

State of Alabama



Alabama Law Institute

Alabama Uniform Voidable Transactions Act

March 2017

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Preface

The Uniform Fraudulent Transfer Act (UFTA) (enacted in Alabama in 1989 as Alabama Code §§8-9A-1 *et seq.*, with only minor variations) governs not only transfers made with the intent to hinder or delay any creditor but also transfers made by an insolvent or to be insolvent debtor for less than reasonably equivalent value. To better emphasize this overriding dual role of the UFTA, the Uniform Bar Commissioners in 2014 revised the UFTA by amendments and promulgated the Uniform Voidable Transfer Act (UVTA) upon which this proposed act is modeled. Under the UVTA the term “fraudulent” is replaced by the word “voidable” to minimize confusion and to emphasize the continuing dual role of the act.

In addition to this clarifying wordsmithing, the UVTA also deals with a small number of narrowly-defined issues (as opposed to being a comprehensive revision). These issues include:

- A) **Choice of Law.** The proposed act adds a new § 10, which sets forth a choice of law rule focusing on the residence of the debtor.
- B) **Evidentiary Matters.** New §§ 4(c), 5(c), 8(g), and 8(h) add uniform rules allocating the burden of proof and defining the standard of proof with respect to claims for relief and defenses under the Act.
- C) **Deletion of the Special Definition of “Insolvency” for Partnerships.** Section 2(c) of the UFTA sets forth a special definition of “insolvency” applicable to partnerships. The proposed act deletes UFTA § 2(c), with the result that the general definition of “insolvency” in § 2(a) now applies to partnerships. One reason for this change is that original § 2(c) gave a partnership full credit for the net worth of each of its general partners. That makes sense only if each general partner is liable for all debts of the partnership, but such is not necessarily the case under modern partnership statutes. A more fundamental reason is that the general definition of “insolvency” in § 2(a) does not credit a non-partnership debtor with any part of the net worth of its guarantors. To the extent

that a general partner is liable for the debts of the partnership, that liability is analogous to that of a guarantor. There is no good reason to define “insolvency” differently for a partnership debtor than for a non-partnership debtor whose debts are guaranteed by contract.

D) Defenses. The proposed act refines in relatively minor respects several provisions relating to defenses available to a transferee, as follows:

- (1) Section 8(a) of the UFTA created a complete defense to an action under § 4(a)(1) (which renders voidable a transfer made with actual intent to hinder, delay, or defraud any creditor of the debtor) if the transferee takes in good faith and for a reasonably equivalent value. The proposed act adds to § 8(a) the further requirement that the reasonably equivalent value must be given the debtor.
- (2) Section 8(b), derived from Bankruptcy Code §§ 550(a), (b) (1984), creates a defense for a subsequent transferee (that is, a transferee other than the first transferee) that takes in good faith and for value, and for any subsequent transferee from such a person. Among other things, the proposed act make clear that the defense applies to recovery of or from the transferred property or its proceeds, by levy or otherwise, as well as to an action for a money judgment.
- (3) Section 8(e)(2) of the UFTA created a defense to an action under § 4(a)(2) or § 5 to avoid a transfer if the transfer results from enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. The proposed act excludes from that defense acceptance of collateral in full or partial satisfaction of the obligation it secures (a remedy sometimes referred to as “strict foreclosure”).

E) Series Organizations. A new § 11 provides that each “protected series” of a “series organization” is to be treated as a person for purposes of the act, even if it is not treated as a person for other purposes. This change responds to the emergence of the “series organization” as a significant form of

business organization. See Alabama Code § 10A-5A-11.01 *et seq.*

- F) **Medium Neutrality.** In order to accommodate modern technology, the references in the Act to a “writing” have been replaced with “record,” and related changes made.
- G) **Style.** The proposed act make a number of stylistic changes that are not intended to change the meaning of the act. For example, the proposed act consistently uses the word “voidable” to denote a transfer for which the act provides a remedy. As originally written the UFTA sometimes inconsistently used the word “fraudulent.” No change in meaning is intended.

In keeping with Alabama’s long standing practice of not addressing “obligations,” within the purview of the act, we have once again (as we did back in 1989) removed all references to obligations from the act, leaving their determination to existing common law. See Alabama Comment 1 to Section 1. Whether an obligation is void as a voidable conveyance is to be determined by the courts by applying by analogy all the law that existed before the enactment of this act. The proposed act is neutral on this issue concerning an obligation.

Likewise, we retained Alabama existing statute of limitations for actions under this proposed act (see Section 9).

