

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2015

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SENATE BILL 123*
Judiciary II Committee Substitute Adopted 3/17/15

Short Title: Uniform Fraudulent Transfer Act.

(Public)

Sponsors:

Referred to:

February 27, 2015

1 A BILL TO BE ENTITLED
2 AN ACT TO AMEND THE UNIFORM FRAUDULENT TRANSFER ACT TO ADOPT THE
3 AMENDMENTS APPROVED BY THE UNIFORM LAW COMMISSION IN 2014 AND
4 TO MAKE RELATED CONFORMING AND TECHNICAL AMENDMENTS, AS
5 RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

6 The General Assembly of North Carolina enacts:

7
8 **PART I. AMENDMENTS TO THE UNIFORM FRAUDULENT TRANSFER ACT**

9 **SECTION 1.** Article 3A of Chapter 39 of the General Statutes reads as rewritten:

10 "Article 3A.

11 "Uniform Fraudulent Transfer Voidable Transactions Act.

12 **"§ 39-23.1. Definitions.**

13 ~~As used in this Article:~~ In this Article, the following definitions apply:

14 (1) ~~"Affiliate"~~ means: Affiliate. – Any of the following:

- 15 a. A person ~~who~~ that directly or indirectly owns, controls, or holds with
16 power to vote, twenty percent (20%) or more of the outstanding
17 voting securities of the debtor, other than a person ~~who~~ that holds the
18 ~~securities, securities:~~
- 19 1. As a fiduciary or agent without sole discretionary power to
20 vote the securities; or
21 2. Solely to secure a debt, if the person has not in fact exercised
22 the power to ~~vote;~~ vote.
- 23 b. A corporation twenty percent (20%) or more of whose outstanding
24 voting securities are directly or indirectly owned, controlled, or held
25 with power to vote, by the debtor or a person ~~who~~ that directly or
26 indirectly owns, controls, or holds, with power to vote, twenty
27 percent (20%) or more of the outstanding voting securities of the
28 debtor, other than a person ~~who~~ that holds the ~~securities, securities:~~
- 29 1. As a fiduciary or agent without sole discretionary power to
30 vote the securities; or
31 2. Solely to secure a debt, if the person has not in fact exercised
32 the power to ~~vote;~~ vote.
- 33 c. A person whose business is operated by the debtor under a lease or
34 other agreement, or a person substantially all of whose assets are
35 controlled by the ~~debtor;~~ debtor.



