

House Bill 2330

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of House Interim Committee on Judiciary for Oregon State Bar)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Redesignates Uniform Fraudulent Transfer Act as Uniform Voidable Transactions Act. Conforms provisions relating to covered transactions, burdens of proof and choice of law.

A BILL FOR AN ACT

1
2 Relating to voidable transactions; creating new provisions; and amending ORS 18.358, 95.200, 95.210,
3 95.220, 95.230, 95.240, 95.250, 95.270, 95.280 and 95.310.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. Sections 2 to 4 of this 2023 Act are added to and made a part of ORS 95.200**
6 **to 95.310.**

7 **SECTION 2. (1) A claim for relief in the nature of a claim for relief under ORS 95.200 to**
8 **95.310 is governed by the local law of the jurisdiction in which the debtor is located at the**
9 **time the transfer is made or the obligation is incurred.**

10 **(2) For purposes of this section, a debtor's location is determined as follows:**

11 **(a) A debtor who is an individual is located at the individual's principal residence.**

12 **(b) A debtor that is an organization and has only one place of business is located at its**
13 **place of business.**

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

16 **SECTION 3. (1) For the purposes of ORS 95.200 to 95.310, a series organization and each**
17 **protected series of the organization is a separate person, even if for other purposes a pro-**
18 **ected series is not a person separate from the series organization or other protected series**
19 **of the organization.**

20 **(2) As used in this section:**

21 **(a) "Protected series" means an arrangement, however denominated, created by a series**
22 **organization that, pursuant to the law under which the series organization is organized, has**
23 **the characteristics set forth in paragraph (b) of this subsection.**

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

26 **(A) The organic record of the organization provides for creation by the organization of**
27 **one or more protected series, however denominated, with respect to specified property of the**
28 **organization, and for records to be maintained for each protected series that identify the**
29 **property of or associated with the protected series.**

30 **(B) Debt incurred or existing with respect to the activities of, or property of or associ-**
31 **ated with, a particular protected series is enforceable against the property of or associated**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 with the protected series only, and not against the property of or associated with the or-
 2 ganization or other protected series of the organization.

3 (C) Debt incurred or existing with respect to the activities or property of the organiza-
 4 tion is enforceable against the property of the organization only, and not against the prop-
 5 erty of or associated with a protected series of the organization.

6 **SECTION 4.** ORS 95.200 to 95.310 modifies, limits and supersedes the Electronic Signa-
 7 tures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., but does not modify, limit
 8 or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices described
 9 in 15 U.S.C. 7003(b).

10 **SECTION 5.** ORS 95.200 is amended to read:

11 95.200. As used in ORS 95.200 to 95.310:

12 (1) "Affiliate" means *[any of the following]*:

13 (a) A person *[who]* **that** directly or indirectly owns, controls or holds with power to vote 20 or
 14 more percent of the outstanding voting securities of the debtor, other than a person *[who]* **that** holds
 15 the securities:

16 (A) As a fiduciary or agent without sole discretionary power to vote the securities; or

17 (B) Solely to secure a debt, if the person has not in fact exercised the power to vote.

18 (b) *[A corporation]* **An organization**, 20 or more percent of whose outstanding voting securities
 19 **or other voting interests** are directly or indirectly owned, controlled or held with power to vote
 20 by the debtor or by a person *[who]* **that** directly or indirectly owns, controls or holds with power
 21 to vote 20 or more percent of the outstanding voting securities **or other voting interests** of the
 22 debtor, other than a person *[who]* **that** holds the securities:

23 (A) As a fiduciary or agent without sole discretionary power to vote the securities **or other**
 24 **voting interests**; or

25 (B) Solely to secure a debt, if the person has not in fact exercised the power to vote.

26 (c) A person whose business is operated by the debtor under a lease or other agreement, or a
 27 person substantially all of whose assets are controlled by the debtor.

28 (d) A person *[who]* **that** operates the debtor's business under a lease or other agreement or
 29 controls substantially all of the debtor's assets.

30 (2) "Asset" means property of a debtor but does not include:

31 (a) Property to the extent *[that it is]* encumbered by a valid lien;

32 (b) Property to the extent that it is generally exempt under nonbankruptcy law; or

33 (c) An interest in property held in tenancy by the *[entirety to the extent that it is]* **entireties to**
 34 **the extent** not subject to process by a creditor holding a claim against only one tenant.