Once enacted this new act will be controlling for transfers made on or after January 1, 2018, and the old Alabama Uniform Fraudulent Transfer Act is amended to only apply to transfers made prior to January 1, 2018.

This proposed act was drafted by a committee of attorneys and law professors from throughout the State of Alabama who volunteer their time and assist the Law Institute in its mandate to update the laws of Alabama.

Othni Lathram
Director
Alabama Law Institute

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ALABAMA UNIFORM VOIDABLE TRANSACTIONS ACT

SECTION 1. DEFINITIONS. As used in this chapter[Act]:

(1) “Affiliate” means:

(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:

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

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

(ii) a corporation 20 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, 20 percent or more of the outstanding voting securities of the debtor, other than a person that holds the securities:

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

(B) solely to secure a debt, if the person has

not in fact exercised the power to vote;

(iii) 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

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

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

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

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

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

(3) "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.

- (4) “Creditor” means a person that has a claim.
 - (5) “Debt” means liability on a claim.
 - (6) “Debtor” means a person that is liable on a claim.
 - (7) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- (8) “Insider” includes:
 - (i) if the debtor is an individual:
 - (A) a relative of the debtor or of a general partner of the debtor;
 - (B) a partnership in which the debtor is a general partner;
 - (C) a general partner in a partnership described in clause (B); or
 - (D) a corporation of which the debtor is a director, officer, or person in control;
 - (ii) if the debtor is a corporation:
 - (A) a director of the debtor;
 - (B) an officer of the debtor;
 - (C) a person in control of the debtor;
 - (D) a partnership in which the debtor is a

general partner;

- (E) a general partner in a partnership described in clause (D); or
 - (F) a relative of a general partner, director, officer, or person in control of the debtor;
- (iii) if the debtor is a partnership:
- (A) a general partner in the debtor;
 - (B) a relative of a general partner in, a general partner of, or a person in control of the debtor;
 - (C) another partnership in which the debtor is a general partner;
 - (D) a general partner in a partnership described in clause (C); or
 - (E) a person in control of the debtor;
- (iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
- (v) a managing agent of the debtor.

(9) “Lien” means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings,

a common-law lien, or a statutory lien.

(10) “Organization” means a person other than an individual.

(11) “Person” means an individual, estate, partnership, association, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal or commercial entity.

(12) “Property” means both real and personal property, whether tangible or intangible, and any interest in property whether legal or equitable and includes anything that may be the subject of ownership~~anything that may be the subject of ownership~~.

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

(14) “Relative” means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(15) “Sign” means, with present intent to authenticate or adopt a record:

(i) to execute or adopt a tangible symbol; or
(ii) to attach to or logically associate with the record an electronic symbol, sound, or process.

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

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

Alabama Comment

1.-Although the Uniform Act (the Uniform Voidable Transaction Act (formerly Uniform Fraudulent Transfer Act) (As Amended in 2014)) covers both transfers and obligations, this ~~c~~Chapter applies only to transfers. The language in the Uniform Act which deals with obligations is omitted. Whether an obligation is void as a ~~fraudulent~~voidable conveyance is to be determined by the courts by applying by analogy all the law that existed before the enactment of this ~~c~~Chapter. This ~~c~~Chapter is neutral on this issue concerning an obligation.

2.-In paragraph (2)(iii)e of this section the words “tenancy by the entireties”, which were used in the Uniform Act, are deleted and the words “tenancy in common for life with cross contingent remainder to the survivor in fee” are inserted. This change is not intended to operate as a substantive departure from the Uniform Act, because, under current judicial interpretations in Alabama, such cross contingent remainders are not subject to levy and sale under

execution, thus imparting a characteristic to such a form of ownership which is similar to a tenancy by the entirety. It is questionable whether Alabama law recognizes tenancy by the entirety. See Brown v. Andrews, 288 Ala. 111, 257 So. 2d 356 (1972), Yates v. Guest, 416 So. 2d 973 (Ala. 1982), Nunn v. Keith, 289 Ala. 518, 268 So. 2d 792 (1972); Durant v. Hamrick, 409 So. 2d 731 (Ala. 1981); Denniston, *Joint Tenancy and Tenancy in Common of Real Property — The Gulf Separating Them*, 44 Alabama Lawyer, p. 72 (March, 1983); Comment, .

