to transactions that occur after January 1, 2019.

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BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

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Section 1. Chapter 9B, commencing with 8-9B-1, is added to Title 8 of the Code of Alabama 1975, as follows:

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Chapter 9B. UNIFORM VOIDABLE TRANSACTIONS ACT.

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8-9B-1. SHORT TITLE. This chapter may be cited as the Alabama Uniform Voidable Transactions Act.

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8-9B-2. DEFINITIONS. As used in this chapter:

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(1) "Affiliate" means:

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(i) a person that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person that holds the securities:

23

(A) as a fiduciary or agent without sole

24

discretionary power to vote the securities; or

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

3 (ii) a corporation 20 percent or more of whose
4 outstanding voting securities are directly or indirectly
5 owned, controlled, or held, with power to vote, by the debtor
6 or a person that directly or indirectly owns, controls, or
7 holds, with power to vote, 20 percent or more of the
8 outstanding voting securities of the debtor, other than a
9 person that holds the securities:

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

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

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

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

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

23 (i) property to the extent it is encumbered by a
24 valid lien;

1 (ii) property to the extent it is generally exempt
2 under nonbankruptcy law; or

3 (iii) an interest in property held in tenancy in
4 common for life with cross contingent remainder to the
5 survivor in fee to the extent it is not subject to process by
6 a creditor holding a claim against only one tenant.

7 (3) "Claim," except as used in "claim for relief,"
8 means a right to payment, whether or not the right is reduced
9 to judgment, liquidated, unliquidated, fixed, contingent,
10 matured, unmatured, disputed, undisputed, legal, equitable,
11 secured, or unsecured and specifically shall include the
12 nonpayment of child support pursuant to a court order.

13 (4) "Creditor" means a person that has a claim.

14 (5) "Debt" means liability on a claim.

15 (6) "Debtor" means a person that is liable on a
16 claim.

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

20 (8) "Insider" includes: (i) if the debtor is an
21 individual:

22 (A) a relative of the debtor or of a general partner
23 of the debtor;

24 (B) a partnership in which the debtor is a general
25 partner;

- 1 (C) a general partner in a partnership described in
2 clause (B); or
- 3 (D) a corporation of which the debtor is a director,
4 officer, or person in control;
- 5 (ii) if the debtor is a corporation:
- 6 (A) a director of the debtor;
- 7 (B) an officer of the debtor;
- 8 (C) a person in control of the debtor;
- 9 (D) a partnership in which the debtor is a general
10 partner;
- 11 (E) a general partner in a partnership described in
12 clause (D); or
- 13 (F) a relative of a general partner, director,
14 officer, or person in control of the debtor;
- 15 (iii) if the debtor is a partnership:
- 16 (A) a general partner in the debtor;
- 17 (B) a relative of a general partner in, a general
18 partner of, or a person in control of the debtor;
- 19 (C) another partnership in which the debtor is a
20 general partner;
- 21 (D) a general partner in a partnership described in
22 clause (C); or
- 23 (E) a person in control of the debtor;
- 24 (iv) an affiliate, or an insider of an affiliate as
25 if the affiliate were the debtor; and

1 (v) a managing agent of the debtor.

2 (9) "Lien" means a charge against or an interest in
3 property to secure payment of a debt or performance of an
4 obligation, and includes a security interest created by
5 agreement, a judicial lien obtained by legal or equitable
6 process or proceedings, a common-law lien, or a statutory
7 lien.

8 (10) "Organization" means a person other than an
9 individual.

10 (11) "Person" means an individual, estate,
11 partnership, association, trust, business or nonprofit entity,
12 public corporation, government or governmental subdivision,
13 agency, or instrumentality, or other legal or commercial
14 entity.

15 (12) "Property" means both real and personal
16 property, whether tangible or intangible, and any interest in
17 property whether legal or equitable and includes anything that
18 may be the subject of ownership.

19 (13) "Record" means information that is inscribed on
20 a tangible medium or that is stored in an electronic or other
21 medium and is retrievable in perceivable form.