- 1 d. A person ~~who~~that operates the debtor's business under a lease or
2 other agreement or controls substantially all of the debtor's assets.
- 3 (2) ~~"Asset" means property~~ Asset. – Property of a debtor, but the term does not
4 ~~include;~~include any of the following:
- 5 a. Property to the extent it is encumbered by a valid ~~lien;~~lien.
6 b. Property to the extent it is generally exempt under nonbankruptcy
7 ~~law;~~or law.
8 c. An interest in property held in tenancy by the entireties to the extent
9 it is not subject to process by a creditor holding a claim against only
10 one tenant.
- 11 (3) ~~"Claim" means~~ Claim. – Except as used in "claim for relief," a right to
12 payment, whether or not the right is reduced to judgment, liquidated,
13 unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed,
14 legal, equitable, secured, or unsecured.
- 15 (4) ~~"Creditor" means a~~ Creditor. – A person ~~who~~that has a claim.
16 (5) ~~"Debt" means liability~~ Debt. – Liability on a claim.
17 (6) ~~"Debtor" means a~~ Debtor. – A person ~~who~~that is liable on a claim.
- 18 (6a) Electronic. – Relating to technology having electrical, digital, magnetic,
19 wireless, optical, electromagnetic, or similar capabilities.
- 20 (7) ~~"Insider" includes;~~ Insider. – Includes any of the following:
- 21 a. If the debtor is an ~~individual;~~individual:
22 1. A relative of the debtor or of a general partner of the debtor;
23 2. A partnership in which the debtor is a general partner;
24 3. A general partner in a partnership in which the debtor is a
25 general partner; or
26 4. A corporation of which the debtor is a director, officer, or
27 person in ~~control;~~control.
- 28 b. If the debtor is a ~~corporation;~~corporation:
29 1. A director of the debtor;
30 2. An officer of the debtor;
31 3. A person in control of the debtor;
32 4. A partnership in which the debtor is a general partner;
33 5. A general partner in a partnership in which the debtor is a
34 general partner; or
35 6. A relative of a general partner, director, officer, or person in
36 control of the ~~debtor;~~debtor.
- 37 c. If the debtor is a ~~partnership;~~partnership:
38 1. A general partner in the debtor;
39 2. A relative of a general partner in, a general partner of, or a
40 person in control of the debtor;
41 3. Another partnership in which the debtor is a general partner;
42 4. A general partner in a partnership in which the debtor is a
43 general partner; or
44 5. A person in control of the ~~debtor;~~debtor.
- 45 d. An affiliate, or an insider of an affiliate as if the affiliate were the
46 ~~debtor;~~and debtor.
- 47 e. A managing agent of the debtor.
- 48 (8) ~~"Lien" means a~~ Lien. – A charge against or an interest in property to secure
49 payment of a debt or performance of an obligation and includes a security
50 interest created by agreement, a judicial lien obtained by legal or equitable
51 process or proceedings, a common-law lien, or a statutory lien.

- 1 (8a) Organization. – A person other than an individual.
- 2 (9) ~~"Person" means an~~ Person. – An individual, partnership, corporation,
3 association, organization, government or governmental subdivision or
4 agency, business trust, estate, trust, or any other legal or commercial entity.
- 5 (10) ~~"Property" means anything~~ Property. – Anything that may be the subject of
6 ownership.
- 7 (10a) Record. – Information that is inscribed on a tangible medium or that is stored
8 in an electronic or other medium and is retrievable in perceivable form.
- 9 (11) ~~"Relative" means an~~ Relative. – An individual related by consanguinity
10 within the third degree as determined in accordance with G.S. 104A-1, a
11 spouse, or an individual related to a spouse within the third degree as so
12 determined, and includes an individual in an adoptive relationship within the
13 third degree.
- 14 (11a) Sign. – With present intent to authenticate or adopt a record, to do any of the
15 following:
- 16 a. Execute or adopt a tangible symbol.
- 17 b. Attach to or logically associate with the record an electronic symbol,
18 sound, or process.
- 19 (12) ~~"Transfer" means every~~ Transfer. – Every mode, direct or indirect, absolute
20 or conditional, voluntary or involuntary, of disposing of or parting with an
21 asset or an interest in an asset and includes payment of money, release, lease,
22 license, and creation of a lien or other encumbrance.
- 23 (13) ~~"Valid lien" means a~~ Valid lien. – A lien that is effective against the holder
24 of a judicial lien subsequently obtained by legal or equitable process or
25 proceedings.

26 **"§ 39-23.2. Insolvency.**

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

29 (b) A debtor ~~who~~ that is generally not paying the debtor's debts as they become due
30 other than as a result of a bona fide dispute is presumed to be insolvent. The presumption
31 imposes on the party against which the presumption is directed the burden of proving that the
32 nonexistence of insolvency is more probable than its existence.

33 ~~(c) A partnership is insolvent under subsection (a) of this section if the sum of the~~
34 ~~partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's~~
35 ~~assets and the sum of the excess of the value of each general partner's nonpartnership assets~~
36 ~~over the partner's nonpartnership debts.~~

37 (d) Assets under this section do not include property that has been transferred,
38 concealed, or removed with intent to hinder, delay, or defraud creditors or that has been
39 transferred in a manner making transfer voidable under this Article.

40 (e) Debts under this section do not include an obligation to the extent it is secured by a
41 valid lien on property of the debtor not included as an asset.

