BOR Bill Brief – House Bill 1059 Amended

Amend the Uniform Fraudulent Transfer Act Concerning Payments of Higher Education Expenses

What does this bill do?

• This bill provides that (i) a parent or guardian (ii) receives reasonably equivalent value (iii) for a transfer made to a public institution of higher education in the State of South Dakota (iv) on behalf of a dependent (as defined by federal law) (v) in furtherance of the dependent’s undergraduate education (vi) as long as the transfer was for a past or the then-current academic year.

Background

• When individuals file for bankruptcy, the bankruptcy trustee is tasked with increasing the pool of assets available to pay off creditors. The bankruptcy trustee can use both federal law or state law to attempt to claw back payments by claiming that such payments were fraudulent transfers.
  - The look back period under federal law is 2 years from the date of the transfer (11 USC 548)
  - The look back period under state law is 4 years from the date of the transfer (SDCL 54-8A-9)
• The two arguments a trustee can make under either state or federal law are: (1) that the transfer was made with actual intent to hinder, delay, or defraud any entity, or (2) that the debtor received less than a reasonably equivalent value in exchange for the transfer
• Both nationally, and within South Dakota, bankruptcy trustees have attempted to force institutions of higher education to transfer to the trustee any payments made by parents on behalf of their children for higher education expenses by arguing that the parents did not receive reasonably equivalent value for these payments, and therefore that these payments were fraudulent transfers.
• Federal law on this topic is still developing, but the courts seem to be siding with institutions of higher education. Because state laws can also be used (particularly considering the longer look back period), some states have passed state laws, similar to HB 1059, that make it clear that these payments by parents of higher education expenses of their children are not fraudulent transfers and cannot be clawed back.

Why is it necessary?

• One of our institutions was sued by a bankruptcy trustee from another state where the trustee made the argument of a lack of reasonably equivalent value for a payment made by the parent that was almost 2 years old for a completed semester where the student attended and received the benefits of higher education.

• While this bill would not have impacted that specific situation, it would prevent bankruptcy trustees from using state law to claw back payments made by parents on behalf of their children for higher education expenses at public institutions of higher education in South Dakota by claiming a lack of reasonably equivalent value for the payment.