CHAPTER 242

UNIFORM FRAUDULENT TRANSFER ACT

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242.01 Definitions. In this chapter:

(1) "Affiliate" means any of the following:

(a) A person who 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 who holds the securities:

1. As a fiduciary or agent without sole discretionary power to vote the securities; or

2. Solely to secure a debt, if the person has not in fact exercised the power to vote.

(b) 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 who 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 who holds the securities:

1. As a fiduciary or agent without sole discretionary power to vote the securities;

2. 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.

(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 does not include any of the following:

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

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

(bm) Property to the extent it is exempt under s. 815.18.

(c) 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.

(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 any of the following:

(a) If the debtor is an individual:

1. A relative of the debtor or of a general partner of the debtor;

2. A partnership in which the debtor is a general partner;

3. A general partner in a partnership described in subd. 2.;

4. A corporation of which the debtor is a director, officer or person in control; or

5. A limited liability company of which the debtor is a manager or person in control.

(b) If the debtor is a corporation:

1. A director of the debtor;

2. An officer of the debtor;

3. A person in control of the debtor;

4. A partnership in which the debtor is a general partner;

5. A general partner in a partnership described in subd. 4.; or

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

(bL) If the debtor is a limited liability company, any of the following:

1. A manager of the debtor.

2. A person in control of the debtor.

3. A partnership in which the debtor is a general partner.

4. A general partner in a partnership described in subd. 3.

5. A relative of a manager or person in control of the debtor.

(c) If the debtor is a partnership:

1. A general partner in the debtor;

2. A relative of a general partner in, a general partner of or a person in control of the debtor;

3. Another partnership in which the debtor is a general partner;

4. A general partner in a partnership described in subd. 3.; or

5. 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 common–law lien or a statutory lien.

(9) "Person" means an individual, partnership, corporation, limited liability company, 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 blood within the 3rd degree of kinship as computed under s. 990.001 (16), a spouse or an individual related to a spouse within the 3rd degree as so computed, and includes an individual in an adoptive relationship within the 3rd 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.

History: 1987 a. 192; 1989 a. 278; 1993 a. 112; 1997 a. 188; 1999 a. 32, 85, 162; 2001 a. 38.

242.02 Insolvency. (1) In this section:

(a) "Assets" 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.

(b) "Debts" 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.

(2) 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.

(3) A debtor who is generally not paying debts as they become due is presumed to be insolvent.

(4) A partnership is insolvent under sub. (2) 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.

History: 1987 a. 192.

242.03 Value. (1) 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.

(2) For the purposes of ss. 242.04 (1) (b) and 242.05, 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.

(3) 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.

History: 1987 a. 192.

242.04 Transfers fraudulent as to present and future creditors. (1) A transfer made or obligations 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:

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

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

1. 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

2. 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.

(2) In determining actual intent under sub. (1) (a), consideration may be given, among other factors, to whether:

(a) The transfer or obligation was to an insider;

(b) The debtor retained possession or control of the property transferred after the transfer;

(c) The transfer or the obligation was disclosed or concealed;

(d) Before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;

(e) The transfer was of substantially all the debtor's assets;

(f) The debtor absconded;

(g) The debtor removed or concealed assets;

(h) 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;

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

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

History: 1987 a. 192.

Federal law does not preclude a labor union from bringing a state action for an alleged fraudulent conveyance by an employer when the claim does not require substantial interpretation of a collective bargaining agreement. International Machinist Association v. United States Can Co., 150 Wis. 2d 479, 441 N.W.2d 710 (1989).

The Wisconsin Uniform Fraudulent Transfer Act exists independently from the common law history of the law of fraudulent conveyances and fulfills a purpose quite separate from that of the fraudulent transaction exception to the rule of successor non–liability. Whereas the Act is designed to assist creditors in collecting on claims that may be frustrated by recent asset transfers, the fraudulent transaction exception is a doctrine that prevents successor companies from avoiding obligations incurred by their predecessors. This chapter has not supplanted the common law fraudulent transaction exception to the rule of successor non–liability. Springer v. Nohl Electric Products Corporation, 2018 WI 48, 381 Wis. 2d 438, 912 N.W.2d 1, 15–0829.

242.05 Transfers fraudulent as to present creditors. (1) 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.

(2) 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.

History: 1987 a. 192.

Unlike other provisions of the Uniform Fraudulent Transfer Act governing transfers made with fraudulent intent, this section deems certain transactions constructively fraudulent based on the circumstances of the transfer. Proving fraudulent intent is not necessary under this section. Beck v. BidRX, LLC, 2018 WI App 61, 384 Wis. 2d 207, 918 N.W.2d 96, 17–2043.