42 **"§ 39-23.3. Value.**

43 (a) Value is given for a transfer or an obligation if, in exchange for the transfer or
44 obligation, property is transferred or an antecedent debt is secured or satisfied, but value does
45 not include an unperformed promise made otherwise than in the ordinary course of the
46 promisor's business to furnish support to the debtor or another person.

47 (b) For the purposes of G.S. 39-23.4(a)(2) and G.S. 39-23.5, a person gives a
48 reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant
49 to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the
50 acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of
51 trust, or security agreement.

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

4 **"§ 39-23.4. Transfers fraudulent as to present and future creditors. Transfer or obligation**
5 **voidable as to present or future creditor.**

6 (a) A transfer made or obligation incurred by a debtor is ~~fraudulent~~ voidable as to a
7 creditor, whether the creditor's claim arose before or after the transfer was made or the
8 obligation was incurred, if the debtor made the transfer or incurred the obligation:

9 (1) With intent to hinder, delay, or defraud any creditor of the debtor; or

10 (2) Without receiving a reasonably equivalent value in exchange for the transfer
11 or obligation, and the debtor:

12 a. Was engaged or was about to engage in a business or a transaction
13 for which the remaining assets of the debtor were unreasonably small
14 in relation to the business or transaction; or

15 b. Intended to incur, or believed that the debtor would incur, debts
16 beyond the debtor's ability to pay as they became due.

17 (b) In determining intent under subdivision (a)(1) of this section, consideration may be
18 given, among other factors, to whether:

19 (1) The transfer or obligation was to an insider;

20 (2) The debtor retained possession or control of the property transferred after the
21 transfer;

22 (3) The transfer or obligation was disclosed or concealed;

23 (4) Before the transfer was made or obligation was incurred, the debtor had been
24 sued or threatened with suit;

25 (5) The transfer was of substantially all the debtor's assets;

26 (6) The debtor absconded;

27 (7) The debtor removed or concealed assets;

28 (8) The value of the consideration received by the debtor was reasonably
29 equivalent to the value of the asset transferred or the amount of the
30 obligation incurred;

31 (9) The debtor was insolvent or became insolvent shortly after the transfer was
32 made or the obligation was incurred;

33 (10) The transfer occurred shortly before or shortly after a substantial debt was
34 incurred;

35 (11) The debtor transferred the essential assets of the business to a lienor ~~who~~
36 that transferred the assets to an insider of the debtor;

37 (12) The debtor made the transfer or incurred the obligation without receiving a
38 reasonably equivalent value in exchange for the transfer or obligation, and
39 the debtor reasonably should have believed that the debtor would incur debts
40 beyond the debtor's ability to pay as they became due; and

41 (13) The debtor transferred the assets in the course of legitimate estate or tax
42 planning.

43 (c) A creditor making a claim for relief under subsection (a) of this section has the
44 burden of proving the elements of the claim for relief by a preponderance of the evidence.

45 **"§ 39-23.5. Transfers fraudulent as to present creditors. Transfer or obligation voidable**
46 **as to present creditor.**

47 (a) A transfer made or obligation incurred by a debtor is ~~fraudulent~~ voidable as to a
48 creditor whose claim arose before the transfer was made or the obligation was incurred if the
49 debtor made the transfer or incurred the obligation without receiving a reasonably equivalent
50 value in exchange for the transfer or obligation, and the debtor was insolvent at that time or the
51 debtor became insolvent as a result of the transfer or obligation.

1 (b) A transfer made by a debtor is voidable as to a creditor whose claim arose before the
2 transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was
3 insolvent at that time, and the insider had reasonable cause to believe that the debtor was
4 insolvent.

5 (c) Subject to G.S. 39-23.2(b), a creditor making a claim for relief under subsection (a)
6 or subsection (b) of this section has the burden of proving the elements of the claim for relief
7 by a preponderance of the evidence.

