

## SB0058S01 compared with SB0058

~~{deleted text}~~ shows text that was in SB0058 but was deleted in SB0058S01.

Inserted text shows text that was not in SB0058 but was inserted into SB0058S01.

**DISCLAIMER:** This document is provided to assist you in your comparison of the two bills. Sometimes this automated comparison will NOT be completely accurate. Therefore, you need to read the actual bills. This automatically generated document could contain inaccuracies caused by: limitations of the compare program; bad input data; or other causes.

Senator Lyle W. Hillyard proposes the following substitute bill:

### UNIFORM VOIDABLE TRANSACTIONS ACT

2017 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Lyle W. Hillyard**

House Sponsor: ~~{~~ V. Lowry Snow

---

#### LONG TITLE

##### General Description:

This bill renames, recodifies, and amends the Uniform Fraudulent Transfer Act and related provisions.

##### Highlighted Provisions:

This bill:

- ▶ changes the name of the Uniform Fraudulent Transfer Act to the Uniform Voidable Transactions Act;
- ▶ makes changes consistent with the 2014 version of the Uniform Fraudulent Transfer Act;
- ▶ modifies and defines terms;

~~{~~ removes provisions relating to limited liability companies;

~~}~~ ▶ modifies provisions relating to the determination of insolvency;

## **SB0058S01 compared with SB0058**

- ▶ enacts provisions relating to the burden of proof;
- ▶ modifies provisions relating to the transfer and recovery of assets;
- ▶ enacts a governing law provision;
- ▶ addresses the bill's applicability to a series organization;
- ▶ enacts transitional language;
- ▶ addresses the applicability of the Relation to Electronic Signatures in Global and National Commerce Act; and
- ▶ makes technical and conforming changes.

### **Money Appropriated in this Bill:**

None

### **Other Special Clauses:**

None

### **Utah Code Sections Affected:**

#### AMENDS:

- 7-2-12**, as last amended by Laws of Utah 2014, Chapter 189
- 31A-27a-507**, as enacted by Laws of Utah 2007, Chapter 309
- 70A-2-402**, as enacted by Laws of Utah 1965, Chapter 154
- 70A-2a-308**, as enacted by Laws of Utah 1990, Chapter 197
- 75-2-205**, as last amended by Laws of Utah 2003, Second Special Session, Chapter 3
- 75-7-105**, as enacted by Laws of Utah 2004, Chapter 89
- 75-7-107**, as renumbered and amended by Laws of Utah 2004, Chapter 89
- 75-7-301**, as repealed and reenacted by Laws of Utah 2004, Chapter 89
- 75-7-501**, as repealed and reenacted by Laws of Utah 2004, Chapter 89
- 75-7-505**, as enacted by Laws of Utah 2004, Chapter 89
- 75-7-816**, as enacted by Laws of Utah 2004, Chapter 89
- 78B-2-302**, as last amended by Laws of Utah 2016, Chapter 388
- 78B-2-307**, as renumbered and amended by Laws of Utah 2008, Chapter 3

#### ENACTS:

- 25-6-201**, Utah Code Annotated 1953
- 25-6-301**, Utah Code Annotated 1953
- 25-6-401**, Utah Code Annotated 1953

## SB0058S01 compared with SB0058

25-6-402, Utah Code Annotated 1953

25-6-403, Utah Code Annotated 1953

25-6-407, Utah Code Annotated 1953

25-6-501, Utah Code Annotated 1953

### RENUMBERS AND AMENDS:

25-6-101, (Renumbered from 25-6-1, as enacted by Laws of Utah 1988, Chapter 59)

25-6-102, (Renumbered from 25-6-2, as last amended by Laws of Utah 1992, Chapter 168)

25-6-103, (Renumbered from 25-6-3, as enacted by Laws of Utah 1988, Chapter 59)

25-6-104, (Renumbered from 25-6-4, as enacted by Laws of Utah 1988, Chapter 59)

25-6-202, (Renumbered from 25-6-5, as enacted by Laws of Utah 1988, Chapter 59)

25-6-203, (Renumbered from 25-6-6, as last amended by Laws of Utah 1989, Chapter 61)

25-6-302, (Renumbered from 25-6-7, as enacted by Laws of Utah 1988, Chapter 59)

25-6-303, (Renumbered from 25-6-8, as enacted by Laws of Utah 1988, Chapter 59)

25-6-304, (Renumbered from 25-6-9, as last amended by Laws of Utah 2015, Chapter 459)

25-6-305, (Renumbered from 25-6-10, as enacted by Laws of Utah 1988, Chapter 59)

25-6-404, (Renumbered from 25-6-11, as enacted by Laws of Utah 1988, Chapter 59)

25-6-405, (Renumbered from 25-6-12, as enacted by Laws of Utah 1988, Chapter 59)

25-6-406, (Renumbered from 25-6-13, as enacted by Laws of Utah 1988, Chapter 59)

25-6-502, (Renumbered from 25-6-14, as repealed and reenacted by Laws of Utah 2013, Chapter 284)

---

*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section 7-2-12 is amended to read:

**7-2-12. Powers of commissioner in possession -- Sale of assets -- Postpossession financing -- New deposit instruments -- Executory contracts -- Transfer of property -- Avoidance of transfers -- Avoidable preferences -- Setoff.**

(1) Upon taking possession of the institution, the commissioner may do all things necessary to preserve its assets and business, and shall rehabilitate, reorganize, or liquidate the

## **SB0058S01 compared with SB0058**

affairs of the institution in a manner he determines to be in the best interests of the institution's depositors and creditors. Any such determination by the commissioner may not be overruled by a reviewing court unless it is found to be arbitrary, capricious, fraudulent, or contrary to law. In the event of a liquidation, he shall collect all debts due and claims belonging to it, and may compromise all bad or doubtful debts. He may sell, upon terms he may determine, any or all of the property of the institution for cash or other consideration. The commissioner shall give such notice as the court may direct to the institution of the time and place of hearing upon an application to the court for approval of the sale. The commissioner shall execute and deliver to the purchaser of any property of the institution sold by him those deeds or instruments necessary to evidence the passing of title.

(2) With approval of the court and upon terms and with priority determined by the court, the commissioner may borrow money and issue evidence of indebtedness. To secure repayment of the indebtedness, he may mortgage, pledge, transfer in trust, or hypothecate any or all of the property of the institution superior to any charge on the property for expenses of the proceeding as provided in Section 7-2-14. These loans may be obtained for the purpose of facilitating liquidation, protecting or preserving the assets in the charge of the commissioner, expediting the making of distributions to depositors and other claimants, aiding in the reopening or reorganization of the institution or its merger or consolidation with another institution, or the sale of all of its assets. Neither the commissioner nor any special deputy or other person lawfully in charge of the affairs of the institution is under any personal obligation to repay those loans. The commissioner may take any action necessary or proper to consummate the loan and to provide for its repayment and to give bond when required for the faithful performance of all undertakings in connection with it. The commissioner or special deputy shall make application to the court for approval of any loan proposed under this section. Notice of hearing upon the application shall be given as the court directs. At the hearing upon the application any stockholder or shareholder of the institution or any depositor or other creditor of the institution may appear and be heard on the application. Prior to the obtaining of a court order, the commissioner or special deputy in charge of the affairs of the institution may make application or negotiate for the loan or loans subject to the obtaining of the court order.