35 (3)(a) "Claim" means a right to payment, whether or not the right is reduced to judgment, liq-
 36 uidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable,
 37 secured or unsecured.

38 (b) **"Claim for relief" does not have the same meaning as the term "claim."**

39 (4) "Creditor" means a person *[who]* **that** has a claim *[against a debtor]*.

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

41 (6) "Debtor" means a person *[against whom a creditor has]* **that is liable on** a claim.

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

44 [(7)] (8) *[An]* "Insider" includes:

45 (a) If the debtor is an individual:

- 1 (A) A relative of the debtor or of a general partner of the debtor;
 2 (B) A partnership in which the debtor is a general partner;
 3 (C) A general partner in a partnership described in subparagraph (B) of this paragraph; or
 4 (D) A corporation of which the debtor is a director, officer, **manager** or person in control.
 5 (b) If the debtor is a corporation:
 6 (A) A director of the debtor;
 7 (B) An officer of the debtor;
 8 (C) A person in control of the debtor;
 9 (D) A partnership in which the debtor is a general partner;
 10 (E) A general partner in a partnership described in subparagraph (D) of this paragraph; or
 11 (F) A relative of a general partner, director, officer or person in control of the debtor.
 12 (c) If the debtor is a partnership:
 13 (A) A general partner in the debtor;
 14 (B) A relative of a general partner in, **a general partner of, or** *[a debtor, of a general partner*
 15 *of a debtor, or of]* a person in control of the debtor;
 16 (C) Another partnership in which the debtor is a general partner;
 17 (D) A general partner in a partnership described in subparagraph (C) of this paragraph; or
 18 (E) A person in control of the debtor.
 19 **(d) If the debtor is a limited liability company or other business organization:**
 20 **(A) A member of the debtor; or**
 21 **(B) A manager, or other person in control, of the debtor.**
 22 *[(d)]* (e) An affiliate or an insider of an affiliate as if the affiliate were the debtor.]; *and]*
 23 *[(e)]* (f) A managing agent of the debtor.
 24 *[(8)]* (9) “Lien” means a charge against or an interest in property to secure payment of a debt
 25 or performance of an obligation, including a security interest created by agreement, a judicial lien
 26 obtained by legal or equitable process or proceedings, a common-law lien or a statutory lien.
 27 **(10) “Organization” means a person other than an individual.**
 28 *[(9)]* (11) “Person” means an individual, partnership, corporation, association, organization, gov-
 29 ernment or governmental subdivision or agency, business trust or any other legal or commercial
 30 entity.
 31 *[(10)]* (12) “Property” means anything that may be the subject of ownership.
 32 **(13) “Record” means information that is inscribed on a tangible medium or that is stored**
 33 **in an electronic or other medium and is retrievable in any perceivable form.**
 34 *[(11)]* (14) “Relative” means an individual related **by consanguinity** within the third degree as
 35 determined by the common law, a spouse, or an individual related to a spouse within the third de-
 36 gree as so determined, and includes an individual in an adoptive relationship within the third de-
 37 gree.
 38 **(15) “Sign” means, with present intent to authenticate or adopt a record:**
 39 **(a) To execute or adopt a tangible symbol; or**
 40 **(b) To attach to or logically associate with the record an electronic symbol, sound or**
 41 **process.**
 42 *[(12)]* (16) “Transfer” means every mode, direct or indirect, absolute or conditional, voluntary
 43 or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes a
 44 payment of money, a release, a lease and the creation of a lien or **other** encumbrance.
 45 *[(13)]* (17) “Valid lien” means a lien that is effective against the holder of a judicial lien subse-

1 quently obtained by legal or equitable process or proceedings.

2 **SECTION 6.** ORS 95.210 is amended to read:

3 95.210. (1) A debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater
4 than *[all]* **the sum** of the debtor's assets.

5 **(2) A debtor that is generally not paying the debtor's debts as they become due, other
6 than as a result of a bona fide dispute, is rebuttably presumed to be insolvent.**

7 *[(2) A debtor who is generally not paying debts of the debtor as they become due is presumed to
8 be insolvent.]*

9 *[(3) A partnership is insolvent under subsection (1) of this section if, at a fair valuation, the sum
10 of the partnership's debts is greater than the aggregate of all of the partnership's assets and the sum
11 of the excess of the value of each general partner's nonpartnership assets over the partner's nonpart-
12 nership debts.]*

13 *[(4)]* **(3)** Assets under this section do not include property that has been transferred, concealed
14 or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a
15 manner making the transfer voidable under ORS 95.200 to 95.310.