8 **"§ 39-23.6. When transfer is made or obligation is incurred.**

9 For the purposes of this Article:

10 (1) A transfer is made:

11 a. With respect to an asset that is real property other than a fixture, but
12 including the interest of a seller or purchaser under a contract for the
13 sale of the asset, when the transfer is so far perfected that a
14 good-faith purchaser of the asset from the debtor against ~~whom~~
15 which applicable law permits the transfer to be perfected cannot
16 acquire an interest in the asset that is superior to the interest of the
17 transferee; and

18 b. With respect to an asset that is not real property or that is a fixture,
19 when the transfer is so far perfected that a creditor on a simple
20 contract cannot acquire a judicial lien otherwise than under this
21 Article that is superior to the interest of the transferee.

22 (2) If applicable law permits the transfer to be perfected as provided in
23 subdivision (1) of this section and the transfer is not so perfected before the
24 commencement of an action for relief under this Article, the transfer is
25 deemed made immediately before the commencement of the action.

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

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

31 (5) An obligation is incurred:

32 a. If oral, when it becomes effective between the parties; or

33 b. If evidenced by a ~~writing, record,~~ when the ~~writing executed record~~
34 signed by the obligor is delivered to or for the benefit of the obligee.

35 **"§ 39-23.7. Remedies of ~~creditors, creditor.~~**

36 (a) In an action for relief against a transfer or obligation under this Article, a creditor,
37 subject to the limitations in G.S. 39-23.8, may obtain:

38 (1) Avoidance of the transfer or obligation to the extent necessary to satisfy the
39 creditor's claim;

40 (2) An attachment or other provisional remedy against the asset transferred or
41 other property of the transferee ~~in accordance with the procedure prescribed~~
42 ~~by Article 35 of Chapter 1 of the General Statutes;~~ if available under
43 applicable law; and

44 (3) Subject to applicable principles of equity and in accordance with applicable
45 rules of civil ~~procedure,~~ procedure:

46 a. An injunction against further disposition by the debtor or a
47 transferee, or both, of the asset transferred or of other property;

48 b. Appointment of a receiver to take charge of the asset transferred or of
49 other property of the transferee; or

50 c. Any other relief the circumstances may require.

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

3 **"§ 39-23.8. Defenses, liability, and protection of transferee, transferee or obligee.**

4 (a) A transfer or obligation is not voidable under G.S. 39-23.4(a)(1) against a person
5 ~~who that~~ took in good faith and for a reasonably equivalent value given the debtor or against
6 any subsequent transferee or obligee.

7 (b) To the extent a transfer is avoidable in an action by a creditor under
8 G.S. 39-23.7(a)(1), the following rules apply:

9 (1) Except as otherwise provided in this section, ~~to the extent a transfer is~~
10 ~~voidable in an action by a creditor under G.S. 39-23.7(a)(1),~~ the creditor may
11 recover judgment for the value of the asset transferred, as adjusted under
12 subsection (c) of this section, or the amount necessary to satisfy the
13 creditor's claim, whichever is less. The judgment may be entered against:

14 (1)a. The first transferee of the asset or the person for whose benefit the
15 transfer was made; or

16 (2)b. ~~Any subsequent transferee other than a~~ An immediate or mediate
17 transferee of the first transferee, other than:

18 1. A good-faith transferee who that took for value ~~or from any~~
19 ~~subsequent transferee.~~ value; or

20 2. An immediate or mediate good-faith transferee of a person
21 described in sub-sub-subdivision 1. of this sub-subdivision.

22 (2) Recovery pursuant to G.S. 39-23.7(a)(1) or G.S. 39-23.7(b) of or from the
23 asset transferred or its proceeds, by levy or otherwise, is available only
24 against a person described in sub-subdivision a. or b. of subdivision (1) of
25 this subsection.