(3) With the approval of the court pursuant to a plan of reorganization or liquidation under Section 7-2-18, the commissioner may provide for depositors to receive new deposit

## **SB0058S01 compared with SB0058**

instruments from a depository institution that purchases or receives some or all of the assets of the institution in the possession of the commissioner. All new deposit instruments issued by the acquiring depository institution may, in accordance with the terms of the plan of reorganization or liquidation, be subject to different amounts, terms, and interest rates than the original deposit instruments of the institution in the possession of the commissioner. All deposit instruments issued by the acquiring institution shall be considered new deposit obligations of the acquiring institution. The original deposit instruments issued by the institution in the possession of the commissioner are not liabilities of the acquiring institution, unless assumed by the acquiring institution. Unpaid claims of depositors against the institution in the possession of the commissioner continue, and may be provided for in the plan of reorganization or liquidation.

(4) The commissioner, after taking possession of any institution or other person subject to the jurisdiction of the department, may terminate any executory contract, including standby letters of credit, unexpired leases and unexpired employment contracts, to which the institution or other person is a party. If the termination of an executory contract or unexpired lease constitutes a breach of the contract or lease, the date of the breach is the date on which the commissioner took possession of the institution. Claims for damages for breach of an executory contract shall be filed within 30 days of receipt of notice of the termination, and if allowed, shall be paid in the same manner as all other allowable claims of the same priority out of the assets of the institution available to pay claims.

(5) With approval of the court and upon a showing by the commissioner that it is in the best interests of the depositors and creditors, the commissioner may transfer property on account of an indebtedness incurred by the institution prior to the date of the taking.

(6) (a) The commissioner may avoid any transfer of any interest of the institution in property or any obligation incurred by the institution that is void or voidable by a creditor under Title 25, Chapter 6, Uniform [~~Fraudulent Transfer~~] Voidable Transactions Act.

(b) The commissioner may avoid any transfer of any interest in real property of the institution that is void as against or voidable by a subsequent purchaser in good faith and for a valuable consideration of the same real property or any portion thereof who has duly recorded his conveyance at the time possession of the institution is taken, whether or not such a purchaser exists.

## **SB0058S01 compared with SB0058**

(c) The commissioner may avoid any transfer of any interest in property of the institution or any obligation incurred by the institution that is invalid or void as against, or is voidable by a creditor that extends credit to the institution at the time possession of the institution is taken by the commissioner, and that obtains, at such time and with respect to such credit, a judgment lien or a lien by attachment, levy, execution, garnishment, or other judicial lien on the property involved, whether or not such a creditor exists.

(d) The right of the commissioner under Subsections (6)(b) and (c) to avoid any transfer of any interest in property of the institution shall be unaffected by and without regard to any knowledge of the commissioner or of any creditor of the institution.

(e) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, or disposing of or parting with property or with an interest in property, including retention of title as a security interest.

(f) The commissioner may avoid and recover any payment or other transfer of any interest in property of the institution to or for the benefit of a creditor, for or on account of an antecedent debt owed by the institution before the transfer was made if the creditor at the time of such transfer had reasonable cause to believe that the institution was insolvent, and if the payment or other transfer will allow the creditor to obtain a greater percentage of his debt than he would be entitled to under the provisions of Section 7-2-15. For the purposes of this subsection:

(i) antecedent debt does not include earned wages and salaries and other operating expenses incurred and paid in the normal course of business;

(ii) a transfer of any interest in real property is deemed to have been made or suffered when it became so far perfected that a subsequent good faith purchaser of the property from the institution for a valuable consideration could not acquire an interest superior to the transferee; and

(iii) a transfer of property other than real property is deemed to have been made or suffered when it became so far perfected that a creditor on a simple contract could not acquire a lien by attachment, levy, execution, garnishment, or other judicial lien superior to the interest of the transferee.

(g) For purposes of this section, "date of possession" means the earlier of the date the commissioner takes possession of a financial institution under Title 7, Chapter 2, Possession of

## **SB0058S01 compared with SB0058**

Depository Institution by Commissioner, or the date when the commissioner enters an order suspending payments to depositors and other creditors under Section 7-2-19.

(7) (a) With or without the prior approval of the court, the commissioner or any federal deposit insurance agency appointed by him as receiver or liquidator of a depository institution closed by the commissioner under the provisions of this chapter may setoff against the deposits or other liabilities of the institution any debts or other obligations of the depositor or claimant due and owing to the institution. The amount of any setoff against the liabilities of the institution shall be no greater than the amount the depositor or claimant would receive pursuant to Section 7-2-15 after final liquidation of the institution. When the liquidation value of a depositor's or claimant's claim against the institution will or may be less than the full amount of the claim, setoff may be made prior to final liquidation if the commissioner or any receiver or liquidator appointed by him can reasonably estimate the liquidation value of the claim, and the court, after notice and opportunity for hearing, approves the estimate for purposes of making the setoff. If the right of setoff is exercised, the commissioner or any receiver or liquidator appointed by him shall give written notice to the depositor or claimant of the amount setoff.

(b) The existence and amount of a debtor or creditor relationship or both, between the institution and its depositor or claimant and the right to the proceeds in a deposit account shall be determined solely by the books and records of the institution.

(c) Any contract purporting to affect the right of setoff shall be in writing and signed by the depositor-debtor and an authorized officer of the institution and be maintained as a part of the records of the institution.

(d) Any claim that a deposit account is a special account not subject to setoff because it was maintained for a specific purpose or to satisfy a particular obligation other than satisfaction of or as security for an indebtedness to the institution or that the right to the deposit actually belongs to a third party does not affect the right to setoff of the commissioner or any receiver or liquidator appointed by him unless the special nature of the account is clearly shown in the books and records of the institution.

(e) In the absence of any other instrument in writing, the terms and provisions of the signature card applicable to a particular account in effect at the time the commissioner takes possession of the institution shall be determinative of the right of setoff by the commissioner or any receiver or liquidator appointed by him.

## SB0058S01 compared with SB0058

(f) Knowledge of the institution or of any director, officer, or employee of the institution that the nature of the account is other than as shown in the books and records of the institution does not affect the right of setoff by the commissioner or any receiver or liquidator appointed by him.

