

By: Representative Perry

To: Judiciary A

COMMITTEE SUBSTITUTE
FOR
HOUSE BILL NO. 777

1 AN ACT TO CREATE THE UNIFORM FRAUDULENT TRANSFER ACT; TO
2 DEFINE CERTAIN TERMS; TO PROVIDE FOR INSOLVENCY UNDER THIS ACT; TO
3 SPECIFY VALUE UNDER THIS ACT; TO PROVIDE FOR FRAUDULENT TRANSFERS
4 AS TO PRESENT AND FUTURE CREDITORS; TO SPECIFY WHEN A TRANSFER IS
5 MADE OR OBLIGATION IS INCURRED; TO PROVIDE REMEDIES OF CREDITORS;
6 TO PROVIDE FOR DEFENSES, LIABILITY AND PROTECTION OF TRANSFEREES;
7 TO PROVIDE FOR THE EXTINGUISHMENT OF A CAUSE OF ACTION; TO AMEND
8 SECTIONS 11-5-75, 15-3-3 AND 15-3-5, MISSISSIPPI CODE OF 1972, IN
9 CONFORMITY TO THE PROVISIONS OF THIS ACT; AND FOR RELATED
10 PURPOSES.

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

12 SECTION 1. The following words and phrases shall have the
13 meanings ascribed herein, unless the context clearly indicates
14 otherwise:

15 (a) "Affiliate" means:

16 (i) A person who directly or indirectly owns,
17 controls, or holds with power to vote, twenty percent (20%) or
18 more of the outstanding voting securities of the debtor, other
19 than a person who holds the securities,

20 1. As a fiduciary or agent without sole
21 discretionary power to vote the securities; or

22 2. Solely to secure a debt, if the person has
23 not exercised the power to vote;

24 (ii) A corporation twenty percent (20%) or more of
25 whose outstanding voting securities are directly or indirectly
26 owned, controlled, or held with power to vote, by the debtor or a
27 person who directly or indirectly owns, controls, or holds with
28 power to vote, twenty percent (20%) or more of the outstanding
29 voting securities of the debtor, other than a person who holds the
30 securities,

31 1. As a fiduciary or agent without sole power
32 to vote the securities; or

33 2. Solely to secure a debt, if the person has
34 not in fact exercised the power to vote;

35 (iii) A person whose business is operated by the
36 debtor under a lease or other agreement, or a person substantially
37 all of whose assets are controlled by the debtor; or

38 (iv) A person who operates the debtor's business
39 under a lease or other agreement or controls substantially all of
40 the debtor's assets.

41 (b) "Asset" means property of a debtor, but the term
42 does not include:

43 (i) Property to the extent it is encumbered by a
44 valid lien;

45 (ii) Property to the extent it is generally exempt
46 under nonbankruptcy law; or

47 (iii) An interest in property held in tenancy by
48 the entirety to the extent it is not subject to process by a
49 creditor holding a claim against only one tenant.

50 (c) "Claim" means a right to payment, whether or not
51 the right is reduced to judgment, liquidated, unliquidated, fixed,
52 contingent, matured, unmatured, disputed, undisputed, legal,
53 equitable, secured, or unsecured.

54 (d) "Creditor" means a person who has a claim.

55 (e) "Debt" means liability on a claim.

56 (f) "Debtor" means a person who is liable on a claim.

57 (g) "Insider" includes:

58 (i) If the debtor is an individual,

59 1. A relative of the debtor or of a general
60 partner of the debtor;

61 2. A partnership in which the debtor is a
62 general partner;

63 3. A general partner in a partnership

64 described in clause 2; or

65 4. A corporation of which the debtor is a

66 director, officer, or person in control;

67 (ii) If the debtor is a corporation,

68 1. A director of the debtor;

69 2. An officer of the debtor;

70 3. A person in control of the debtor;

71 4. A partnership in which the debtor is a

72 general partner;

73 5. A general partner in a partnership

74 described in clause 4; or

75 6. A relative of a general partner, director,

76 officer, or person in control of the debtor;

77 (iii) If the debtor is a partnership,

78 1. A general partner in the debtor;

79 2. A relative of a general partner in, or a

80 general partner of, or a person in control of the debtor;

81 3. Another partnership in which the debtor is

82 a general partner;

83 4. A general partner in a partnership

84 described in clause 3; or

85 5. A person in control of the debtor;

86 (iv) An affiliate, or an insider of an affiliate

87 as if the affiliate were the debtor; and

88 (v) A managing agent of the debtor.

89 (h) "Lien" means a charge against or an interest in

90 property to secure payment of a debt or performance of an

91 obligation, and includes a security interest created by agreement,

92 a judicial lien obtained by legal or equitable process or

93 proceedings, a common-law lien, or a statutory lien.

94 (i) "Person" means an individual, partnership,

95 corporation, association, organization, government or governmental

96 subdivision or agency, business trust, estate, trust, or any other

97 legal or commercial entity.

