

<b>LFC Requester:</b>	<b>Marty Daly</b>
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**AGENCY BILL ANALYSIS  
2015 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

**[LFC@NMLEGIS.GOV](mailto:LFC@NMLEGIS.GOV)**

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*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

*Check all that apply:*

<b>Original</b>	<input checked="" type="checkbox"/>	<b>Amendment</b>	<input type="checkbox"/>	<b>Date</b>	<u>January 16, 2015</u>
<b>Correction</b>	<input type="checkbox"/>	<b>Substitute</b>	<input type="checkbox"/>	<b>Bill No:</b>	<u>HB 85</u>

<b>Sponsor:</b>	<u>Eliseo Lee Alcon</u>	<b>Agency Code:</b>	<u>Attorney General's Office</u>
<b>Short Title:</b>	<u>Commercial Code &amp; Voidable Transactions</u>	<b>Person Writing</b>	<u>Joel Cruz-Esparza, AAG</u>
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
 Duplicates/Relates to Appropriation in the General Appropriation Act:

**SECTION III: NARRATIVE**

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

**BILL SUMMARY**

Synopsis:

HB 85 makes grammatical and uniform changes to the following Uniform Commercial Code sections:

Section 55-2A-529 NMSA 1978- Lessor’s Action for Rent

Section 55-3-415 NMSA 1978 – Obligation of Indorser

Section 55-4A-106 NMSA 1978 – Time Payment Order is Received

Section 55-9-331 NMSA 1978 – Priority of Rights of Purchases of Instruments, Documents, and Securities under Other Articles

Section 55-9-502 NMSA 1978 – Contents of Financing Statement—Record of Mortgage as Financing Statement—Time of Filing of Financing Statement; and

Section 55-9-512 NMSA 1978 – Amendment of Financing Statement

HB85 also amends and changes the name of the Uniform Fraudulent Transfer Act to the Uniform Voidable Transactions Act.

**FISCAL IMPLICATIONS**

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

**SIGNIFICANT ISSUES**

*NMSA 1978 Section 55-2A-529. Lessor’s Action for Rent*

Subsection (5) adds a reference as to the type of lease contract that is applicable in that a lessor who is held not entitled to rent under this section has not elected a remedy; the lessor must be awarded damages under Sections 2A-527 and 2A-528. This addition does not change that resort to a remedy is optional, unless expressly agreed to be exclusive (Section 2A-503(2)) and that rights and remedies provided in this Article generally are cumulative. (Section 2A-501(2) and

(4).

*NMSA 1978 Section 55-3-415. Obligation of Indorser*

The amendment to this Section makes the indorser is subject to Subsection (e), which states that the 30-day period after indorsement is applicable and that it as an absolute rather than a presumptive period. This amendment also clarifies that all subsections from (a) thru (e) fall under this Section.

*NMSA 1978 Section 55-4A-106. Time Payment Order is Received*

This amendment adds that the cut-off times may apply to different categories of payment orders, cancellations or amendments. It appears that this amendment simply makes the entire Subsection 9(a) consistent or uniform to the entire language of the Subsection.

*Section 55-9-331 NMSA 1978 – Priority of Rights of Purchases of Instruments, Documents, and Securities under Other Articles*

This section deletes the phrase “an adverse” to a claim under Chapter 55. Article 8 NMSA 1978.

Subsection (b) provides explicit protection for those who deal with financial assets and security entitlements and who are immunized from liability under Article 8. See, e.g., Sections 8-502, 8-503(e), 8-510, 8-511. This Subsection makes this explicit in Article 9 and in several provisions of Article 8. The question is the legal effect of amending Subsection (b) to “a claim” rather than an “adverse claim”.

N. M. S. A. 1978, § 55-8-102

**§ 55-8-102. Definitions**

(a) In this article:

(1) “adverse claim” means a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer or deal with the financial asset;

The following commentary may be relevant in understanding this amendment.

“The definition of the term “adverse claim” has two components. First, the term refers only to property interests. Second, the term means not merely that a person has a property interest in a financial asset but that it is a violation of the claimant's property interest for the other person to hold or transfer the security or other financial asset.

The term adverse claim is not, of course, limited to ownership rights, but extends to other property interests established by other law. A security interest, for example, would be an adverse claim with respect to a transferee from the debtor since any effort by the secured party to enforce the security interest against the property would be an interference with the transferee's interest.