26 (c) If the judgment under subsection (b) of this section is based upon the value of the
27 asset transferred, the judgment shall be for an amount equal to the value of the asset at the time
28 of the transfer, subject to adjustment as the equities may require.

29 (d) Notwithstanding voidability of a transfer or an obligation under this Article, a
30 good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the
31 transfer or obligation, to:

32 (1) A lien on or a right to retain ~~any an~~ interest in the asset transferred;

33 (2) Enforcement of ~~any an~~ obligation incurred; or

34 (3) A reduction in the amount of the liability on the judgment.

35 (e) A transfer is not voidable under G.S. 39-23.4(a)(2) or G.S. 39-23.5 if the transfer
36 results from:

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

39 (2) Enforcement of a security interest in compliance with Article 9 of Chapter
40 25 of the General Statutes, the Uniform Commercial ~~Code.~~ Code, other than
41 acceptance of collateral in full or partial satisfaction of the obligation it
42 secures.

43 (f) A transfer is not voidable under G.S. 39-23.5(b):

44 (1) To the extent the insider gave new value to or for the benefit of the debtor
45 after the transfer was ~~made unless made,~~ except to the extent the new value
46 was secured by a valid lien;

47 (2) If made in the ordinary course of business or financial affairs of the debtor
48 and the insider; or

49 (3) If made pursuant to a good-faith effort to rehabilitate the debtor, and the
50 transfer secured present value given for that purpose as well as an antecedent
51 debt of the debtor.

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

3 (1) A party that seeks to invoke subsection (a), (d), (e), or (f) of this section has
4 the burden of proving the applicability of that subsection.

5 (2) Except as otherwise provided in subdivisions (3) and (4) of this subsection,
6 the creditor has the burden of proving each applicable element of subsection
7 (b) or (c) of this section.

8 (3) The transferee has the burden of proving the applicability to the transferee of
9 sub-sub-subdivision (b)(1)b.1. or 2. of this section.

10 (4) A party that seeks adjustment under subsection (c) of this section has the
11 burden of proving the adjustment.

12 (h) The standard of proof required to establish matters referred to in this section is
13 preponderance of the evidence.

14 **"§ 39-23.9. Extinguishment of ~~cause of action~~ claim for relief.**

15 A ~~cause of action~~ claim for relief with respect to a ~~fraudulent or voidable~~ transfer or
16 obligation under this Article is extinguished unless action is brought:

17 (1) Under G.S. 39-23.4(a)(1), ~~within not later than~~ four years after the transfer
18 was made or the obligation was incurred or, if later, ~~within not later than~~ one
19 year after the transfer or obligation was or could reasonably have been
20 discovered by the claimant;

21 (2) Under G.S. 39-23.4(a)(2) or G.S. 39-23.5(a), ~~within not later than~~ four years
22 after the transfer was made or the obligation was incurred; or

23 (3) Under G.S. 39-23.5(b), ~~within not later than~~ one year after the transfer was
24 ~~made or the obligation was incurred.~~ made.

25 **"§ 39-23.9A. Governing law.**

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

27 (1) A debtor who is an individual is located at the individual's principal
28 residence.

29 (2) A debtor that is an organization and has only one place of business is located
30 at its place of business.

31 (3) A debtor that is an organization and has more than one place of business is
32 located at its chief executive office.

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

36 **"§ 39-23.9B. Application to series organization.**

37 (a) In this section, the following definitions apply:

38 (1) Protected series. – An arrangement, however denominated, created by a
39 series organization that, pursuant to the law under which the series
40 organization is organized, has the characteristics set forth in subdivision (2)
41 of this subsection.

42 (2) Series organization. – An organization that, pursuant to the law under which
43 it is organized, has all the following characteristics:

44 a. The organic record of the organization provides for creation by the
45 organization of one or more protected series, however denominated,
46 with respect to specified property of the organization, and for records
47 to be maintained for each protected series that identify the property
48 of or associated with the protected series.