16 *[(5)]* **(4)** Debts under this section do not include an obligation to the extent the obligation is
17 secured by a valid lien on property of the debtor not included as an asset.

18 **SECTION 7.** ORS 95.220 is amended to read:

19 95.220. (1) Value is given for a transfer or an obligation if in exchange for the transfer or obli-
20 gation property is transferred or an antecedent debt is secured or satisfied, but value does not in-
21 clude an unperformed promise made otherwise than in the ordinary course of the promisor's business
22 to furnish support to the debtor or another person.

23 (2) For the purposes of ORS 95.230 (1)(b) and 95.240, a person gives a reasonably equivalent
24 value if the person acquires an interest *[in]* **of** the debtor in an asset pursuant to a regularly con-
25 ducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposi-
26 tion of the interest of the debtor upon default under a mortgage, deed of trust or security agreement.

27 (3) A transfer is made for present value if the exchange between the debtor and the transferee
28 is intended by them to be contemporaneous and is in fact substantially contemporaneous.

29 **SECTION 8.** ORS 95.230 is amended to read:

30 95.230. (1) A transfer made or obligation incurred by a debtor is *[fraudulent]* **voidable** as to a
31 creditor, whether the creditor's claim arose before or after the transfer was made or the obligation
32 was incurred, if the debtor made the transfer or incurred the obligation:

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

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

36 (A) Was engaged or was about to engage in a business or a transaction for which the remaining
37 assets of the debtor were unreasonably small in relation to the business or transaction; or

38 (B) Intended to incur, or believed or reasonably should have believed that the debtor would
39 incur, debts beyond the debtor's ability to pay as they become due.

40 (2) In determining actual intent under subsection (1)(a) of this section, consideration may be
41 given, among other factors, to whether:

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

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

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

45 (d) Before the transfer was made or obligation was incurred, the debtor was sued or threatened

1 with suit;

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

3 (f) The debtor had absconded;

4 (g) The debtor had removed or concealed assets;

5 (h) The value of the consideration received by the debtor was reasonably equivalent to the value
6 of the asset transferred or the amount of the obligation incurred;

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

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

10 (k) The debtor had transferred the essential assets of the business to a lienor who had trans-
11 ferred the assets to an insider of the debtor.

12 **(3) A creditor making a claim for relief under this section has the burden of proving the**
13 **elements of the claim for relief by preponderance of the evidence.**

14 **SECTION 9.** ORS 95.240 is amended to read:

15 95.240. (1) A transfer made or obligation incurred by a debtor is [*fraudulent*] **voidable** as to a
16 creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor
17 made the transfer or incurred the obligation without receiving a reasonably equivalent value in ex-
18 change for the transfer or obligation and the debtor was insolvent at that time or the debtor [*be-*
19 *comes*] **became** insolvent as a result of the transfer or obligation.

20 (2) A transfer made by a debtor is [*fraudulent*] **voidable** as to a creditor whose claim arose be-
21 fore the transfer was made if the transfer was made to an insider for [*other than a present, reason-*
22 *ably equivalent value*] **an antecedent debt**, the debtor was insolvent at that time and the insider
23 had reasonable cause to believe that the debtor was insolvent.

24 **(3) Subject to ORS 95.210, a creditor making a claim for relief under this section has the**
25 **burden of proving the elements of the claim for relief by a preponderance of the evidence.**

26 **SECTION 10.** ORS 95.250 is amended to read:

27 95.250. For the purposes of ORS 95.200 to 95.310:

28 (1) A transfer is made:

29 (a) With respect to an asset that is real property other than a fixture, but including the interest
30 of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far per-
31 fected that a good-faith purchaser of the asset from the debtor against [*whom*] **which** applicable law
32 permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the
33 interest of the transferee; and

34 (b) With respect to an asset that is not real property or that is a fixture, when the transfer is
35 so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than
36 under ORS 95.200 to 95.310 that is superior to the interest of the transferee.

37 (2) If applicable law permits the transfer to be perfected as provided in subsection (1) of this
38 section and the transfer is not so perfected before the commencement of an action for relief under
39 ORS 95.200 to 95.310, the transfer is **deemed** made immediately before the commencement of the
40 action.

41 (3) If applicable law does not permit the transfer to be perfected as provided in subsection (1)
42 of this section, the transfer is made when it becomes effective between the debtor and the
43 transferee.