~~3. Since the term “includes” is used throughout this Chapter, “includes” is specifically defined to eliminate confusion in interpretation of this Chapter.~~
~~(Clarify and reword this comment)~~

34. The definition of property is amended. The Uniform Act simply defined property as anything that may be the subject of ownership. The Alabama Act includes this language; however, it adds other language in order to give the term “property” a broad meaning and to use language similar to the Alabama Probate Code. The added language is derived in part from Alabama Code § 43-8-1(25), the Alabama Probate Code.

4. The term “transfer” specifically includes “a transfer made pursuant to a settlement whether or not incorporated into a court order.” This insertion clarifies existing law and is in conformity with the Alabama Court of Civil Appeal’s decision in RES-GA Lake Shadow, LLC v. Kennedy, 2017 Ala. Civ. App. LEXIS 6 (Ala. Civ. App. Jan. 6, 2017) clarifying Aliant Bank v. Davis, 198 So. 3d 508 (Ala. Civ. App. 2015).

SECTION 2. INSOLVENCY.

(a) A debtor is insolvent if, ~~at a fair valuation~~, the sum of the debtor’s debts ~~at a fair valuation~~ is greater than the sum of the debtor’s assets ~~at a fair valuation~~.

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

against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

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

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

Alabama Comment

This section is identical to section 2 of the Uniform Act. Section 2(a) from the Uniform Act has been modified to emphasize that both the sum of the debtor's debt and the sum of the debtor's assets should be determined at a fair valuation.

SECTION 3. VALUE.

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

debtor or another person.

(b) For the purposes of Section 4(a)(2) and Section 5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

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

Alabama Comment

~~1. The last clause of subsection (a) of this section is reworded to state more clearly the concept of an unperformed promise as value. The language used in this chapter is intended to clarify rather than change the meaning of subsection 3(a) of the Uniform Act.~~

~~Subsection (b) of this section is amended to refer to section 8-9A-4(c) and section 8-9A-5(a). Section 8-9A-4 is rearranged so that section 4(a)(2) of the Uniform Act is subsection (e) of section 8-9A-4. Subsection 3(b) of the Uniform Act refers to section 5 thereof. However, only subsection (a) of section 8-9A-5 uses the term “reasonably equivalent value.” Subsection (b) of section 8-9A-5 does not use the term “reasonable equivalent value.” Official comment 1 incorrectly lists subsection 5(b) of the Uniform Act as using the term “present, reasonably equivalent value.”~~

~~2. Although the Uniform Act covers both transfers and obligations, this chapter applies only to transfers. The language in the Uniform Act which deals with obligations is omitted. Whether an obligation is void as a fraudulent voidable conveyance is to be determined by the courts by applying by analogy all the law~~

that existed before the enactment of this chapter. This chapter is neutral on this issue concerning an obligation.

SECTION 4. TRANSFER OR OBLIGATION VOIDABLE

AS TO PRESENT OR FUTURE CREDITOR.

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

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

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

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

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

(b) In determining actual intent under subsection (a)(1),

consideration may be given, among other factors, to whether:

- (1) the transfer-~~or obligation~~ was to an insider;
- (2) the debtor retained possession or control of the property transferred after the transfer;
- (3) the transfer-~~or obligation~~ was concealed or not disclosed-~~or concealed~~;
- (4) before the transfer was made-~~or obligation was incurred~~, the debtor had been sued or threatened with suit;
- (5) the transfer was of substantially all the debtor's assets;
- (6) the debtor absconded;
- (7) the debtor removed or concealed assets;
- (8) the value of the consideration received by the debtor was not the reasonably equivalent to the value of the asset transferred-~~or the amount of the obligation incurred~~;
- (9) the debtor was insolvent or became insolvent shortly after the transfer was made-~~or the obligation was incurred~~;
- (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the

debtor.

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

Alabama Comment

~~1. This section is organized differently from the Uniform Act. Subsection (4)(b) of the Uniform Act is moved to immediately follow the provision for actual fraud in subsection (a) of this section. The badges of fraud listed in subsection (b) of this section apply to actual fraud, which is defined in subsection (a) of this section, and should follow subsection (a). Two forms of constructive fraud are contained in subsection (c) of this section. The substance of section 4 of the Uniform Act is not changed by the new organization of this chapter.~~

~~12. The following language in Comment 65 of the Uniform Act shall be disregarded: "Proof of the presence of certain badges in combination establishes voidabilityfraud conclusively — i.e., without regard to the actual intent of the debtor parties — when they concur as provided in § 4(a)(2e) or in § 5. The fact that a transfer has been made to a relative or to an affiliated corporation has not been regarded as a badge of fraud sufficient to warrant avoidance when unaccompanied by any other evidence of intend to hinder, delay or defraud creditorsfraud. The courts have uniformly recognized, however, that a transfer to a closely related person warrants close scrutiny of the other circumstances, including the nature and extent of the consideration exchanged. See 1 G. Glenn, Fraudulent Conveyances and Preferences, § 307 (Rev. ed. 1940)." This language is confusing and not properly placed in the comments.~~