22 (14) "Relative" means an individual related by
23 consanguinity within the third degree as determined by the
24 common law, a spouse, or an individual related to a spouse
25 within the third degree as so determined, and includes an

1 individual in an adoptive relationship within the third
2 degree.

3 (15) "Sign" means, with present intent to
4 authenticate or adopt a record:

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

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

8 (16) "Transfer" means every mode, direct or
9 indirect, absolute or conditional, voluntary or involuntary,
10 of disposing of or parting with an asset or an interest in an
11 asset, and includes payment of money, release, lease, license,
12 and creation of a lien or other encumbrance. The term also
13 includes a transfer made pursuant to a settlement whether or
14 not incorporated into a court order.

15 (17) "Valid lien" means a lien that is effective
16 against the holder of a judicial lien subsequently obtained by
17 legal or equitable process or proceedings.

18 8-9B-3. INSOLVENCY.

19 (a) A debtor is insolvent if the sum of the debtor's
20 debts at a fair valuation is greater than the sum of the
21 debtor's assets at a fair valuation.

22 (b) A debtor that is generally not paying the
23 debtor's debts as they become due other than as a result of a
24 bona fide dispute is presumed to be insolvent. The
25 presumption imposes on the party against which the presumption

1 is directed the burden of proving that the nonexistence of
2 insolvency is more probable than its existence.

3 (c) Assets under this section do not include
4 property that has been transferred, concealed, or removed with
5 intent to hinder, delay, or defraud creditors or that has been
6 transferred in a manner making the transfer voidable under
7 this chapter.

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

11 8-9B-4. VALUE.

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

18 (b) For the purposes of Section 8-9B-5 (a) (2) and
19 Section 8-9B-6, a person gives a reasonably equivalent value
20 if the person acquires an interest of the debtor in an asset
21 pursuant to a regularly conducted, noncollusive foreclosure
22 sale or execution of a power of sale for the acquisition or
23 disposition of the interest of the debtor upon default under a
24 mortgage, deed of trust, or security agreement.

1 (c) A transfer is made for present value if the
2 exchange between the debtor and the transferee is intended by
3 them to be contemporaneous and is in fact substantially
4 contemporaneous.

5 8-9B-5. TRANSFER VOIDABLE AS TO PRESENT OR FUTURE
6 CREDITOR.

7 (a) A transfer made by a debtor is voidable as to a
8 creditor, whether the creditor's claim arose before or after
9 the transfer was made, if the debtor made the transfer:

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

12 (2) without receiving a reasonably equivalent value
13 in exchange for the transfer, and the debtor:

14 (i) was engaged or was about to engage in a business
15 or a transaction for which the remaining assets of the debtor
16 were unreasonably small in relation to the business or
17 transaction; or

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

21 (b) In determining actual intent under
22 subsection (a) (1), consideration may be given, among other
23 factors, to whether:

24 (1) the transfer was to an insider;

1 (2) the debtor retained possession or control of the
2 property transferred after the transfer;

3 (3) the transfer was concealed or not disclosed;

4 (4) before the transfer was made, the debtor had
5 been sued or threatened with suit;

6 (5) the transfer was of substantially all the
7 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
11 debtor was not the reasonably equivalent to the value of the
12 asset transferred;

13 (9) the debtor was insolvent or became insolvent
14 shortly after the transfer was made;

15 (10) the transfer occurred shortly before or shortly
16 after a substantial debt was incurred; and

17 (11) the debtor transferred the essential assets of
18 the business to a lienor that transferred the assets to an
19 insider of the debtor.

20 (c) A creditor making a claim for relief under
21 subsection (a) has the burden of proving the elements of the
22 claim for relief by a preponderance of the evidence.

23 8-9B-6. TRANSFER VOIDABLE AS TO PRESENT CREDITOR.

24 (a) A transfer made by a debtor is voidable as to a
25 creditor whose claim arose before the transfer was made if the

1 debtor made the transfer without the debtor receiving a
2 reasonably equivalent value in exchange for the transfer and
3 the debtor was insolvent at that time or the debtor became
4 insolvent as a result of the transfer.