Sub. (2) addresses "preferential transfers," a novel category of fraudulent transaction based on bankruptcy principles that attacks a transfer by an insolvent debtor to pay an antecedent debt to a preferred insider. The provision is aimed at diminishing the sometimes unfair advantages insiders possess when they are familiar with the debtor's financial status. A person attacking a transfer under sub. (2) must show that the debtor is improperly preferring insider creditors over others. Beck v. BidRX, LLC, 2018 WI App 61, 384 Wis. 2d 207, 918 N.W.2d 96, 17–2043.

The evidence in this case was insufficient to prove a fraudulent transfer under sub. (2) because no evidence was introduced showing that the allegedly fraudulent transfers were made to satisfy an antecedent debt. The fact of a transfer to an insider is not enough; it is the preferential payment of prior debts to insiders to which sub. (2) is addressed. Beck v. BidRX, LLC, 2018 WI App 61, 384 Wis. 2d 207, 918 N.W.2d 96, 17–2043.

Intent to defraud need not be proved under this section. DeWitt, Porter v. Kovalic, 991 F.2d 1243 (1993).

242.06 When transfer is made or obligation is incurred. For the purposes of this chapter:

(1) A transfer is made:

(a) 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.

(b) 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 other 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 sub. (1) 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.

(3) If applicable law does not permit the transfer to be perfected as provided in sub. (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:

(a) If oral, when it becomes effective between the parties.

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

History: 1987 a. 192.

Sub. (1) requires viewing a transfer exclusively from the perspective of the creditor and not a transferee. What the transferees may have believed regarding with whom they were dealing is irrelevant under sub. (1). The good–faith defense under s. 242.08 (1) applies only to claims made under s. 242.04 (1) (a), not to claims under this section. Badger State Bank v. Taylor, 2004 WI 128, 276 Wis. 2d 312, 688 N.W.2d 439, 03–0750.

242.07 Remedies of creditors. (1) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in s. 242.08, may obtain any of the following:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

(b) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with chs. 810 to 813.

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

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

2. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

3. Any other relief the circumstances may require.

(2) 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.

History: 1987 a. 192.

Nothing in ch. 242 changes the principle of law that compensatory damages are a threshold requirement for awarding punitive damages or otherwise permits a punitive damages award. Rescission under sub. (1) is an equitable remedy and does not constitute compensatory damages. C & A Investments v. Kelly, 2010 WI App 151, 330 Wis. 2d 223, 792 N.W.2d 644, 09–2420.

242.08 Defenses, liability and protection of transferee. (1) A transfer or obligation is not voidable under s. 242.04 (1) (a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under s. 242.07 (1) (a), the creditor may recover judgment for the value of the asset transferred, as adjusted under sub. (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against any of the following:

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

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

(3) If the judgment under sub. (2) 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.

(4) 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 any of the following:

(a) A lien on or a right to retain any interest in the asset transferred.

(b) Enforcement of any obligation incurred.

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

(5) A transfer is not voidable under s. 242.04 (1) (b) or 242.05 if the transfer results from any of the following:

(a) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.

(b) Enforcement of a security interest in compliance with ch. 409.

(6) A transfer is not voidable under s. 242.05 (2):

(a) To the extent that 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;

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

(c) 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.

History: 1987 a. 192.

The good–faith defense under sub.(1) applies only to claims made under s. 242.04 (1) (a), not claims under other sections. Badger State Bank v. Taylor, 2004 WI 128, 276 Wis. 2d 312, 688 N.W.2d 439, 03–0750.

242.09 Statute of limitation. Actions under this chapter are barred as provided in s. 893.425.

History: 1987 a. 192.

242.10 Supplementary provisions. Unless displaced by 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 this chapter.

History: 1987 a. 192.

242.11 Uniformity of application and construction. This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

History: 1987 a. 192.

This section provides an explicit invitation for a court to consider the way other jurisdictions have interpreted the same language in the Uniform Fraudulent Transfer Act. Beck v. BidRX, LLC, 2018 WI App 61, 384 Wis. 2d 207, 918 N.W.2d 96, 17–2043.

The legislature expressly stated its intent that the Uniform Fraudulent Transfer Act should be construed to accomplish uniformity among states enacting it. Official Committee of Unsecured Creditors of Great Lakes Quick Lube LP v. Theisen, 2018 WI App 70, 384 Wis. 2d 580, 920 N.W.2d 356, 18–0333.