

Memorandum in Support

T&E #4-GOV

May 20, 2019

S. 4236
A. 5622

By: Senator Hoylman
By: M. or A. Weinstein

Senate Committee: Judiciary
Assembly Committee: Codes
Effective Date: 120 day after it shall have become a law

AN ACT to amend the debtor and creditor law, the civil practice law and rules, the estates, powers and trusts law and the workers' compensation law, in relation to enacting the "uniform voidable transactions act"; and to repeal certain provisions of the debtor and creditor law relating to fraudulent conveyances.

LAW & SECTION REFERRED TO: Article 10 (§§ 270-281) of the Debtor and Creditor Law; Paragraph 5 of Subdivision (c) of Section 5205 of the Civil Practice Law and Rules; Subdivision (g) of Section 5519 of the Civil Practice Law and Rules; Subparagraph 4 of Paragraph (b) of Section 7-3.1 of the Estates, Powers and Trusts Law; Paragraph 3 of Subdivision 3-a of Section 50 of the Workers' Compensation Law.

BACKGROUND

New York enacted the Uniform Fraudulent Conveyance Act ("UFCA"), promulgated by the Uniform Law Commission (the "Commission"), in 1925. The UFCA was later modernized and rationalized as the Uniform Fraudulent Transfer Act ("UFTA"), which became the law in forty-four states, the District of Columbia, and the U.S. Virgin Islands. In July 2014, the Commission approved modest improvements to the UFTA and renamed it the Uniform Voidable Transactions Act ("UVTA") to reflect the fact that it covers the incurrence of obligations, as well as transfers, and that so-called "fraudulent transfers" do not require proof of the elements of common law fraud. The UVTA provides remedies available to creditors injured by what traditionally have been referred to as "intentional" or "constructive" fraudulent conveyances or transfers—property transferred or obligations incurred by a debtor (a) with actual intent to hinder, delay or defraud its creditors or (b) for less than fair consideration if the debtor is insolvent or undercapitalized.

New York, however, still operates under a form of the UFCA that has not been updated significantly in 90 years. New York fraudulent conveyance law is also inconsistent with federal bankruptcy law and the law in most states. The existing New York statute differs in several respects from the UVTA and the UFTA, one or both of which the overwhelming majority of the U.S. states have adopted, and from the fraudulent transfer provisions of the U.S. Bankruptcy Code. This discord leads to confusion, disparate

results, and fuels costly litigation over choice-of-law question. Enactment of this bill should help ameliorate all of these issues by replacing New York's outdated UFCA provisions with a version of the UVTA.

We generally support adoption of the UVTA by New York. We believe that such adoption would provide efficient and fair remedies for creditors who are victims of voidable transactions, while also protecting the justified interests of innocent and good-faith recipients or beneficiaries of challenged transactions from unwarranted or inappropriate avoidance claims. We also believe it would minimize litigation over choice of law, and ensure efficient and certain remedies if a debtor attempts to hide its assets from creditors, or otherwise prejudices creditors.

However, we note that many practitioners argue that the Commission's Comments 2 and 8 to Section 4 of the UVTA may go beyond the function of explaining specific revisions to the UVTA. Our support of this bill is conditioned on our understanding that these comments to the UVTA are not being adopted by New York, and that, except as expressly set forth in its text, this bill will not change the substance of the law as it has evolved in New York relating to what are now referred to as "actually or constructively fraudulent transfers."

If enacted into law, this bill would modernize New York's fraudulent conveyance law while also addressing the above concerns with respect to the Commission's Comments 2 and 8 to Section 4 of the UVTA.

CONCLUSION

Based on the foregoing, we respectfully request that Governor Cuomo approve this bill.