5 (b) A transfer made by a debtor is voidable as to a
6 creditor whose claim arose before the transfer was made if the
7 transfer was made to an insider for an antecedent debt, the
8 debtor was insolvent at that time, and the insider had
9 reasonable cause to believe that the debtor was insolvent.

10 (c) Subject to Section 8-9B-3(b), a creditor making
11 a claim for relief under subsection (a) or (b) has the burden
12 of proving the elements of the claim for relief by a
13 preponderance of the evidence.

14 8-9B-7. WHEN TRANSFER IS MADE. For the purposes of
15 this chapter:

16 (1) a transfer is made:

17 (i) with respect to an asset that is real property
18 other than a fixture, but including the interest of a seller
19 or purchaser under a contract for the sale of the asset, when
20 the transfer is so far perfected that a good-faith purchaser
21 of the asset from the debtor against which applicable law
22 permits the transfer to be perfected cannot acquire an
23 interest in the asset that is superior to the interest of the
24 transferee; and

1 (ii) with respect to an asset that is not real
2 property or that is a fixture, when the transfer is so far
3 perfected that a creditor on a simple contract cannot acquire
4 a judicial lien otherwise than under this chapter that is
5 superior to the interest of the transferee;

6 (2) if applicable law permits the transfer to be
7 perfected as provided in paragraph (1) and the transfer is not
8 so perfected before the commencement of an action for relief
9 under this chapter, the transfer is deemed made immediately
10 before the commencement of the action;

11 (3) if applicable law does not permit the transfer
12 to be perfected as provided in paragraph (1), the transfer is
13 made when it becomes effective between the debtor and the
14 transferee; and

15 (4) except with respect to personal property and
16 fixtures where a lender has perfected its security interest in
17 such property in which event paragraph (1)(i) shall apply, a
18 transfer is not made until the debtor has acquired rights in
19 the asset transferred.

20 8-9B-8. REMEDIES OF CREDITOR.

21 (a) In an action for relief against a transfer under
22 this chapter, a creditor, subject to the limitations in
23 Section 8-9B-9, may obtain:

24 (1) avoidance of the transfer to the extent
25 necessary to satisfy the creditor's claim;

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

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

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

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

11 (iii) any other relief the circumstances may
12 require.

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

16 8-9B-9. DEFENSES, LIABILITY, AND PROTECTION OF
17 TRANSFEREE.

18 (a) A transfer is not voidable under
19 Section 8-9A-5(a)(1) against a person that took in good faith
20 and for a reasonably equivalent value given the debtor or
21 against any subsequent transferee that took in good faith.

22 (b) To the extent a transfer is avoidable in an
23 action by a creditor under Section 8-9B-8(a)(1), the following
24 rules apply:

1 (1) Except as otherwise provided in this section,
2 the creditor may recover judgment for the value of the asset
3 transferred, as adjusted under subsection (c), or the amount
4 necessary to satisfy the creditor's claim, whichever is less.
5 The judgment may be entered against:

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

8 (ii) any subsequent transferee, other than:

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

10 (B) a subsequent transferee of a person described in
11 clause (A).

12 (2) Recovery pursuant to Section 8-9B-8(a)(1) or (b)
13 of or from the asset transferred or its proceeds, by levy or
14 otherwise, is available only against a person described in
15 paragraph (1)(i) or (ii).

16 (c) If the judgment under subsection (b) is based
17 upon the value of the asset transferred, the judgment must be
18 for an amount equal to the value of the asset at the time of
19 the transfer, subject to adjustment as the equities may
20 require.

21 (d) Notwithstanding voidability of a transfer under
22 this chapter, a good-faith transferee is entitled, to the
23 extent of the value given the debtor for the transfer, to:

24 (1) a lien on or a right to retain an interest in
25 the asset transferred; or

1 (2) a reduction in the amount of the liability on
2 the judgment.