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

45 (5) An obligation is incurred:

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

2 (b) If evidenced by a *[writing, when the writing executed]* **record, when the record signed** by
 3 the obligor is delivered to or for the benefit of the obligee.

4 **SECTION 11.** ORS 95.270 is amended to read:

5 95.270. (1) A transfer or obligation is not voidable under ORS 95.230 (1)(a) as against a person
 6 *[who]* **that** took in good faith and for a reasonably equivalent value *[or]* **given the debtor or as**
 7 **against** any subsequent transferee or obligee.

8 (2) *[Except as otherwise provided in this section,]* To the extent a transfer is *[voidable]* **avoidable**
 9 in an action by a creditor under ORS 95.260 (1)(a), the **following apply:**

10 (a) **Except as otherwise provided in this section, the** creditor may recover judgment for the
 11 value of the asset transferred, as adjusted under subsection (3) of this section, or the amount nec-
 12 essary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

13 *[(a)]* (A) The first transferee of the asset or the person for whose benefit the transfer was made;
 14 or

15 (B) **An immediate or mediate transferee of the first transferee, other than:**

16 (i) **A good-faith transferee that took for value; or**

17 (ii) **An immediate or mediate good-faith transferee of a person described in sub-**
 18 **subparagraph (i) of this subparagraph.**

19 (b) **Recovery under ORS 95.260 (1)(a) or (2) of, or from, the asset transferred or its pro-**
 20 **ceeds, by levy or otherwise, is available only against a person described in paragraph (a) of**
 21 **this subsection.**

22 *[(b) Any subsequent transferee.]*

23 (3) If the judgment under subsection (2) of this section is based upon the value of the asset
 24 transferred, the judgment must be for an amount equal to the value of the asset at the time of the
 25 transfer, subject to adjustment as the equities may require.

26 *[(4) A creditor may not recover under subsection (2)(b) of this section from a good-faith transferee*
 27 *or obligee who took for value or from any subsequent transferee or obligee.]*

28 *[(5)]* (4) Notwithstanding voidability of a transfer or an obligation under ORS 95.200 to 95.310,
 29 a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the
 30 transfer or obligation, to:

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

32 (b) Enforcement of any obligation incurred; or

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

34 *[(6) A transfer is not voidable under ORS 95.240 (2):]*

35 *[(a) To the extent the insider gave new value to or for the benefit of the debtor after the transfer*
 36 *was made unless the new value was secured by an otherwise unavoidable lien;]*

37 *[(b) If made in the ordinary course of business or financial affairs of the debtor and the insider;*
 38 *or]*

39 *[(c) If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured*
 40 *present value given for that purpose as well as an antecedent debt of the debtor.]*

41 *[(7)]* (5) A transfer is not voidable under ORS 95.230 (1)(b) or 95.240 if the transfer results from:

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

44 (b) Enforcement of a security interest in compliance with ORS chapter 79.

45 (6) **A transfer is not voidable under ORS 95.240 (2):**

1 (a) To the extent the insider gave new value to or for the benefit of the debtor after the
2 transfer was made unless the new value was secured by an otherwise unavoidable lien;

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

5 (c) If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer
6 secured present value given for that purpose as well as an antecedent debt of the debtor.

7 (7) The burden of proving matters referred to in this section is determined as follows:

8 (a) A party that seeks to invoke subsection (1), (4), (5) or (6) of this section has the
9 burden of proving the applicability of the subsection.

10 (b) Except as otherwise provided in paragraphs (c) and (d) of this subsection, the creditor
11 has the burden of proving each applicable element of subsection (2) or (3) of this section.

12 (c) The transferee has the burden of proving the applicability to the transferee of sub-
13 section (2)(a)(B)(i) or (ii) of this section.

14 (d) A party that seeks adjustment under subsection (3) of this section has the burden of
15 proving the adjustment.

16 (8) The standard of proof required to establish matters referred to in this section is
17 preponderance of the evidence.

18 **SECTION 12.** ORS 95.280 is amended to read:

19 95.280. A claim for relief with respect to a [*fraudulent*] transfer or obligation under ORS 95.200
20 to 95.310 is extinguished unless action is brought:

21 (1) Under ORS 95.230 (1)(a) within four years after the transfer was made or the obligation was
22 incurred or, if later, within one year after the transfer or obligation was or could reasonably have
23 been discovered by the claimant;

24 (2) Under ORS 95.230 (1)(b) or 95.240 (1), within four years after the transfer was made or the
25 obligation was incurred; or

26 (3) Under ORS 95.240 (2), within one year after the transfer was made or the obligation was
27 incurred.