(g) The liability of the commissioner or any receiver or liquidator appointed by him for exercising a right of setoff other than as authorized by this section shall be only to a person who establishes by the procedure set forth in Section 7-2-6 that his interest in the account is superior to that of the person whose debt to the institution was setoff against the account. The amount of any such liability shall be no greater than the amount of the setoff and neither the commissioner or any receiver or liquidator appointed by him shall be liable for any action taken under this section unless the action taken is determined by the court to be arbitrary or capricious.

Section 2. Section **25-6-101**, which is renumbered from Section 25-6-1 is renumbered and amended to read:

### CHAPTER 6. UNIFORM VOIDABLE TRANSACTIONS ACT

#### Part 1. General Provisions

~~[25-6-1]~~. **25-6-101**. Title.

(1) This chapter is known as the "Uniform [~~Fraudulent Transfer~~] Voidable Transactions Act."

(2) This part is known as "General Provisions."

Section 3. Section **25-6-102**, which is renumbered from Section 25-6-2 is renumbered and amended to read:

~~[25-6-2]~~. **25-6-102**. Definitions.

~~[It]~~ As used in this chapter:

(1) "Affiliate" means:

(a) a person [~~who~~] that directly or indirectly owns, controls, or holds with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person [~~who~~] that 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 20% or more of whose outstanding voting securities are directly or



## SB0058S01 compared with SB0058

indirectly owned, controlled, or held with power to vote, by the debtor or a person ~~[who]~~ that directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person ~~[who]~~ that 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;

(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]~~ that 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:

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

(b) property to the extent it is generally exempt under nonbankruptcy law; or

(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," except as used in "claim for relief," 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]~~ that has a claim.

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

(6) "Debtor" means a person ~~[who]~~ that is liable on a claim.

(7) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

~~[(7)]~~ (8) "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 Subsection ~~[(7)]~~ (8)(a)(ii); ~~or~~

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

~~or~~

~~(v)~~ (v) a limited liability company of which the debtor is a member or manager; ~~or~~

(b) if the debtor is a corporation:

## SB0058S01 compared with SB0058

- (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 Subsection [(7)] (8)(b)(iv); ~~{or}~~
  - ~~{(vi)}~~ (vi) a limited liability company of which the debtor is a member or manager; or ~~{(vii)}~~
  - ~~{(vii)}~~ ~~{(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 in 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 Subsection [(7)] (8)(c)(iii); ~~{or}~~
  - ~~{(v)}~~ (v) a limited liability company of which the debtor is a member or manager; or ~~{(vi)}~~ ~~(v) a person in control of the debtor;~~
  - ~~{(d) if the debtor is a limited liability company:}~~
  - ~~{(i) a member or manager of the debtor;}~~
  - ~~{(ii) another limited liability company in which the debtor is a member or manager;}~~
  - ~~{(iii) a partnership in which the debtor is a general partner;}~~
  - ~~{(iv) a general partner in a partnership described in Subsection (7)(d)(iii);}~~
  - ~~{(v)}~~
  - (vi) a person in control of the debtor; {or}
  - ~~{~~
  - (d) if the debtor is a limited liability company:
  - (i) a member or manager of the debtor;
  - (ii) another limited liability company in which the debtor is a member or manager;
  - (iii) a partnership in which the debtor is a general partner;
  - (iv) a general partner in a partnership described in Subsection (7)(d)(iii);
  - (v) a person in control of the debtor; or
  - (vi) a relative of a general partner, member, manager, or person in control of the

## SB0058S01 compared with SB0058

debtor; ~~(f)~~

~~(f)(e)~~ ~~(d)~~ an affiliate, or an insider of an affiliate as if the affiliate were the debtor;  
and

~~(f)(f)~~ ~~(e)~~ a managing agent of the debtor.

~~(8)~~ (9) "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.

(10) "Organization" means a person other than an individual.

~~(9)~~ (11) "Person" means an individual, estate, partnership, ~~(f)~~ limited liability company, corporation ~~(g)~~, association, ~~(organization)~~, trust, business or nonprofit entity, public corporation, government or governmental subdivision ~~(or)~~, agency, ~~(business trust, estate, trust, or any)~~ instrumentality, or other legal or commercial entity.

~~(10)~~ (12) "Property" means anything that may be the subject of ownership.

(13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium that is retrievable in perceivable form.

~~(11)~~ (14) "Relative" means an individual ~~(or an individual related to a spouse)~~, related by consanguinity within the third degree as determined by the common law, ~~(or)~~ 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.

(15) "Sign" means, with present intent to authenticate or adopt a record:

(a) to execute or adopt a tangible symbol; or

(b) to attach to or logically associate with the record an electronic symbol, sound, or process.

~~(12)~~ (16) "Transfer" means every mode, direct or indirect, absolute or conditional, or 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)~~ (17) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

Section 4. Section **25-6-103**, which is renumbered from Section 25-6-3 is renumbered and amended to read:

## SB0058S01 compared with SB0058

### ~~[25-6-3].~~ 25-6-103. Insolvency.

(1) A debtor is insolvent if, at fair valuation, the sum of the debtor's debts is greater than all of the debtor's assets [~~at a fair valuation~~].

(2) (a) A debtor [~~who~~] that is generally not paying [~~his~~] the debtor's debts as they become due other than as a result of a bona fide dispute is presumed to be insolvent.

(b) The presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

~~[(3) A partnership is insolvent under Subsection (1) 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.]~~

~~[(4) (3) 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.~~

~~[(5) (4) 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.~~

Section 5. Section **25-6-104**, which is renumbered from Section 25-6-4 is renumbered and amended to read:

### ~~[25-6-4].~~ 25-6-104. Value -- Transfer.

(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. However, value does not include an unperformed promise made other than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) Under Subsection [~~25-6-5~~] 25-6-202(1)(b) and Section [~~25-6-6~~] 25-6-203, 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.

## SB0058S01 compared with SB0058

Section 6. Section **25-6-201** is enacted to read:

### **Part 2. Voidable Transfer or Obligation**

#### **25-6-201. Title.**

This part is known as "Voidable Transfer or Obligation."

Section 7. Section **25-6-202**, which is renumbered from Section 25-6-5 is renumbered and amended to read:

#### **[25-6-5]. 25-6-202. Voidable transfer or obligation -- Present or future creditor -- Determination of intent -- Burden of proof.**

(1) A transfer made or obligation incurred by a debtor is [~~fraudulent~~] voidable 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:

(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 [~~he~~] the debtor would incur, debts beyond [~~his~~] the debtor's ability to pay as they became due.

(2) To determine "actual intent" under Subsection (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 obligation was disclosed or concealed;

(d) before the transfer was made or 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

## SB0058S01 compared with SB0058

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]~~ that transferred the assets to an insider of the debtor.

