



What You Should Know About Kentucky's New Uniform Voidable Transactions Act

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On January 1, 2016, the Uniform Voidable Transactions Act (UVTA) was enacted in Kentucky and can be found at KRS 378A.005 *e seq.* The UVTA replaces KRS 378, which contained KRS 378.010, the Kentucky fraudulent conveyance statute, and KRS 378.060, the Kentucky preference statute. Nationally, the UVTA will replace the Uniform Fraudulent Transfer Act ("UFTA"). According to the Conference of Commissioners on Uniform State Laws, California, Georgia, Idaho, Minnesota, New Mexico, North Carolina, and North Dakota have joined Kentucky in enacting the UVTA. Adoption of the UVTA is anticipated by the remaining states in the coming years. A major change in the UVTA is the removal of the word "fraud." This was done to avoid confusion with claims of common law fraud requiring clear and convincing evidence. Now all a plaintiff must do is show that less than reasonably equivalent value was given in exchange for a transfer. The UVTA is clear that a preponderance of the evidence standard is all that is required to avoid a transfer. Accordingly, the UVTA does not distinguish between transfers that are "actually" or "constructively" fraudulent.

In many respects, the UVTA tracks the language and structure of 11 U.S.C. §§ 547 and 548, the Bankruptcy Code's preference and fraudulent conveyance provision. However, the creditor seeking to avoid the transfer bears the initial burden of proving that the debtor is insolvent. The UVTA declares that a debtor not paying its debts (except those subject to bona fide dispute) as they become due is insolvent. However, the statute also allows the debtor to rebut this presumption of insolvency. The UVTA also incorporates many of the defenses codified in the Bankruptcy Code, including subsequent new value, defenses for "immediate or mediate" transferees, and ordinary course of business.

The UVTA also contains a choice of law provision to adopt the law of the state of the debtor's location when the transfer is made: individuals are located in the state of their principal residence; and

organizations are located in the state where their sole place of business is located, but if the organization has multiple places of business, it is located in the state containing its chief executive office.

The UVTA permits unsecured creditors of a debtor to assert a claim against a secured creditor of the debtor that repossesses and retains personal property collateral in satisfaction of a debt pursuant to Article 9 of the UCC. Thus, an unsecured creditor of a debtor could sue a lender that repossessed and retained one million dollars of collateral to satisfy a five hundred thousand dollar debt. However, if the collateral was sold in a commercially reasonable manner pursuant to Article 9, then the creditor would be immune from suit.

Another change from the prior Kentucky law is the reduced statute of limitations. The prior statute had a five year period, but KRS 378A.090(1) provides that parties have the greater of four years to bring a claim from the date the challenged transfer was made or an obligation was incurred, or a year after the plaintiff actually discovered or reasonably could have discovered that the transfer occurred or the obligation was incurred.

While the enactment of the UVTA repealed the state preference and fraudulent conveyance statutes, those statutes will continue to apply transfers in Kentucky that occurred before January 1, 2016. KRS 466.080(3) states that “No statute shall be construed to be retroactive, unless expressly so declared.” There is nothing in KRS 378A that indicates that was intended to apply retroactively. Furthermore, retroactive application of the Kentucky UVTA would deprive parties of rights under the prior statutes that had already accrued. The Bankruptcy Appellate Panel for the Sixth Circuit rejected a similar argument in *In re Trujillo*, 378 B.R. 526, 538 (6th Cir. B.A.P. 2007)(holding that an amendment of Kentucky’s mortgage acknowledgment statute could not be applied retroactively as it would deprive parties of claims that had already vested) and *Baker v. Fletcher*, 204 S.W.3d 589, 597 (Ky. 2006)(holding that the General Assembly is not required to use specific words to make a statute apply retroactively, but that the “enactment [must] make it

apparent that retroactivity was the intended result"). Thus, the quirky, non-uniform Kentucky preference and fraudulent conveyance statutes will be with us for a few more years for transactions that occurred prior to January 1, 2016.

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