The definition of adverse claim in the prior version of Article 8 might have been read to suggest that any wrongful action concerning a security, even a simple breach of contract, gave rise to an adverse claim. Insofar as such cases as [Fallon v. Wall Street Clearing Corp., 586 N.Y.S.2d 953, 182 A.D.2d 245, \(1992\)](#) and [Pentech Intl. v. Wall St. Clearing Co., 983 F.2d 441 \(2d Cir. 1993\)](#),

were based on that view, they are rejected by the new definition which explicitly limits the term adverse claim to property interests. Suppose, for example, that A contracts to sell or deliver securities to B, but fails to do so and instead sells or pledges the securities to C. B, the promisee, has an action against A for breach of contract, but absent unusual circumstances the action for breach would not give rise to a property interest in the securities. Accordingly, B does not have an adverse claim. An adverse claim might, however, be based upon principles of equitable remedies that give rise to property claims. It would, for example, cover a right established by other law to rescind a transaction in which securities were transferred. Suppose, for example, that A holds securities and is induced by B's fraud to transfer them to B. Under the law of contract or restitution, A may have a right to rescind the transfer, which gives A a property claim to the securities. If so, A has an adverse claim to the securities in B's hands. By contrast, if B had committed no fraud, but had merely committed a breach of contract in connection with the transfer from A to B, A may have only a right to damages for breach, not a right to rescind. In that case, A would not have an adverse claim to the securities in B's hands.”

*NMSA 1978 Section 55-9-502. Contents of Financing Statement—Record of Mortgage as Financing Statement—Time of Filing of Financing Statement*

The only change to this Section is found in Section 55-9-502 (c) (4) where it adds the word “duly” in front of “recorded” The new subsection would read: (4) the record is duly recorded. This means that under Section 55-9-502 (c) the recording of a mortgage alone is not sufficient but that it must be appropriately or correctly filed to be effective.

*NMSA 1978 Section 55-9-512. Amendment of Financing Statement*

This subsection adds to Subsection (a) (2) that if the amendment related to an initial financing statement filed “for record” in a county clerk’s office as provided in Section 55-9-502 NMSA 1978. This change makes it consistent with the “duly” filed amendment proposed previously in this bill.

*HB85 amends and changes the name of the Uniform Fraudulent Transfer Act, UFTA, to the Uniform Voidable Transactions Act, UVTA.*

Under the UFTA, fraudulent conveyances are merely voidable, rather than void ab initio. In re Silver, 2003, 302 B.R. 720. This may be the explanation for the change of name of the UFTA.

*NMSA Section 56-10-15. Definitions*

HB 85 makes grammatical corrections to this Section and adds additional definition of terms. These changes appear to be to make terms and definitions consistent, uniform and current. “Claim” is redefined by excluding when used in the phrase “claim for relief”.

A definition of “record” is added to include electronic or other medium and retrievable. A definition to “organization” is added which is other than an individual and then reconfigures the definition of “person” to include some, but not all, of the presently defined as persons.

Under the definition of “affiliate”, HB 85 adds that as a fiduciary or agent without sole “discretionary” power to vote the securities. This addition makes it consistent with the language found at NMSA Section 55-10-15(A)(1)(a). Finally, a definition of “sign” is added which is defined as with present intent to authenticate or adopt a record.

*NMSA Section 56-10-16. Insolvency*

A debtor's insolvency is determined at a fair valuation which is the sum of the debtor's debts greater than the sum of the debtor's assets instead of all debtor's assets. Section 56-10-16(B) NMSA is amended by excluding debts as they become due unless there is a bona fide dispute of any debt and the burden of proof is on the party against the presumption is directed.

*NMSA Section 56-10-18. Transfers Fraudulent as to Present and Future Creditors*

The transfer made or obligation incurred is voidable, not fraudulent, under the changes proposed by HB 85. The new name for this section is proposed to be: Transfer or Obligation Voidable as to Present or Future Creditor. A new Subsection is added (C) providing that the burden by the preponderance of the evidence is on the creditor making a "Claim of Relief". This is a significant change and clarification as case law has established that in constructive fraudulent transfer avoidance proceeding, whether brought pursuant to federal bankruptcy statute or in strong-arm capacity pursuant to New Mexico law, plaintiff bears burden of demonstrating that transferor received less than reasonably equivalent value in exchange for transfer. In re Vaughan Co., Realtors, 2012, 477 B.R. 206 and that a creditor must establish actual fraud under the New Mexico Uniform Fraudulent Transfer Act (UFTA) by clear and convincing evidence and may establish a prima facie case through proof of badges of fraud. Ellen Equipment Corp. v. C.V. Consultants & Associates, Inc., 2008, 144 N.M. 55, 183 P.3d 940

*NMSA Section 56-10-19. Transfers Fraudulent as to Present Creditors*

The proposed name for this Section is Transfer or Obligation Voidable as to Present Creditor. This Section also add a new subsection (C) providing the preponderance of the evidence burden of proof.

*NMSA Section 56-10-20. When Transfer is Made or Obligation is Incurred*

Subsection E provides that an obligation is incurred if evidenced by a "record signed" instead of a "writing" executed by the obligor.

*NMSA Section 56-10-22. Defenses, Liability and Protection of Transferee.*

The proposal of HB 85 adds to the title of this Section the term "or Obligee" and this is consistent with the language used in Subsection (A).