(3) A creditor making a claim for relief under Subsection (1) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

Section 8. Section **25-6-203**, which is renumbered from Section 25-6-6 is renumbered and amended to read:

~~[25-6-6].~~     **25-6-203. Transfer or obligation voidable -- Present creditor -- Burden of proof.**

(1) A transfer made or obligation incurred by a debtor is ~~[fraudulent]~~ voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:

(a) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and

(b) the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is ~~[fraudulent]~~ voidable 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 the time, and the insider had reasonable cause to believe that the debtor was insolvent.

(3) Subject to Subsection 25-6-103(2), a creditor making a claim for relief under Subsection (1) or (2) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

Section 9. Section **25-6-301** is enacted to read:

### **Part 3. Transfers and Remedies**

**25-6-301. Title.**

This part is known as "Transfers and Remedies."

Section 10. Section **25-6-302**, which is renumbered from Section 25-6-7 is renumbered

## SB0058S01 compared with SB0058

and amended to read:

~~[25-6-7].~~      **25-6-302. Transfer -- When made.**

In this chapter:

(1) ~~[A]~~ 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]~~ which 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

(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) ~~[H]~~ if applicable law permits the transfer to be perfected as provided in Subsection (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) ~~[H]~~ if applicable law does not permit the transfer to be perfected as provided in Subsection (1), the transfer is made when it becomes effective between the debtor and the transferee~~[-]~~;

(4) ~~[A]~~ a transfer is not made until the debtor has acquired rights in the asset transferred~~[-]~~; and

(5) ~~[An]~~ an obligation is incurred:

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

(b) if evidenced by a ~~[writing]~~ record, when the ~~[writing-executed]~~ record signed by the obligor is delivered to or for the benefit of the obligee.

Section 11. Section **25-6-303**, which is renumbered from Section 25-6-8 is renumbered and amended to read:

~~[25-6-8].~~      **25-6-303. Remedies of creditors.**

(1) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section ~~[25-6-9]~~ 25-6-304, may obtain:

(a) avoidance of the transfer or obligation to the extent necessary to satisfy the

## SB0058S01 compared with SB0058

creditor's claim;

(b) an attachment or other provisional remedy against the asset transferred or other property of the transferee [~~in accordance with the procedure prescribed by the Utah Rules of Civil Procedure~~] if available under applicable law;

(c) 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.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court orders, may levy execution on the asset transferred or its proceeds.

Section 12. Section ~~25-6-304~~, which is renumbered from Section 25-6-9 is renumbered and amended to read:

~~[25-6-9].~~      **25-6-304. Good faith transfer.**

(1) Except as otherwise provided in this section, a transfer or obligation is not voidable under Subsection [~~25-6-5~~] 25-6-202(1)(a) against a person [~~who~~] that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is [~~voidable~~] avoidable in an action by a creditor under Subsection [~~25-6-8~~] 25-6-303(1)(a), the following rules apply:

(a) the creditor may recover judgment for the value of the asset transferred, as adjusted under Subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less[-]; and

(b) the judgment may be entered against:

~~[(a)]~~ (i) the first transferee of the asset or the person for whose benefit the transfer was made; or

~~[(b) any subsequent transferee other than]~~

(ii) an immediate or mediate transferee of the first transferee, other than:

(A) a good faith transferee [~~who~~] that took for value; or [~~from any subsequent~~



## SB0058S01 compared with SB0058

transferee.]

(B) an immediate or mediate good faith transferee of a person described in Subsection (2)(a)(ii)(A); and

(c) recovery under Subsection 25-6-303(1)(a) or (2) of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person described in Subsection (2)(b)(i) or (ii).

(3) If the judgment under Subsection (2) is based upon the value of the asset transferred, the judgment shall be for an amount equal to the value of the asset at the time of the transfer, subject to an adjustment as equities may require.

(4) Except as otherwise provided in this section, notwithstanding the voidability of a transfer or an obligation under this chapter, a [~~good-faith~~] good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

- (a) a lien on or a right to retain [~~any~~] an interest in the asset transferred;
- (b) enforcement of [~~any~~] an obligation incurred; or
- (c) a reduction in the amount of the liability on the judgment.

(5) A transfer is not voidable under Subsection [~~25-6-5~~] 25-6-202(1)(b) or Section [~~25-6-6~~] 25-6-203 if the transfer results from:

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

(b) enforcement of a security interest in compliance with Title 70A, Chapter 9a, Uniform Commercial Code - Secured Transactions, other than acceptance of collateral in full or partial satisfaction of the obligation it secures.

(6) Except as otherwise provided in this section, a transfer is not voidable under Subsection [~~25-6-6~~] 25-6-203(2):

- (a) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made [~~unless~~], except to the extent 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.

(7) [~~Notwithstanding the foregoing, a~~] A transfer is not voidable under Section

## SB0058S01 compared with SB0058

[~~25-6-5~~] 25-6-202 or Subsection [~~25-6-6~~] 25-6-203(1) if:

(a) the transfer was made by the debtor:

(i) in payment of or in exchange for goods, services, or other consideration obtained by the debtor or a third party from a merchant in the ordinary course of the merchant's business; or

(ii) in payment of amounts loaned or advanced by a merchant or a credit or financing company to pay for the goods, services, or other consideration obtained by the debtor or a third party from a merchant in the ordinary course of the merchant's business;

(b) the goods, services, or other consideration obtained from the merchant or the amounts loaned or advanced by the merchant or the credit or financing company in payment of the goods, services, or other consideration obtained from the merchant in the ordinary course of the merchant's business was of a reasonably equivalent value to the transfer, as provided in Subsection (8); and

(c) the transferee received the transfer in good faith, in the ordinary course of the transferee's business, and without actual knowledge that:

(i) the transfer was made by the debtor with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(ii) that the debtor was insolvent at the time the transfer was made.

(8) For purposes of Subsection (7):

(a) the term "merchant" means the same as that term is defined in Section 70A-2-104;

(b) where the value of the goods, services, or other consideration obtained from the merchant, or where the value of the amounts loaned or advanced by a merchant or a credit or financing company in payment of the goods, services, or other consideration obtained from the merchant, was reasonably equivalent to the value of the transfer, the "reasonably equivalent value" requirement in Subsection (7)(b) will be satisfied regardless of whether the debtor or a third party received the reasonably equivalent value for the transfer; and

(c) a transferee's receipt of payment from a debtor is not, and may not be used as, evidence that:

(i) the transferee did not act in good faith;

(ii) the goods, services, or other consideration were not provided by the merchant in the ordinary course of the merchant's business;

(iii) the transferee had actual knowledge that the transfer was made by the debtor with

## SB0058S01 compared with SB0058

actual intent to hinder, delay, or defraud any creditor of the debtor; or

(iv) the debtor was insolvent at the time the transfer was made.