~~2. The factors listed in subsection (b) of the Uniform Act have been recharacterized so that each considered factor consistently points to a similar conclusion.~~

~~3. Subsection (c) of this section list two types of fraud, which are commonly identified as constructive fraud. Both existing and future creditors can avoid a transfer under the provisions of subsection (c). Under prior Alabama law only an existing creditor can avoid a transfer because of constructive fraud.~~

~~34. Although the Uniform Act covers both transfers and obligations, this chapter applies only to transfers. The language in the Uniform Act which deals with obligations is omitted. Whether an obligation is void as a fraudulent-voidable conveyance is to be determined by the courts by applying by analogy all the law~~

that existed before the enactment of this chapter. This chapter is neutral on this issue concerning an obligation.

SECTION 5. TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT CREDITOR.

(a) A transfer made ~~or obligation incurred~~ by a debtor is voidable as to a creditor whose claim arose before the transfer was made ~~or the obligation was incurred~~ if the debtor made the transfer ~~or incurred the obligation without the debtor~~ receiving a reasonably equivalent value in exchange for the transfer ~~or obligation~~ and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer ~~or obligation~~.

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

(c) Subject to Section 2(b), a creditor making a claim for relief under subsection (a) or (b) has the burden of proving the elements of the claim for relief by a preponderance of the

evidence.

Alabama Comment

Although the Uniform Act covers both transfers and obligations, this chapter applies only to transfers. The language in the Uniform Act which deals with obligations is omitted. Whether an obligation is void as a ~~fraudulent-voidable~~ conveyance is to be determined by the courts by applying by analogy all the law that existed before the enactment of this chapter. This chapter is neutral on this issue concerning an obligation.

SECTION 6. WHEN TRANSFER IS MADE OR ~~OBLIGATION IS INCURRED~~. For the purposes of this chapter[Aet]:

- (1) a transfer is made:
 - (i) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against which applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and
 - (ii) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this chapter[Aet] that is superior to the

interest of the transferee;

- (2) if applicable law permits the transfer to be perfected as provided in paragraph (1) and the transfer is not so perfected before the commencement of an action for relief under this chapter[Aet], the transfer is deemed made immediately before the commencement of the action;
- (3) if applicable law does not permit the transfer to be perfected as provided in paragraph (1), the transfer is made when it becomes effective between the debtor and the transferee; and
- (4) except with respect to personal property and fixtures where a lender has perfected its security interest in such property in which event paragraph (1)(i) shall apply, a transfer is not made until the debtor has acquired rights in the asset transferred.; and
- (5) an obligation is incurred:

- _____ (i) if oral, when it becomes effective between the parties; or
- _____ (ii) if evidenced by a record, when the record signed by the obligor is delivered to or for the benefit of the obligee.

Alabama Comment

1. Although the Uniform Act covers both transfers and obligations, this chapter applies only to transfers. The language in the Uniform Act which deals with obligations is omitted. Whether an obligation is void as a fraudulent-voidable

conveyance is to be determined by the courts by applying by analogy all the law that existed before the enactment of this chapter. This chapter is neutral on the issue concerning an obligation.

2. In subdivision (4) of this section the following language is added to the language used in the Uniform Act, to wit: "except with respect to personal property and fixtures where a lender has perfected its security in such property in which event paragraph (1)(i)a shall apply."

SECTION 7. REMEDIES OF CREDITOR.

(a) In an action for relief against a transfer~~or obligation~~ under this chapter[Act], a creditor, subject to the limitations in Section 8, may obtain:

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

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

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

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

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

(iii) any other relief the circumstances may require.

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

Alabama Comment

1. The introductory language to this section is modified to make clear that this section does not limit the remedies available to a creditor.

12. Subdivision (a)(2) of this section, which is an optional section in the Uniform Act, is included in this chapter. The language “any applicable provision of any other statute or the Alabama Rules of Civil Procedure” is added to the subdivision.