28 **SECTION 13.** ORS 95.310 is amended to read:

29 95.310. ORS 95.200 to 95.310 may be cited as the Uniform [*Fraudulent Transfer*] **Voidable**
30 **Transactions Act.**

31 **SECTION 14.** (1) Sections 2 to 4 of this 2023 Act and the amendments to ORS 95.200,
32 95.210, 95.220, 95.230, 95.240, 95.250, 95.270, 95.280 and 95.310 by sections 5 to 13 of this 2023
33 **Act:**

34 (a) Apply to a transfer made or obligation incurred on or after the effective date of this
35 2023 Act;

36 (b) Do not apply to a transfer made or obligation incurred before the effective date of this
37 2023 Act; and

38 (c) Do not apply to a right of action that has accrued before the effective date of this 2023
39 **Act.**

40 (2) For the purposes of this section, a transfer is made and an obligation is incurred at
41 the time described in ORS 95.250, as amended by section 10 of this 2023 Act.

42 **SECTION 15.** ORS 18.358 is amended to read:

43 18.358. (1) As used in this section:

44 (a) "Beneficiary" means a person for whom retirement plan benefits are provided or their
45 spouse.

1 (b) "Internal Revenue Code" means the federal Internal Revenue Code as amended and in effect
 2 on December 31, 1998.

3 (c) "Permitted contribution" means:

4 (A) A contribution that, at the time of the contribution, is not taxable income to the beneficiary
 5 and, if the sponsor is a taxable entity, is tax deductible to the sponsor;

6 (B) A nondeductible contribution by a beneficiary to a retirement plan to the extent that the
 7 contribution is permitted to be made under the Internal Revenue Code;

8 (C) A deductible or nondeductible contribution to an individual retirement account to the extent
 9 the contribution is not subject to federal excise tax as an excess contribution;

10 (D) A contribution, pursuant to a rollover or transfer, from one retirement plan to another, to
 11 the extent the federal tax deferred status is preserved at such time;

12 (E) A rollover from an individual retirement account described in section 408 of the Internal
 13 Revenue Code to an individual retirement account described in section 408A of the Internal Revenue
 14 Code; and

15 (F) Any earnings under a retirement plan that are attributable to a contribution described in
 16 subparagraphs (A) to (E) of this paragraph.

17 (d) "Retirement plan" means:

18 (A) A pension plan and trust, including a profit sharing plan, that is described in sections 401(a),
 19 401(c), 401(k), 403 and 457 of the Internal Revenue Code, including that portion attributable to con-
 20 tributions made by or attributable to a beneficiary;

21 (B) An individual retirement account or annuity, including one that is pursuant to a simplified
 22 employee pension, as described in section 408 or 408A of the Internal Revenue Code; and

23 (C) Any pension not described in subparagraphs (A) and (B) of this paragraph granted to any
 24 person in recognition or by reason of a period of employment by or service for the Government of
 25 the United States or any state or political subdivision of any state, or any municipality, person,
 26 partnership, association or corporation.

27 (e) "Sponsor" means an individual or entity that establishes a retirement plan.

28 (2) Subject to the limitations set forth in subsection (3) of this section, a retirement plan shall
 29 be conclusively presumed to be a valid spendthrift trust under these statutes and the common law
 30 of this state, whether or not the retirement plan is self-settled, and a beneficiary's interest in a re-
 31 tirement plan shall be exempt, effective without necessity of claim thereof, from execution and all
 32 other process, mesne or final.

33 (3) Notwithstanding subsection (2) of this section:

34 (a) A contribution to a retirement plan, other than a permitted contribution, shall be subject to
 35 ORS 95.200 to 95.310 concerning [*fraudulent transfers*] **voidable transactions**; and

36 (b) Unless otherwise ordered by a court under ORS 25.387, 75 percent of a beneficiary's interest
 37 in a retirement plan, or 50 percent of a lump sum retirement plan disbursement or withdrawal, shall
 38 be exempt from execution or other process arising out of a support obligation or an order or notice
 39 entered or issued under ORS 25.501 to 25.556 or ORS chapter 25, 107, 108, 109, 110, 419B or 419C.

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