(9) The following rules determine the burden of proving matters referred to in this section:

(a) a party that seeks to invoke Subsection (1), (4), (5), or (6) has the burden of proving the applicability of that subsection;

(b) except as otherwise provided in Subsections (9)(c) and (d), the creditor has the burden of proving each applicable element of Subsection (2) or (3);

(c) the transferee has the burden of proving the applicability to the transferee of Subsection (2)(a)(ii)(A) or (B); and

(d) a party that seeks adjustment under Subsection (3) has the burden of proving the adjustment.

(10) The standard of proof required to establish matters referred to in this section is a preponderance of the evidence.

Section 13. Section **25-6-305**, which is renumbered from Section 25-6-10 is renumbered and amended to read:

~~[25-6-10].~~ **25-6-305. Claim for relief -- Time limits.**

A claim for relief [~~or cause of action~~] regarding a [~~fraudulent~~] transfer or obligation under this chapter is extinguished unless action is brought:

(1) under Subsection [~~25-6-5~~] 25-6-202(1)(a), [~~within~~] no later than four years after the transfer was made or the obligation was incurred or, if later, [~~within~~] no later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) under Subsection [~~25-6-5~~] 25-6-202(1)(b) or [~~25-6-6~~] 25-6-203(1), [~~within~~] no later than four years after the transfer was made or the obligation was incurred; or

(3) under Subsection [~~25-6-6~~] 25-6-203(2), [~~within~~] no later than one year after the transfer was made [~~or the obligation was incurred~~].

Section 14. Section **25-6-401** is enacted to read:

### **Part 4. Applicability and Construction**

**25-6-401. Title.**

This part is known as "Applicability and Construction."

Section 15. Section **25-6-402** is enacted to read:

## SB0058S01 compared with SB0058

### **25-6-402. Governing law.**

(1) In this section, the following rules determine the debtor's location:

(a) a debtor who is an individual is located at the individual's principal residence;

(b) a debtor that is an organization and has only one place of business is located at its place of business; and

(c) a debtor that is an organization and has more than one place of business is located at its chief executive office.

(2) A claim for relief in the nature of a claim for relief under this chapter is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.

Section 16. Section **25-6-403** is enacted to read:

### **25-6-403. Application to series organization.**

(1) As used in this section:

(a) "Protected series" means an arrangement, however denominated, created by a series organization that, pursuant to the law under which the series organization is organized, has the characteristics described in Subsection (1)(b).

(b) "Series organization" means an organization that, pursuant to the law under which it is organized, has the following characteristics:

(i) the organic record of the organization provides for creation by the organization of one or more protected series, however denominated, with respect to specified property of the organization, and for records to be maintained for each protected series that identify the property of or associated with the protected series;

(ii) debt incurred or existing with respect to the activities of, or property of or associated with, a particular protected series is enforceable against the property of or associated with the protected series only, and not against the property of or associated with the organization or other protected series of the organization; and

(iii) debt incurred or existing with respect to the activities or property of the organization is enforceable against the property of the organization only, and not against the property of or associated with a protected series of the organization.

(2) A series organization and each protected series of the organization is a separate person for purposes of this chapter, even if for other purposes a protected series is not a person

## SB0058S01 compared with SB0058

separate from the organization or other protected series of the organization.

Section 17. Section **25-6-404**, which is renumbered from Section 25-6-11 is renumbered and amended to read:

~~[25-6-11].~~ **25-6-404. Legal principles applicable to chapter.**

Unless displaced by this chapter, the principles of law and equity, including merchant law and the law relating to principal and agent, equitable subordination, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement this chapter's provisions.

Section 18. Section **25-6-405**, which is renumbered from Section 25-6-12 is renumbered and amended to read:

~~[25-6-12].~~ **25-6-405. Construction of chapter.**

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.

Section 19. Section **25-6-406**, which is renumbered from Section 25-6-13 is renumbered and amended to read:

~~[25-6-13].~~ **25-6-406. Applicability of chapter.**

(1) This ~~[act]~~ chapter applies when any transfer occurs after the effective date of this act.

(2) The amendments to this chapter that take effect on May 9, 2017:

(a) apply to a transfer made or obligation incurred on or after May 9, 2017;

(b) do not apply to a transfer made or obligation incurred before May 9, 2017; and

(c) do not apply to a right of action that has accrued before May 9, 2017.

(3) For purposes of Subsection (2), a transfer is made and an obligation is incurred at the time provided in Section 25-6-302.

Section 20. Section **25-6-407** is enacted to read:

**25-6-407. Relation to Electronic Signatures in Global and National Commerce Act.**

This chapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Sec. 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Sec. 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Sec. 7003(b).

## SB0058S01 compared with SB0058

Section 21. Section **25-6-501** is enacted to read:

### Part 5. Asset Protection Trust

#### **25-6-501.** Title.

This part is known as "Asset Protection Trust."

Section 22. Section **25-6-502**, which is renumbered from Section 25-6-14 is renumbered and amended to read:

#### **~~25-6-14~~.** **25-6-502.** Asset protection trust.

(1) As used in this section:

(a) "Creditor" means:

(i) a creditor or other claimant of the settlor existing when the trust is created; or

(ii) a person who subsequently becomes a creditor, including, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured:

(A) one holding or seeking to enforce a judgment entered by a court or other body having adjudicative authority; or

(B) one with a right to payment.

(b) "Property" means real property, personal property, and interests in real or personal property.

(c) "Settlor" means a person who transfers property in trust.

(d) "Transfer" means any form of transfer of property, including gratuitous transfers, whether by deed, conveyance, or assignment.

(e) "Trust" has the same meaning as in Section 75-1-201.

(2) "Paid and delivered" to the settlor, as beneficiary, does not include the settlor's use or occupancy of real property or tangible personal property owned by the trust if the use or occupancy is in accordance with the trustee's discretionary authority under the trust instrument.

(3) If the settlor of an irrevocable trust is also a beneficiary of the trust, and if the requirements of Subsection (5) are satisfied, a creditor of the settlor may not:

(a) satisfy a claim or liability of the settlor in either law or equity out of the settlor's transfer to the trust or the settlor's beneficial interest in the trust;

(b) force or require the trustee to make a distribution to the settlor, as beneficiary; or

(c) require the trustee to pay any distribution directly to the creditor, or otherwise

## **SB0058S01 compared with SB0058**

attach the distribution before it has been paid or delivered by the trustee to the settlor, as beneficiary.

(4) Notwithstanding Subsection (3), nothing in this section prohibits a creditor from satisfying a claim or liability from the distribution once it has been paid or delivered by the trustee to the settlor, as beneficiary.

(5) In order for Subsection (3) to apply, the conditions in this Subsection (5) shall be satisfied. Where this Subsection (5) requires that a provision be included in the trust instrument, no particular language need be used in the trust instrument if the meaning of the trust provision otherwise complies with this Subsection (5).

(a) The trust instrument shall provide that the trust is governed by Utah law and is established pursuant to this section.