The gist of the changes as proposed by HB 85 is that while a creditor may recover judgment for the value of the asset transferred, the judgment may be entered against (1) the first transferee of the asset and (2) an "immediate or mediate transferee of the first transferee, rather than against "any subsequent transferee". The exception as against a good-faith transferee does not change.

These changes will also apply to remedies to the creditor under Section 56-10-21 with respect to the persons as described here as (1) and (2).

Finally, two new subsections are proposed. These are Subsections G and H which outline the burdens of proof applicable to this section. The standard of proof as proposed here by HB 85 is by the preponderance of the evidence and its applicable to a party, a creditor or transferee under any of the subsections A through F.

*NMSA Section 56-10-23. Extinguishment of Cause of Action*

The title of this section is proposed to Extinguishment of Claim for Relief.

The time limitation is proposed to be “not later than” four years after transfer was made or “not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant. This language substitutes “within” four and one year respectively.

HB 85 provides new material with respect to the governing law in proposed Section 56-10-24. The governing law is proposed to be determined by location. If individual, principal residence, if it is an organization and has only one place of business, that place of business, and if organization has more than one place of business, then the governing law of the location of its chief executive office. A claim of relief 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.

*NMSA Section 56-10-27. Uniformity of Application and Construction*

HB 85 provides uniform application and construction to effectuate its general purpose to make uniform the law with respect to the Uniform Voidable Transactions Act among states enacting it.

*NMSA Section 56-10-25. Application to Series Organization*

HB 85 provides enforceability of debts, activities or property of a “series organization” In essence a series organization and each protected series is a separate person for purposes of the Uniform Voidable Transactions Act. A series organization is one that its organic record provides for the creation of protected series with respect to specified property.

*NMSA Section 56-10-28. Relation to Electronic Signature in Global and National Commerce Act*

The provisions found in Section 101(c) of the Global and National Commerce Act are not modified, limited or superseded by the UVTA.

Those provisions are exhaustive and therefore are quoted here:

“(c) Consumer disclosures

(1) Consent to electronic records

Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if--

**(A)** the consumer has affirmatively consented to such use and has not withdrawn such consent;

**(B)** the consumer, prior to consenting, is provided with a clear and conspicuous statement--

**(i)** informing the consumer of **(I)** any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and **(II)** the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal;

- (ii) informing the consumer of whether the consent applies (I) only to the particular transaction which gave rise to the obligation to provide the record, or (II) to identified categories of records that may be provided or made available during the course of the parties' relationship;
  - (iii) describing the procedures the consumer must use to withdraw consent as provided in clause (i) and to update information needed to contact the consumer electronically; and
  - (iv) informing the consumer (I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and (II) whether any fee will be charged for such copy;
- (C) the consumer--
- (i) prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and
  - (ii) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent; and
- (D) after the consent of a consumer in accordance with subparagraph (A), if a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the person providing the electronic record--
- (i) provides the consumer with a statement of (I) the revised hardware and software requirements for access to and retention of the electronic records, and (II) the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed under subparagraph (B)(i); and
  - (ii) again complies with subparagraph (C).

(2) Other rights

(A) Preservation of consumer protections

Nothing in this subchapter affects the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law.

(B) Verification or acknowledgment

If a law that was enacted prior to this chapter expressly requires a record to be provided or made available by a specified method that requires verification or acknowledgment of receipt, the record may be provided or made available electronically only if the method used provides verification or acknowledgment of receipt (whichever is required).

(3) Effect of failure to obtain electronic consent or confirmation of consent

The legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer in accordance with paragraph (1)(C)(ii).”

*NMSA Section 56-10-229. Applicability*

The provisions of HB 85 apply to a transfer made or obligation incurred on or after January 1, 2016; but do not apply to a transfer made or an obligation incurred before January 1, 2016 nor to a right of action that has accrued before January 1, 2016. Section 56-10-20 of the UVTA provides the time when a transfer is made or obligation incurred.

EFFECTIVE DATE: Sections 1 through 7 of the UVTA are effective July 1, 2015. Sections 8 through 23 are effective January 1, 2016.

## **PERFORMANCE IMPLICATIONS**

Sections 1 through 7 of the UVTA are effective July 1, 2015. Sections 8 through 23 are effective January 1, 2016.

## **ADMINISTRATIVE IMPLICATIONS**

**None**

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

**None**

## **TECHNICAL ISSUES**

**None**

## **OTHER SUBSTANTIVE ISSUES**

**None**

## **ALTERNATIVES**

**None**

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Law will remain the same-Status Quo. There are some minor inconsistencies with the present law. Some of the proposed changes correct that. It appears that this bill attempts to make these sections more current to commercial transactions including adding a provision related to electronic documents and transactions.

## **AMENDMENTS**

**None**