23. Generally, a judgment creditor who exercises diligence and avoids a transfer for fraud is given preference over senior judgment creditors who failed to act. The rights of a general creditor who avoids a transfer, however, are subject to the rights of a lien creditor. *First National Bank v. Powell*, 229 Ala. 178, 155 So. 624 (1934); *North Birmingham American Bank v. Realty Mortgage Co.*, 223 Ala. 30, 134 So. 796 (1931); *Kelly v. Turner*, 74 Ala. 513 (1883); *Dargan v. Waring*, 11 Ala. 988 (1847); *Mathews v. Mobile Mutual Insurance Co.*, 75 Ala. 85 (1883). This section enacts the same result that was reached in these Alabama cases.

34. Although the Uniform Act covers both transfers and obligations, this chapter applies only to transfers. The language in the Uniform Act which deals with obligations is omitted. Whether an obligation is void as a fraudulent-voidable conveyance is to be determined by the courts by applying by analogy all the law that existed before the enactment of this chapter. This chapter is neutral on this issue concerning an obligation.

SECTION 8. DEFENSES, LIABILITY, AND PROTECTION OF TRANSFeree-OR-OBLIGEE.

(a) A transfer ~~or obligation~~ is not voidable under

Section 4(a)(1) against a person that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee that took in good faith.~~-or obligee~~.

(b) To the extent a transfer is avoidable in an action by a creditor under Section 7(a)(1), the following rules apply:

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

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

(ii) any subsequent~~an immediate or mediate~~ transferee ~~of the first transferee~~, other than:

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

(B) a subsequent~~a immediate or~~ ~~mediate good faith~~ transferee of a person described in clause (A).

(2) Recovery pursuant to Section 7(a)(1) or (b) of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person described in paragraph (1)(i) or (ii).

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

(d) Notwithstanding voidability of a transfer ~~or an~~ obligation under this chapter[Act], a good-faith transferee ~~or~~ obligee is entitled, to the extent of the value given the debtor for the transfer ~~or obligation~~, to:

(1) a lien on or a right to retain an interest in the asset transferred;
—~~(2) enforcement of an obligation incurred; or~~
~~(23)~~ a reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under Section 4(a)(2) or Section 5 if the transfer results from:

(1) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or
(2) enforcement of a security interest in compliance

with Article 9 of the Uniform Commercial Code, other than acceptance of collateral in full or partial satisfaction of the obligation it secures; or

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

(f) A transfer is not voidable under Section 5(b):

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

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

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

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

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

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

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

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

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

Alabama Comment

1. The clause, “~~who that~~ took in good faith” is added to the end of subsection (a) of this section. In the case of actual fraud, ~~section section 4(a)(1)8-9A-4(a)~~, a subsequent transferee should not obtain the benefit of the defense of subsection (a) of this section if he did not take the property in good faith. A subsequent transferee who was a party to the fraud does not take in good faith.

2. Subsection (b) of this section states the principle that in the case of constructive fraud, ~~sections 4(a)(2) - sections 8-9A-4(c) and 8-9A-5(a)5(a)~~, a subsequent transferee is protected by the shelter doctrine.

3. The language, “or to another person as a consequence of the debtor’s making such transfer to” is added to the Uniform Act in subsection (d) of this section. This language is merely to clarify the fact that a good faith transferee is protected to extent of value given by the transferee to one other than the debtor is effectively a transfer for the debtor to the one who receives the value, this transfer may under proper circumstances be a ~~fraudulent voidable~~ transfer. Moreover, the fact that the transferee gives value for the property he receives from the debtor to a person other than the debtor may affect the transferee’s status as a good faith transferee.

4. The language, “or a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor under a mortgage or deed of trust” is added to subdivision (e)(32) of this section. Subdivision (e)(32) is not intended to limit section 3(a) section 8-

~~9A-3(a)~~ and the purpose of this change is to eliminate any negative implication. The new language is taken from ~~section section section 3(b), - 8~~ ~~9A-3(b)~~.

5. Although the Uniform Act covers both transfers and obligations, this chapter applies only to transfers. The language in the Uniform Act which deals with obligations is omitted. Whether an obligation is void as a ~~fraudulent-voidable~~ conveyance is to be determined by the courts by applying by analogy all the law that existed before the enactment of this chapter. This chapter is neutral on this issue concerning an obligation.