(b) The trust instrument shall require that at all times at least one trustee shall be a Utah resident or Utah trust company, as the term "trust company" is defined in Section 7-5-1.

(c) The trust instrument shall provide that neither the interest of the settlor, as beneficiary, nor the income or principal of the trust may be voluntarily or involuntarily transferred by the settlor, as beneficiary. The provision shall be considered to be a restriction on the transfer of the settlor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of Section 541(c)(2) of the Bankruptcy Code.

(d) The settlor may not have the ability under the trust instrument to revoke, amend, or terminate all or any part of the trust, or to withdraw property from the trust, without the consent of a person who has a substantial beneficial interest in the trust, which interest would be adversely affected by the exercise of the power held by the settlor.

(e) The trust instrument may not provide for any mandatory distributions of either income or principal to the settlor, as beneficiary, except as provided in Subsection (7)(f).

(f) The settlor may not benefit from, direct a distribution of, or use trust property except as stated in the trust instrument. An agreement or understanding, express or implied, between the settlor and the trustee that attempts to grant or permit the retention of greater rights or authority than is stated in the trust instrument is void.

(g) The trust instrument shall require that, at least 30 days before making any distribution to the settlor, as beneficiary, the trustee notify in writing every person who has a child support judgment or order against the settlor. The trust instrument shall require that the

## **SB0058S01 compared with SB0058**

notice state the date the distribution will be made and the amount of the distribution.

(h) At the time that the settlor transfers any assets to the trust, the settlor may not be in default of making a payment due under any child support judgment or order.

(i) A transfer of assets to the trust may not render the settlor insolvent.

(j) At the time the settlor transfers any assets to the trust, the settlor may not intend to hinder, delay, or defraud a known creditor by transferring the assets to the trust. A settlor's expressed intention to protect trust assets from the settlor's potential future creditors is not evidence of an intent to hinder, delay, or defraud a known creditor.

(k) At the time that the settlor transfers any assets to the trust, the settlor may not be contemplating filing for relief under the provisions of the Bankruptcy Code.

(l) Assets transferred to the trust may not be derived from unlawful activities.

(m) At the time the settlor transfers any assets to the trust, the settlor shall sign a sworn affidavit stating that:

(i) the settlor has full right, title, and authority to transfer the assets to the trust;

(ii) the transfer of the assets to the trust will not render the settlor insolvent;

(iii) the settlor does not intend to hinder, delay, or defraud a known creditor by transferring the assets to the trust;

(iv) there are no pending or threatened court actions against the settlor, except for those court actions identified by the settlor on an attachment to the affidavit;

(v) the settlor is not involved in any administrative proceedings, except those administrative proceedings identified on an attachment to the affidavit;

(vi) at the time of the transfer of the assets to the trust, the settlor is not in default of a child support obligation;

(vii) the settlor does not contemplate filing for relief under the provisions of the Bankruptcy Code; and

(viii) the assets being transferred to the trust were not derived from unlawful activities.

(6) Failure to satisfy the requirements of Subsection (5) shall result in the consequences described in this Subsection (6).

(a) If any requirement of Subsections (5)(a) through (g) is not satisfied, none of the property held in the trust will at any time have the benefit of the protections described in Subsection (3).



## **SB0058S01 compared with SB0058**

(b) If the trustee does not send the notice required under Subsection (5)(g), the court may authorize any person with a child support judgment or order against the settlor to whom notice was not sent to attach the distribution or future distributions, but the person may not:

(i) satisfy a claim or liability in either law or equity out of the settlor's transfer to the trust or the settlor's beneficial interest in the trust; or

(ii) force or require the trustee to make a distribution to the settlor, as beneficiary.

(c) If any requirement set forth in Subsections (5)(h) through (m) is not satisfied, the property transferred to the trust that does not satisfy the requirement may not have the benefit of the protections described in Subsection (3).

(7) The provisions of Subsection (3) may apply to a trust even if:

(a) the settlor serves as a cotrustee or as an advisor to the trustee, provided that the settlor may not participate in the determination as to whether a discretionary distribution will be made;

(b) the settlor has the authority under the terms of the trust instrument to appoint nonsubordinate advisors or trust protectors who can remove and appoint trustees and who can direct, consent to, or disapprove distributions;

(c) the settlor has the power under the terms of the trust instrument to serve as an investment director or to appoint an investment director under Section 75-7-906;

(d) the trust instrument gives the settlor the power to veto a distribution from the trust;

(e) the trust instrument gives the settlor a testamentary nongeneral power of appointment or similar power;

(f) the trust instrument gives the settlor the right to receive the following types of distributions:

(i) income, principal, or both in the discretion of a person, including a trustee, other than the settlor;

(ii) principal, subject to an ascertainable standard set forth in the trust;

(iii) income or principal from a charitable remainder annuity trust or charitable remainder unitrust, as defined in 26 U.S.C. 664;

(iv) a percentage of the value of the trust each year as determined under the trust instrument, but not exceeding the amount that may be defined as income under 26 U.S.C. 643(b);

## **SB0058S01 compared with SB0058**

(v) the transferor's potential or actual use of real property held under a qualified personal residence trust, or potential or actual possession of a qualified annuity interest, within the meaning of 26 U.S.C. 2702 and the accompanying regulations; and

(vi) income or principal from a grantor retained annuity trust or grantor retained unitrust that is allowed under 26 U.S.C. 2702; or

(g) the trust instrument authorizes the settlor to use real or personal property owned by the trust.

(8) If a trust instrument contains the provisions described in Subsections (5)(a) through (g), the transfer restrictions prevent a creditor or other person from asserting any cause of action or claim for relief against a trustee of the trust or against others involved in the counseling, drafting, preparation, execution, or funding of the trust for conspiracy to commit fraudulent conveyance, aiding and abetting a fraudulent conveyance, participation in the trust transaction, or similar cause of action or claim for relief. For purposes of this subsection, counseling, drafting, preparation, execution, or funding of the trust includes the preparation and funding of a limited partnership, a limited liability company, or other entity if interests in the entity are subsequently transferred to the trust. The creditor and other person prevented from asserting a cause of action or claim for relief may assert a cause of action against, and are limited to recourse against, only:

(a) the trust and the trust assets; and

(b) the settlor, to the extent otherwise allowed in this section.

(9) A cause of action or claim for relief regarding a fraudulent transfer of a settlor's assets under Subsection (5)(j) is extinguished unless the action under Subsection (5)(j) is brought by a creditor of the settlor who was a creditor of the settlor before the assets referred to in Subsection (5)(j) were transferred to the trust and the action under Subsection (5)(j) is brought within the earlier of:

(a) the later of:

(i) two years after the transfer is made; or

(ii) one year after the transfer is or reasonably could have been discovered by the creditor if the creditor:

(A) can demonstrate, by a preponderance of the evidence, that the creditor asserted a specific claim against the settlor before the transfer; or

## SB0058S01 compared with SB0058

(B) files another action, other than an action under Subsection (5)(j), against the settlor that asserts a claim based on an act or omission of the settlor that occurred before the transfer, and the action described in this Subsection (9) is filed within two years after the transfer.