3 (e) A transfer is not voidable under
4 Section 8-9B-5(a)(2) or Section 8-9B-6 if the transfer results
5 from:

6 (1) termination of a lease upon default by the
7 debtor when the termination is pursuant to the lease and
8 applicable law;

9 (2) enforcement of a security interest in compliance
10 with Article 9 of the Uniform Commercial Code, Article 9A,
11 commencing with Section 7-9A-1, of Title 7, other than
12 acceptance of collateral in full or partial satisfaction of
13 the obligation it secures; or

14 (3) a regularly conducted, noncollusive foreclosure
15 sale or execution of a power of sale for the acquisition or
16 disposition of the interest of the debtor under a mortgage,
17 deed of trust, or security agreement.

18 (f) A transfer is not voidable under
19 Section 8-9B-6(b):

20 (1) to the extent the insider gave new value to or
21 for the benefit of the debtor after the transfer was made,
22 except to the extent the new value was secured by a valid
23 lien;

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

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

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

7 (1) A party that seeks to invoke subsection (a),
8 (d), (e), or (f) has the burden of proving the applicability
9 of that subsection.

10 (2) Except as otherwise provided in paragraphs (3)
11 and (4), the creditor has the burden of proving each
12 applicable element of subsection (b) or (c).

13 (3) The transferee has the burden of proving the
14 applicability to the transferee of subsection (b)(1)(ii)(A) or
15 (B).

16 (4) A party that seeks adjustment under
17 subsection (c) has the burden of proving the adjustment.

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

21 8-9B-10. EXTINGUISHMENT OF CLAIM FOR RELIEF.

22 A claim for relief with respect to a transfer under
23 this chapter is extinguished unless action is brought:

24 (a) under Section 8-9B-5(a)(1), within ten years
25 after the transfer of real property was made;

1 (b) under Section 8-9B-5(a)(1), within six years
2 after the transfer of personal property was made;

3 (c) under Section 8-9B-5(a)(2) or 8-9B-6(a), within
4 four years after the transfer was made when the action is
5 brought by a creditor whose claim arose before the transfer
6 was made;

7 (d) under Section 8-9B-5(a)(2), within one year
8 after the transfer was made when the action is brought by a
9 creditor whose claim arose after the transfer was made; or

10 (e) under Section 8-9B-6(b), within one year after
11 the transfer was made.

12 8-9B-11. GOVERNING LAW.

13 (a) In this section, the following rules determine a
14 debtor's location:

15 (1) A debtor who is an individual is located at the
16 individual's principal residence.

17 (2) A debtor that is an organization and has only
18 one place of business is located at its place of business.

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

22 (b) A claim for relief in the nature of a claim for
23 relief under this chapter is governed by the local law of the
24 jurisdiction in which the debtor is located when the transfer
25 is made.

1 8-9B-12. APPLICATION TO SERIES ORGANIZATION.

2 (a) In this section:

3 (1) "Series" means an arrangement, however
4 denominated, created by a series organization that, pursuant
5 to the law under which the series organization is organized,
6 has the characteristics set forth in paragraph (2).

7 (2) "Series organization" means an organization
8 that, pursuant to the law under which it is organized, has the
9 following characteristics:

10 (i) The public organic record of the organization
11 provides for creation by the organization of one or more
12 series, however denominated, with respect to specified
13 property of the organization, and for records to be maintained
14 for each series that identify the property of or associated
15 with the series.

16 (ii) Debt incurred or existing with respect to the
17 activities of, or property of or associated with, a particular
18 series is enforceable against the property of or associated
19 with the series only, and not against the property of or
20 associated with the organization or associated with any other
21 series of the organization.

22 (iii) Debt incurred or existing with respect to the
23 activities or property of the organization is enforceable
24 against the property of the organization only, and not against

1 the property of or associated with a series of the
2 organization.

3 (b) A series organization and each series of the
4 organization is a separate person for purposes of this
5 chapter, even if for other purposes a series is not a person
6 separate from the organization or other series of the
7 organization.

