

Regular Session, 2003

ACT No. 552

SENATE BILL NO. 923

BY SENATOR HOYT AND REPRESENTATIVE RICHMOND

AN ACT

To amend and reenact Civil Code Arts. 2036 and 2037 and to enact Chapter 7 of Code Title IV of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 9:2790.1 through 2790.12, all relative to obligations; to provide for the Uniform Fraudulent Transfer Act; to provide for definitions; to provide that certain transfers are fraudulent; to provide for remedies of creditors; to provide for defenses, liability and protection of a transferee; to provide for extinguishment of a cause of action; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Civil Code Arts. 2036 and 2037 are hereby amended and reenacted to read as follows:

Art. 2036. Act of the obligor that causes or increases his insolvency

An obligee has a right to annul an act of the obligor, or the result of a failure to act of the obligor, made or effected after the right of the obligee arose, that causes or increases the obligor's insolvency. **The act of the obligor can be annulled when there is a conversion of non-exempt assets into exempt assets as provided for in R.S. 9:2790.1 through 2790.12.**

Art. 2037. Insolvency

An obligor is insolvent when the total of his liabilities exceeds

the total of his fairly appraised **non-exempt** assets.

Section 2. Chapter 7 of Code Title IV of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 9:2790.1 through 2790.12 is hereby enacted to read as follows:

CHAPTER 7. UNIFORM FRAUDULENT TRANSFER ACT

Chapter 7 is all new law.

§2790.1. Definitions

R.S. 9:2790.1 is all new law.

As used in this Chapter, the following definitions shall apply unless the context clearly indicates a different meaning:

(1) "Affiliate" means:

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

(i) As a fiduciary or agent without sole discretionary power to vote the securities; or

(ii) Solely to secure a debt, if the person has not exercised the power to vote.

(b) A corporation, twenty 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 who directly or indirectly owns, controls, or holds, with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) As a fiduciary or agent without sole power to vote the securities; or

(ii) Solely to secure a debt, if the person has not in fact

exercised the power to vote.

(c) 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

(d) A person who 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:

(a) Property to the extent it is encumbered by a valid lien; or

(b) Property to the extent it is generally exempt under nonbankruptcy law.

(3) "Claim" 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 who has a claim.

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

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(a) If the debtor is an individual:

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

(ii) A partnership in which the debtor is a general partner;

(iii) A general partner in a partnership described in Item (ii) of this Subparagraph or Subparagraph (c); or

(iv) A corporation of which the debtor is a director, officer, or person in control.

(b) If the debtor is a corporation:

(i) A director of the debtor;

(ii) An officer of the debtor;

(iii) A person in control of the debtor;

(iv) A partnership in which the debtor is a general partner;

(v) A general partner in a partnership described in Item (iv) of this Subparagraph or Subparagraph (c); or

(vi) A relative of a general partner, director, officer, or person in control of the debtor.

(c) If the debtor is a partnership:

(i) A general partner of the debtor;

(ii) A relative of a general partner in, a general partner of, or a person in control of the debtor;

(iii) Another partnership in which the debtor is a general partner;

(iv) A general partner in a partnership described in Item (iii) of this Subparagraph; or

(v) A person in control of the debtor.

(d) An affiliate, or an insider of an affiliate as if the affiliate were the debtor.

(e) A managing agent of the debtor.

(8) "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 privilege, or a statutory lien.

(9) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial

entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual related by consanguinity within the third degree as determined by the Civil Code, 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.

(12) "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, and creation of a lien or other encumbrance.

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

§2790.2. Insolvency

R.S. 9:2790.2 is all new law.

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

B. A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.

C. A partnership is insolvent under Subsection A of this Section if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

D. 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.

E. 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.

§2790.3. Value

R.S. 9:2790.3 is all new law.

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 R.S. 9:2790.4 and 2790.5, 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.

§2790.4. Transfers fraudulent as to present and future creditors

R.S. 9:2790.4 is all new law.

A. A transfer made or obligation incurred by a debtor is fraudulent 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:

(a) 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

(b) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

B. In determining actual intent under Paragraph 1 of Subsection A of this Section, consideration may be given, including, but not limited to, 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 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 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.

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

§2790.5. Transfers fraudulent as to present creditors

R.S. 9:2790.5 is all new law.

A. A transfer made or obligation incurred by a debtor is fraudulent 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 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 fraudulent 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.

§2790.6. When transfer made or obligation incurred

R.S. 9:2790.6 is all new law.