(b) (i) with respect to a creditor known to the settlor, 120 days after the date on which notice of the transfer is mailed to the creditor, which notice shall state the name and address of the settlor, the name and address of the trustee, and also describe the assets that were transferred, but does not need to state the value of those assets if the assets are other than cash, and which shall inform the creditor that he is required to present his claim to both the settlor and the trustee within 120 days from the mailing of the notice or be forever barred; or

(ii) with respect to a creditor not known to the settlor, 120 days after the date on which notice of the transfer is first published in a newspaper of general circulation in the county in which the settlor then resides, which notice shall state the name and address of the settlor, the name and address of the trustee, and also describe the assets that were transferred, but does not need to state the value of those assets if the assets are other than cash.

(10) The notice required in Subsection (9)(b) shall be published in accordance with the provisions of Section 45-1-101 for three consecutive weeks and inform creditors that they are required to present claims within 120 days from the first publication of the notice or be forever barred.

(11) (a) A trust is subject to this section if it is governed by Utah law, as provided in Section 75-7-107, and if it otherwise meets the requirements of this section.

(b) A court of this state has exclusive jurisdiction over an action or claim for relief that is based on a transfer of property to a trust that is the subject of this section.

Section 23. Section **31A-27a-507** is amended to read:

### **31A-27a-507. Receiver as lien creditor.**

(1) The receiver may avoid a transfer of or lien on the property of, or obligation incurred by, an insurer that the insurer or a policyholder, creditor, member, or stockholder of the insurer:

(a) may have avoided without regard to any knowledge of:

(i) the receiver;

(ii) the commissioner;

(iii) the insurer; or

## SB0058S01 compared with SB0058

(iv) a policyholder, creditor, member, or stockholder of the insurer; and

(b) whether or not a policyholder, creditor, member, or stockholder described in this Subsection (1) exists.

(2) The receiver is considered a creditor without knowledge for purposes of pursuing claims under:

(a) Title 25, Chapter 6, Uniform [~~Fraudulent Transfer~~] Voidable Transactions Act; or

(b) similar provisions of state or federal law.

Section 24. Section **70A-2-402** is amended to read:

### **70A-2-402. Rights of seller's creditors against sold goods.**

(1) Except as provided in Subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this chapter (Sections 70A-2-502 and 70A-2-716).

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

(3) Nothing in this chapter shall be deemed to impair the rights of creditors of the seller:

(a) under the provisions of the chapter on Secured Transactions (Chapter 9a, Uniform Commercial Code - Secured Transactions); or

(b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this chapter constitute the transaction a [~~fraudulent transfer~~] voidable transaction or voidable preference.

Section 25. Section **70A-2a-308** is amended to read:

### **70A-2a-308. Special rights of creditors.**

(1) A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if as against the creditor retention of possession by the lessor is fraudulent or voids the lease contract under any statute or rule of law, but retention of

## SB0058S01 compared with SB0058

possession in good faith and current course of trade by the lessor for a commercially reasonable time after the lease contract becomes enforceable is not fraudulent and does not void the lease contract.

(2) Nothing in this chapter impairs the rights of creditors of a lessor if the lease contract is made under circumstances which under any statute or rule of law apart from the chapter would constitute the transaction a [~~fraudulent transfer~~] voidable transaction or voidable preference.

(3) A creditor of a seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor retention of possession by the seller is fraudulent under any statute or rule of law, but retention of possession of the goods pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods is not fraudulent if the buyer bought for value and in good faith.

Section 26. Section **75-2-205** is amended to read:

### **75-2-205. Decedent's nonprobate transfers to others.**

Unless excluded under Section 75-2-208, the value of the augmented estate includes the value of the decedent's nonprobate transfers to others, not included under Section 75-2-204, of any of the types described in this section, in the amount provided respectively for each type of transfer:

(1) Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Property included under this category consists of the property described in this Subsection (1).

(a) (i) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment.

(ii) The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

(b) (i) The decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship.

(ii) The amount included is the value of the decedent's fractional interest, to the extent the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse.

## SB0058S01 compared with SB0058

(c) (i) The decedent's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship.

(ii) The amount included is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(d) (i) Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds.

(ii) The amount included:

(A) is the value of the proceeds, to the extent they were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse; and

(B) may not exceed the greater of the cash surrender value of the policy immediately prior to the death of the decedent or the amount of premiums paid on the policy during the decedent's life.

(2) Property transferred in any of the forms described in this Subsection (2) by the decedent during marriage:

(a) (i) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent's right terminated at or continued beyond the decedent's death.

(ii) An irrevocable transfer in trust which includes a restriction on transfer of the decedent's interest as settlor and beneficiary as described in Section ~~[25-6-14]~~ 25-6-502.

(iii) The amount included is the value of the fraction of the property to which the right or restriction related, to the extent the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.

(b) (i) Any transfer in which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the decedent's estate.

(ii) The amount included with respect to a power over property is the value of the property subject to the power, and the amount included with respect to a power over income is

## **SB0058S01 compared with SB0058**

the value of the property that produces or produced the income, to the extent the power in either case was exercisable at the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

(iii) If the power is a power over both income and property and Subsection (2)(b)(ii) produces different amounts, the amount included is the greater amount.

(3) Property that passed during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the types described in this Subsection (3).

(a) (i) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under Subsection (1)(a), (b), or (c), or under Subsection (2), if the right, interest, or power had not terminated until the decedent's death.

(ii) The amount included is the value of the property that would have been included under Subsection (1)(a), (b), (c), or Subsection (2) if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate, spouse, or surviving spouse.

(iii) (A) As used in this Subsection (3)(a), "termination," with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument or the decedent transferred or relinquished the right or interest, and, with respect to a power over property, occurs when the power terminated by exercise, release, lapse, default, or otherwise.

(B) With respect to a power described in Subsection (1)(a), "termination" occurs when the power terminated by exercise or release, but not otherwise.

(b) (i) Any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have been included in the augmented estate under Subsection (1)(d) had the transfer not occurred.

(ii) The amount included:

(A) is the value of the insurance proceeds to the extent the proceeds were payable at

## SB0058S01 compared with SB0058

the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse; and

(B) may not exceed the greater of the cash surrender value of the policy immediately prior to the death of the decedent or the amount of premiums paid on the policy during the decedent's life.

(c) (i) Any transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse.

(ii) The amount included is the value of the transferred property to the extent the aggregate transfers to any one donee in either of the two years exceeded \$10,000.