SECTION 9. EXTINGUISHMENT OF CLAIM FOR

RELIEF. A claim for relief with respect to a transfer ~~or~~ obligation under this ~~chapter[Act]~~ is extinguished unless action is brought:

(a) under Section 4(a)(1), ~~within not later than ten four~~ years after the transfer ~~of real property was madewas made or the~~ obligation was incurred or, if later, not later than one year after the transfer ~~or obligation was or could reasonably have been~~ discovered ~~by the claimant;~~

(b) under Section 4(a)(1), within six years after the transfer of personal property was made;

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

- (d) under Section 4(a)(2), within one year after the transfer was made when the action is brought by a creditor whose claim arose after the transfer was made; or
- ~~not later than four years after the transfer was made or the obligation was incurred; or~~
- (ee) under Section 5(b), within not later than one year after the transfer was made.

Alabama Comment

This chapter generally does not adopt the statute of limitations contained in the Uniform Act.

Under subdivision (a4) of this section, existing and future creditors of the debtor have 10 years from the transfer to institute a cause of action to avoid a transfer of real property for actual fraud. This subsection adopts the present Alabama law.

Under subdivision (b2) of this section, existing and future creditors of the debtor have six years from the transfer or obligation to institute a cause of action to avoid a transfer of personal property or an obligation for actual fraud. This subsection adopts the present Alabama law.

Under subdivisions (c3) and (d4) of this section, the statute of limitation to avoid a transfer or obligation for constructive fraud varies depending on whether an existing creditor and a future creditor is involved.

Existing creditors have four years from the transfer or obligation to initiate a cause of action to avoid the transfer or obligation for constructive fraud. Subdivision (c3) of this section changes present Alabama law. Present Alabama law allows an existing creditor a six year period to avoid a transfer of personal property for constructive fraud and a 10 year period to avoid a transfer of real property for constructive fraud.

Under subdivision (d4) of this section, future creditors have one year from the transfer or obligation to institute a cause of action to avoid the transfer or

obligation. Prior Alabama law does not allow future creditors to avoid a transfer or obligation for constructive fraud.

Under subdivision (eS) of this section, creditors of the debtors have one year to avoid a transfer or obligation that is a preference under section 8-9A-5(b)5(b). This subsection adopts the provision of the uniform law.

Although the Uniform Act covers both transfers and obligations, this chapter applies only to transfers. The language in the Uniform Act which deals with obligations is omitted. Whether an obligation is void as a ~~fraudulent~~-voidable conveyance is to be determined by the courts by applying by analogy all the law that existed before the enactment of this chapter. This chapter is neutral on this issue concerning an obligation.

SECTION 10. GOVERNING LAW.

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

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

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

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

(b) A claim for relief in the nature of a claim for relief under this chapter[Act] is governed by the local law of the

jurisdiction in which the debtor is located when the transfer is made ~~or the obligation is incurred~~.

SECTION 11. APPLICATION TO SERIES ORGANIZATION.

(a) In this section:

(1) “Protected series” means an arrangement, however denominated, created by a series organization that, pursuant to the law under which the series organization is organized, has the characteristics set forth in paragraph (2).

(2) “Series organization” means an organization that, pursuant to the law under which it is organized, has the following characteristics:

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

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

(iii) Debt incurred or existing with respect to the activities or property of the organization is enforceable against the property of the organization only, and not against the property of or associated with a protected series of the organization.

(b) A series organization and each protected series of the organization is a separate person for purposes of this chapter[Aet], even if for other purposes a protected series is not a person separate from the organization or other protected series of the organization.

Alabama Comment

See Code of Ala. § 10A-5A-11.01 et seq which governs the creation of protected series.

SECTION 12. SUPPLEMENTARY PROVISIONS. Unless displaced by the provisions of this chapter[Aet], the principles of law and equity, including the law merchant and the law relating to

principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This chapter[Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter[Act] among states enacting it.

SECTION 14. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This chapter[Act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 15. SHORT TITLE. This chapter[Act], which was formerly cited as the Uniform Fraudulent Transfer Act, may be cited as the Alabama Uniform Voidable Transactions Act.

SECTION 16. APPLICATION~~REPEALS~~; CONFORMING AMENDMENTS.

- (a) This chapter applies to transfers made on or after January 1, 2018 and does not apply to a transfer made before January 1, 2018.
- (b) The Alabama Uniform Fraudulent Transfer Act (Code of Alabama § 8-9A-1 through -12) is amended to only apply to transfers made prior to January 1, 2018 and shall not apply to a transfer made on or after January 1, 2018

Alabama Comment

Distinction should be made between the Alabama Uniform Fraudulent TransferConveyance Act (Ala Code 8-9A-1 to -12) which applies to transfer made prior to January 1, 2018 and this act (the Alabama Uniform Voidable Transactions Act (Ala Code 8-9B-1 to -16) which applies to transfers made on or after January 1, 2018.