49 b. Debt incurred or existing with respect to the activities of, or property
50 of or associated with, a particular protected series is enforceable
51 against the property of or associated with the protected series only,

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

3 c. Debt incurred or existing with respect to the activities or property of
 4 the organization is enforceable against the property of the
 5 organization only, and not against the property of or associated with
 6 a protected series of the organization.

7 (b) A series organization and each protected series of the organization is a separate
 8 person for purposes of this Article, even if for other purposes a protected series is not a person
 9 separate from the organization or other protected series of the organization.

10 **"§ 39-23.10. Supplementary provisions.**

11 Unless displaced by the provisions of this Article, the principles of law and equity,
 12 including the law merchant and the law relating to principal and agent, estoppel, laches, fraud,
 13 misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating
 14 cause, supplement its provisions.

15 **"§ 39-23.11. Uniformity of application and construction.**

16 This ~~act~~ Article shall be applied and construed to effectuate its general purpose to make
 17 uniform the law with respect to the subject of this Article among states enacting it.

18 **"§ 39-23.11A. Relation to Electronic Signatures in Global and National Commerce Act.**

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

23 **"§ 39-23.12. Short title.**

24 This ~~Article~~ Article, which was formerly cited as the Uniform Fraudulent Transfer Act,
 25 may be cited as the Uniform Fraudulent Transfer Voidable Transactions Act."
 26

27 **PART II. RELATED CONFORMING AND TECHNICAL AMENDMENTS TO OTHER**
 28 **SECTIONS OF THE GENERAL STATUTES**

29 **SECTION 2.** G.S. 50-13.4(f) reads as rewritten:

30 "(f) Remedies for enforcement of support of minor children shall be available as ~~herein~~
 31 ~~provided~~ follows:

32 (1) The court may require the person ordered to make payments for the support
 33 of a minor child to secure the ~~same payments~~ by means of a bond, mortgage
 34 or deed of trust, or any other means ordinarily used to secure an obligation to
 35 pay money or transfer property, or by requiring the execution of an
 36 assignment of wages, salary or other income due or to become due.

37 (2) If the court requires the transfer of real or personal property or an interest
 38 therein as provided in subsection (e) of this section as a part of an order for
 39 payment of support for a minor child, or for the securing thereof, the court
 40 may also enter an order which shall transfer title as provided in G.S. 1A-1,
 41 Rule 70 and G.S. 1-228.

42 ...

43 (6) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes,
 44 may be appointed in ~~action~~ actions for child support as in other cases.

45 (7) A minor child or other person for whose benefit an order for the payment of
 46 child support has been entered shall be a creditor within the meaning of
 47 Article 3A of Chapter 39 of the General Statutes pertaining to ~~fraudulent~~
 48 ~~conveyances~~ voidable transactions.

49"

50 **SECTION 3.** G.S. 50-16.7(h) reads as rewritten:

1 "(h) A dependent spouse for whose benefit an order for the payment of alimony or
2 postseparation support has been entered shall be a creditor within the meaning of Article 3A of
3 Chapter 39 of the General Statutes pertaining to ~~fraudulent conveyances~~ voidable transactions."
4

5 **PART III. EFFECTIVE DATE, APPLICABILITY PROVISIONS, AND**
6 **AUTHORIZATION FOR THE PRINTING OF OFFICIAL AND DRAFTERS'**
7 **COMMENTS**

8 **SECTION 4.** The Revisor of Statutes shall cause to be printed, as annotations to
9 the published General Statutes, all relevant portions of the Official Comments to the Uniform
10 Voidable Transactions Act and all explanatory comments of the drafters of this act as the
11 Revisor may deem appropriate.

12 **SECTION 5.** This act becomes effective October 1, 2015, and applies to a transfer
13 made or obligation incurred on or after that date. For purposes of this section, a transfer is made
14 and an obligation is incurred at the time provided in G.S. 39-23.6, as amended by this act.