Section 27. Section **75-7-105** is amended to read:

### **75-7-105. Default and mandatory rules.**

(1) Except as otherwise provided in the terms of the trust, this chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(2) Except as specifically provided in this chapter, the terms of a trust prevail over any provision of this chapter except:

(a) the requirements for creating a trust;

(b) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;

(c) the requirement that a trust and its terms be for the benefit of its beneficiaries;

(d) the power of the court to modify or terminate a trust under Sections 75-7-410 through 75-7-416;

(e) the effect of a spendthrift provision, Section [~~25-6-14~~] 25-6-502, and the rights of certain creditors and assignees to reach a trust as provided in Part 5, Creditor's Claims - Spendthrift and Discretionary Trusts;

(f) the power of the court under Section 75-7-702 to require, dispense with, or modify or terminate a bond;

(g) the effect of an exculpatory term under Section 75-7-1008;

(h) the rights under Sections 75-7-1010 through 75-7-1013 of a person other than a trustee or beneficiary;

(i) periods of limitation for commencing a judicial proceeding; and



## SB0058S01 compared with SB0058

(j) the subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 75-7-203 and 75-7-205.

Section 28. Section **75-7-107** is amended to read:

### **75-7-107. Governing law.**

(1) For purposes of this section:

(a) "Foreign trust" means a trust that is created in another state or country and valid in the state or country in which the trust is created.

(b) "State law provision" means a provision that the laws of a named state govern the validity, construction, and administration of a trust.

(2) If a trust has a state law provision specifying this state, the validity, construction, and administration of the trust are to be governed by the laws of this state if any administration of the trust is done in this state.

(3) For all trusts created on or after December 31, 2003, if a trust does not have a state law provision, the validity, construction, and administration of the trust are to be governed by the laws of this state if the trust is administered in this state.

(4) A trust shall be considered to be administered in this state if:

(a) the trust states that this state is the place of administration, and any administration of the trust is done in this state; or

(b) the place of business where the fiduciary transacts a major portion of its administration of the trust is in this state.

(5) If a foreign trust is administered in this state as provided in this section, the following provisions are effective and enforceable under the laws of this state:

(a) a provision in the trust that restricts the transfer of trust assets in a manner similar to Section [~~25-6-14~~] 25-6-502;

(b) a provision that allows the trust to be perpetual; or

(c) a provision that is not expressly prohibited by the law of this state.

(6) A foreign trust that moves its administration to this state is valid whether or not the trust complied with the laws of this state at the time of the trust's creation or after the trust's creation.

(7) Unless otherwise designated in the trust instrument, a trust is administered in this state if it meets the requirements of Subsection (4).

## **SB0058S01 compared with SB0058**

Section 29. Section **75-7-301** is amended to read:

### **75-7-301. Basic effect.**

(1) Notice to a person who may represent and bind another person under this part has the same effect as if notice were given directly to the other person.

(2) The consent of a person who may represent and bind another person under this part is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(3) Except as otherwise provided in Sections 75-7-411 and ~~[25-6-14]~~ 25-6-502, a person who under this part may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

Section 30. Section **75-7-501** is amended to read:

### **75-7-501. Rights of beneficiary's creditor or assignee.**

To the extent a beneficiary's interest is not protected by a spendthrift provision or Section ~~[25-6-14]~~ 25-6-502, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to relief as is appropriate under the circumstances.

Section 31. Section **75-7-505** is amended to read:

### **75-7-505. Creditor's claim against settlor.**

(1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(a) During the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor's creditors. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(b) With respect to an irrevocable trust other than an irrevocable trust that meets the requirements of Section ~~[25-6-14]~~ 25-6-502, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If the trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(c) After the death of a settlor, and subject to the settlor's right to direct the source from

## SB0058S01 compared with SB0058

which liabilities will be paid, the property of a trust that was revocable at the settlor's death, but not property received by the trust as a result of the death of the settlor which is otherwise exempt from the claims of the settlor's creditors, is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

(2) For purposes of this section:

(a) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(b) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Subsection 2041(b)(2), 2514(e), or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on May 1, 2004.

Section 32. Section **75-7-816** is amended to read:

### **75-7-816. Recitals when title to real property is in trust -- Failure.**

(1) When title to real property is granted to a person as trustee, the terms of the trust may be given either:

(a) in the deed of transfer; or

(b) in an instrument signed by the grantor and recorded in the same office as the grant to the trustee.

(2) If the terms of the trust are not made public as required in Subsection (1), a conveyance from the trustee is absolute in favor of purchasers for value who take the property without notice of the terms of the trust.

(3) The terms of the trust recited in the deed of transfer or the instrument recorded under Subsection (1)(b) shall include:

(a) the name of the trustee;

(b) the address of the trustee; and

(c) the name and date of the trust.

(4) Any real property titled in a trust which has a restriction on transfer described in Section [~~25-6-14~~] 25-6-502 shall include in the title the words "asset protection trust."

## SB0058S01 compared with SB0058

Section 33. Section **78B-2-302** is amended to read:

### **78B-2-302. Within one year.**

An action may be brought within one year:

- (1) for liability created by the statutes of a foreign state;
- (2) upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation;
- (3) except as provided in Section 78B-2-307.5, upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state;
- (4) for libel, slander, false imprisonment, or seduction;
- (5) against a sheriff or other officer for the escape of a prisoner arrested or imprisoned upon either civil or criminal process;
- (6) against a municipal corporation for damages or injuries to property caused by a mob or riot;
- (7) except as otherwise expressly provided by statute, against a county legislative body or a county executive to challenge a decision of the county legislative body or county executive, respectively; ~~[or]~~
- (8) on a claim for relief or a cause of action under Title 63L, Chapter 5, Utah Religious Land Use Act~~[-];~~ or
- (9) for a claim for relief or a cause of action under Subsection 25-6-203(2).

Section 34. Section **78B-2-307** is amended to read:

### **78B-2-307. Within four years.**

An action may be brought within four years:

- (1) after the last charge is made or the last payment is received:
  - (a) upon a contract, obligation, or liability not founded upon an instrument in writing;
  - (b) on an open store account for any goods, wares, or merchandise; or
  - (c) on an open account for work, labor or services rendered, or materials furnished;
- (2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform ~~[Fraudulent Transfer]~~ Voidable Transactions Act:
  - (a) Subsection ~~[25-6-5]~~ 25-6-202(1)(a), ~~[which]~~ except in specific situations ~~[limits]~~ where the time for action is limited to one year~~[-];~~ under Section ~~[25-6-10]~~ 25-6-305;

## **SB0058S01 compared with SB0058**

- (b) Subsection [~~25-6-5~~] 25-6-202(1)(b); or
- (c) Subsection [~~25-6-6~~] 25-6-203(1); and
- (3) for relief not otherwise provided for by law.

†

**Legislative Review Note**

**Office of Legislative Research and General Counsel†**