A. A transfer is made:

(1) 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 whom applicable law permits the transfer to be perfected cannot acquire an

interest in the asset that is superior to the interest of the transferee.

(2) 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 that is superior to the interest of the transferee.

B. If applicable law permits the transfer to be perfected as provided in Paragraph 1 of Subsection A of this Section and the transfer is not so perfected before the commencement of an action for relief under this Chapter, the transfer is deemed made immediately before the commencement of the action.

C. If applicable law does not permit the transfer to be perfected as provided in Paragraph 1 of Subsection A of this Section, the transfer is made when it becomes effective between the debtor and the transferee.

D. A transfer is not made until the debtor has acquired rights in the asset transferred.

E. An obligation is incurred:

(1) If oral, when it becomes effective between the parties; or

(2) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

§2790.7. Remedies of creditors

R.S. 9:2790.7 is all new law.

A. In an action for relief against a transfer or obligation under this Chapter, a creditor, subject to the limitations provided in R.S. 9:2790.8 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 in accordance with applicable law;

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

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

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

(c) 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.

§2790.8. Defenses, liability, and protection of transferee

R.S. 9:2790.8 is all new law.

A. A transfer or obligation is not voidable as provided in R.S. 9:2790.4 against a person who took in good faith and for a reasonably equivalent value or against any subsequent good faith transferee or obligee.

B. Except as otherwise provided in this Section, to the extent a transfer is voidable in an action by a creditor as provided in R.S. 9:2790.7, the creditor may recover judgment for the value of the asset transferred, as adjusted as provided in Subsection C of this Section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

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

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

C. If the judgment as provided in Subsection B of this Section 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 as provided in this Chapter, 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 any interest in the asset transferred;

(2) Enforcement of any obligation incurred; or

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

E. A transfer is not voidable provided in R.S. 9:2790.4 and 2790.5 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 Title 10 of the Louisiana Revised Statutes.

F. A transfer is not voidable as provided in R.S. 9:2790.5:

(1) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless 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.

§2790.9. Extinguishment of cause of action

R.S. 9:2790.9 is all new law.

A cause of action with respect to a fraudulent transfer or obligation as provided in this Chapter is extinguished unless the action is brought:

(1) Under R.S. 9:2790.4(A)(1), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) Under R.S. 9:2790.4(A)(2) or R.S. 9:2790.5(A), within four years after the transfer was made or the obligation was incurred; or

(3) Under R.S. 9:2790.5(B), within one year after the transfer was made or the obligation was incurred.

§2790.10. Supplementary provisions

R.S. 9:2790.10 is all new law.

Unless displaced by the provisions of this Chapter, the principles of law and equity, including Book III of the Civil Code and Title 10 of the Louisiana Revised Statutes the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement those provisions.

§2790.11. No exemption for fraudulent transfers

R.S. 9:2790.11 is all new law.

An exemption from attachment, garnishment, or legal process provided by law is not effective if it results from a fraudulent transfer

or conveyance as provided in this Chapter.

§2790.12. Fraudulent asset conversions

R.S. 9:2790.12 is all new law.

A. As used in this Section, "Conversion" means every mode, direct or indirect, absolute or conditional, of changing or disposing of an asset, such that the products or proceeds of the asset become immune or exempt by law from claims of creditors of the debtor and the products or proceeds of the asset remain property of the debtor. The definitions of this Chapter apply to this Section unless the application of a definition would be unreasonable.

B. Any conversion by a debtor of an asset that results in the proceeds of the asset becoming exempt by law from the claims of a creditor of the debtor is a fraudulent asset conversion as to the creditor, whether the creditor's claim to the asset arose before or after the conversion of the asset, if the debtor made the conversion with the intent to hinder, delay, or defraud the creditor.

C. In an action for relief against a fraudulent asset conversion, a creditor may obtain:

(1) Avoidance of the fraudulent asset conversion to the extent necessary to satisfy the creditor's claim.

(2) An attachment or other provisional remedy against the asset converted in accordance with applicable law.

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

(4) An injunction against further conversion by the debtor of the asset or of other property.

(5) Any other relief the circumstances may require.

D. 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 converted or its proceeds.

E. A cause of action with respect to a fraudulent asset conversion is extinguished unless an action is brought within four years after the fraudulent asset conversion was made.

F. If an asset is converted and the converted asset is subsequently transferred to a third party, the provisions of this Chapter apply to the transfer to the third party.

PRESIDENT OF THE SENATE

SPEAKER OF THE HOUSE OF REPRESENTATIVES

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____