8 8-9B-13. SUPPLEMENTARY PROVISIONS. Unless displaced
9 by the provisions of this chapter, the principles of law and
10 equity, including the law merchant and the law relating to
11 principal and agent, estoppel, laches, fraud,
12 misrepresentation, duress, coercion, mistake, insolvency, or
13 other validating or invalidating cause, supplement its
14 provisions.

15 8-9B-14. UNIFORMITY OF APPLICATION AND CONSTRUCTION.
16 This chapter shall be applied and construed to effectuate its
17 general purpose to make uniform the law with respect to the
18 subject of this chapter among states enacting it.

19 8-9B-15. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL
20 AND NATIONAL COMMERCE ACT. This chapter modifies, limits, or
21 supersedes the Electronic Signatures in Global and National
22 Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
23 modify, limit, or supersede Section 101(c) of that act, 15
24 U.S.C. Section 7001(c), or authorize electronic delivery of

1 any of the notices described in Section 103(b) of that act, 15
2 U.S.C. Section 7003(b).

3 8-9B-16. APPLICATION; CONFORMING AMENDMENTS. This
4 chapter applies to transfers made on or after January 1, 2019,
5 and does not apply to a transfer made before January 1, 2019.
6 The Alabama Uniform Fraudulent Transfer Act, Sections 8-9A-1
7 to 8-9A-12, inclusive, Code of Alabama 1975, shall apply to
8 transfers made prior to January 1, 2019, and shall not apply
9 to a transfer made on or after January 1, 2019.

10 8-9B-17. EFFECTIVE DATE. This act shall become
11 effective on January 1, 2019.

12 Section 2. This act shall become effective January
13 1, 2019.

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Del Mar

President and Presiding Officer of the Senate

Mac McClatchey

Speaker of the House of Representatives

SB152

Senate 06-FEB-18

I hereby certify that the within Act originated in and passed the Senate.

Patrick Harris,
Secretary.

House of Representatives
Amended and passed 20-FEB-18

Senate concurred in House amendment 22-FEB-18

APPROVED 3/6/18

By: ~~Senator~~ **TIME** Smitherman 9:24am

Kay Ivey
GOVERNOR

Alabama Secretary Of State

Act Num....: 2018-163
Bill Num....: S-152

Recv'd 03/06/18 02:47pmSLF

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Thomas
SPONSORS

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I hereby certify that the notice & proof is attached to the Bill, SB _____ as required in the General Acts of Alabama, 1975 Act No. 919.
PATRICK HARRIS,
Secretary

This Bill was referred to the Standing Committee of the Senate on BFI and was acted upon by such Committee in session and is by order of the Committee returned therefrom with a favorable report w/amd(s) _____ w/sub _____ w/eng sub _____ years 4 nays 0 abstain 0 this 31 day of January 2018
Steve Blachard, Chairperson

DATE: 27 2018
RF: FAD RD 2 CAL

I hereby certify that the Resolution as required in Section C of Act No. 81-889 was adopted and is attached to the Bill, SB 52 years 22 nays 0 abstain 0
PATRICK HARRIS,
Secretary

DATE: 2-6-18 RD 3 at length
PASSED PASSED AS AMENDED
years 22 nays 0 abstain 0
And was ordered sent forthwith to the House.
PATRICK HARRIS,
Secretary

FURTHER HOUSE ACTION (OVER)

DATE: 26 2018
RD 1 RFD Jody

REPORT OF STANDING COMMITTEE
This bill having been referred by the House to its standing committee on Judiciary was acted upon by such Committee in session, and returned therefrom to the House with the recommendation that it be Passed, w/amd(s) _____ w/sub _____ this 15 day of Feb., 2018.
[Signature], Chairperson

DATE: 2.15 2018
RF: WAMEND RD 2 CAL

DATE: _____ 20____
RE-REFERRED RE-COMMITTED
COMMITTEE _____

I hereby certify that the Resolution as required in Section C of Act No. 81-889 was adopted and is attached to the Bill, SB 52 years 22 nays 0
JEFF WOODARD,
Clerk