

No. 1993-70

AN ACT

SB 1015

Amending Title 12 (Commerce and Trade) of the Pennsylvania Consolidated Statutes, adding provisions relating to fraudulent transfers; and making repeals.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 12 of the Pennsylvania Consolidated Statutes is amended by adding a chapter to read:

CHAPTER 51
FRAUDULENT TRANSFERS

Sec.

- 5101. Short title of chapter and definitions.
- 5102. Insolvency.
- 5103. Value.
- 5104. Transfers fraudulent as to present and future creditors.
- 5105. Transfers fraudulent as to present creditors.
- 5106. When transfer is made or obligation is incurred.
- 5107. Remedies of creditors.
- 5108. Defenses, liability and protection of transferee.
- 5109. Extinguishment of cause of action.
- 5110. Supplementary provisions.

§ 5101. Short title of chapter and definitions.

(a) Short title of chapter.—This chapter shall be known and may be cited as the Pennsylvania Uniform Fraudulent Transfer Act.

(b) Definitions.—The following words and phrases when used in this chapter shall have the meanings given to them in this subsection unless the context clearly indicates otherwise:

“Asset.” Property of a debtor. The term does not include:

- (1) property to the extent it is encumbered by a valid lien;
- (2) property to the extent it is generally exempt under nonbankruptcy law; or
- (3) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

“Claim.” 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.

“Creditor.” A person who has a claim.

“Debt.” Liability on a claim.

“Debtor.” A person who is liable on a claim.

“Lien.” A charge against or an interest in property to secure payment of a debt or performance of an obligation. The term 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.

“Person.” An individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust or any other legal or commercial entity.

“Property.” Anything that may be the subject of ownership.

“Transfer.” 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. The term includes payment of money, release, lease and creation of a lien or other encumbrance.

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

§ 5102. Insolvency.

(a) General rule.—A debtor is insolvent if, at fair valuations, the sum of the debtor’s debts is greater than all of the debtor’s assets.

(b) Presumption of insolvency.—A debtor who is generally not paying the debtor’s debts as they become due is presumed to be insolvent. This presumption shall impose on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

(c) When partnerships are insolvent.—A partnership is insolvent under subsection (a) if, at fair valuations, the sum of the partnership’s debts is greater than the aggregate 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) Exclusion of certain assets.—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 fraudulent under this chapter.

(e) Exclusion of certain debts.—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.

§ 5103. Value.

(a) General rule.—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) Reasonably equivalent value.—For the purposes of sections 5104(a)(2) (relating to transfers fraudulent as to present and future creditors) and 5105 (relating to transfers fraudulent as to present creditors), a person gives

reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or the exercise 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 or pursuant to a regularly conducted, noncollusive execution sale. § 5104. Transfers fraudulent as to present and future creditors.

(a) General rule.—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:
 - (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) Certain factors.—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 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; and
- (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

§ 5105. Transfers fraudulent as to present creditors.

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.

§ 5106. When transfer is made or obligation is incurred.

For the purposes of this chapter:

(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 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; 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 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, the transfer is 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.

(4) A transfer is not made until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred:

(i) if oral, when it becomes effective between the parties; or

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

§ 5107. Remedies of creditors.

(a) Available remedies.—In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in sections 5108 (relating to defenses, liability and protection of transferee) and 5109 (relating to extinguishment of cause of action), 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 the procedure prescribed by applicable law.

(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) Execution.—If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, subject to the limitations of sections 5108 and 5109, may levy execution on the asset transferred or its proceeds.

§ 5108. Defenses, liability and protection of transferee.

(a) Certain transfers or obligations not fraudulent.—A transfer or obligation is not fraudulent under section 5104(a)(1) (relating to transfers fraudulent as to present and future creditors) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Judgment for certain voidable transfers.—Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under section 5107(a)(1) (relating to remedies of creditors), 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:

(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) Measure of recovery.—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) Rights of good faith transferee or obligee.—Notwithstanding voidability of a transfer or an obligation under 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) Certain transfers not fraudulent.—A transfer is not fraudulent under section 5104(a)(2) or 5105 (relating to transfers fraudulent as to present creditors) 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 13 Pa.C.S. Div. 9 (relating to secured transactions), other than a retention of collateral under 13 Pa.C.S. § 9505(b) (relating to acceptance of collateral as discharge of obligation).

The references to 13 Pa.C.S. Div. 9 and 13 Pa.C.S. § 9505(b) in paragraph (2) shall also be deemed to refer to the corresponding provisions of the Uniform Commercial Code as in effect in any other jurisdiction.

§ 5109. Extinguishment of cause of action.

A cause of action with respect to a fraudulent transfer or obligation under

this chapter is extinguished unless action is brought:

(1) under section 5104(a)(1) (relating to transfers fraudulent as to present and future creditors), 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; or

(2) under section 5104(a)(2) or 5105 (relating to transfers fraudulent as to present creditors), within four years after the transfer was made or the obligation was incurred.

§ 5110. Supplementary provisions.

Unless displaced by the provisions of this chapter, 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 2. In applying and construing 12 Pa.C.S. Ch. 51 (relating to fraudulent transfers), added by this act, comments or reports of the type referred to in 1 Pa.C.S. § 1939 (relating to use of comments and reports) shall control in the event of a conflict between such comments or reports and the policy of uniformity provided under 1 Pa.C.S. § 1927 (relating to construction of uniform laws).

Section 3. (a) The act of May 21, 1921 (P.L.1045, No.379), known as the Uniform Fraudulent Conveyance Act, is repealed.

(b) The Statute of 13 Eliz. Ch. 5 (3 Binney 621, 2 Ruffhead 588, Rob. Dig. 295), entitled "An act against fraudulent deeds, alienations, etc.," is repealed insofar as it is in force in this Commonwealth.

(c) All other acts and parts of acts are repealed insofar as they are inconsistent with this act.

Section 4. This act shall apply to transfers made or obligations incurred on or after the effective date of this act. With respect to transfers made or obligations incurred prior to the effective date of this act, the law in effect at the time the transfer was made or the obligation was incurred shall apply. For purposes of this section, transfers shall be deemed made and obligations shall be deemed incurred at the times provided in 12 Pa.C.S. § 5106.

Section 5. This act shall take effect in 60 days.

APPROVED—The 3rd day of December, A.D. 1993.

MARK S. SINGEL
ACTING GOVERNOR