98 (j) "Property" means anything that may be the subject
99 of ownership.

100 (k) "Relative" means an individual related by
101 consanguinity within the third degree as determined by the common
102 law, a spouse, or an individual related to a spouse within the
103 third degree as so determined, and includes an individual in an
104 adoptive relationship within the third degree.

105 (l) "Transfer" means every mode, direct or indirect,
106 absolute or conditional, voluntary or involuntary, of disposing of
107 or parting with an asset or an interest in an asset, and includes
108 payment of money, release, lease, and creation of a lien or other
109 encumbrance.

110 (m) "Valid lien" means a lien that is effective against
111 the holder of a judicial lien subsequently obtained by legal or
112 equitable process or proceedings.

113 SECTION 2. (1) A debtor is insolvent if the sum of the
114 debtor's debts is greater than all of the debtor's assets, at a
115 fair valuation.

116 (2) A debtor who generally is not paying his or her debts as
117 they become due is presumed to be insolvent.

118 (3) A partnership is insolvent under subsection (1) if the
119 sum of the partnership's debts is greater than the aggregate, at a
120 fair valuation, of all of the partnership's assets, and the sum of
121 the excess of the value of each general partner's nonpartnership
122 assets over the partner's nonpartnership debts.

123 (4) Assets under this section do not include property that
124 has been transferred, concealed, or removed with intent to hinder,
125 delay, or defraud creditors or that has been transferred in a
126 manner making the transfer voidable under this act.

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

130 SECTION 3. (1) Value is given for a transfer or an
131 obligation if, in exchange for the transfer or obligation,
132 property is transferred or an antecedent debt is secured or
133 satisfied, but value does not include an unperformed promise made
134 otherwise than in the ordinary course of the promisor's business
135 to furnish support to the debtor or another person.

136 (2) For the purposes of Section 4(2)(l), (m) and (n), a
137 person gives a reasonably equivalent value if the person acquires
138 an interest of the debtor in an asset pursuant to a regularly
139 conducted, noncollusive foreclosure sale or execution of a power
140 of sale for the acquisition or disposition of the interest of the
141 debtor upon default under a mortgage, deed of trust, or security
142 agreement.

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

146 SECTION 4. (1) A transfer made or obligation incurred by a
147 debtor is fraudulent as to a creditor, whether the creditor's
148 claim arose before or after the transfer was made or the
149 obligation was incurred, if the debtor made the transfer or
150 incurred the obligation with actual intent to hinder, delay, or
151 defraud any creditor of the debtor.

152 (2) In determining actual intent under subsection (1),
153 consideration may be given, among other factors, to whether:

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

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

157 (c) The transfer or obligation was disclosed or
158 concealed;

159 (d) Before the transfer was made or obligation was
160 incurred, the debtor had been sued or threatened with suit;

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

163 (f) The debtor absconded;

164 (g) The debtor removed or concealed assets;

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

168 (i) The debtor was insolvent or became insolvent
169 shortly after the transfer was made or the obligation was
170 incurred;

171 (j) The transfer occurred shortly before or shortly
172 after a substantial debt was incurred;

173 (k) The debtor transferred the essential assets of the
174 business to a lienor who transferred the assets to an insider of
175 the debtor;

176 (l) The debtor made the transfer or incurred the
177 obligation without receiving a reasonably equivalent value in
178 exchange for the transfer or obligation, and the debtor:

179 (i) Was engaged or was about to engage in a
180 business or a transaction for which the remaining assets of the
181 debtor were unreasonably small in relation to the business or
182 transaction; or

183 (ii) Intended to incur, or believed or reasonably
184 should have believed that he would incur, debts beyond his ability
185 to pay as they became due;

186 (m) A transfer made or obligation incurred by a debtor
187 may be fraudulent as to a creditor whose claim arose before the
188 transfer was made or the obligation was incurred if the debtor
189 made the transfer or incurred the obligation without receiving a
190 reasonably equivalent value in exchange for the transfer or
191 obligation and the debtor was insolvent at that time or the debtor
192 became insolvent as a result of the transfer or obligation; and

193 (n) A transfer made by a debtor may be fraudulent as to
194 a creditor whose claim arose before the transfer was made if the
195 transfer was made to an insider for an antecedent debt, the debtor

was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

(3) If there exists a combination of facts such as described in subsection (2)(l), (m) or (n) only, then there will be a strong presumption of fraud which can be rebutted only by clear and convincing evidence.

SECTION 5. For the purposes of this act:

(a) A transfer is made:

(i) 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 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

(ii) 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 otherwise than under this act that is superior to the interest of the transferee;

(b) If applicable law permits the transfer to be perfected as provided in paragraph (a) and the transfer is not so perfected before the commencement of an action for relief under this act, the transfer is deemed made immediately before the commencement of the action;

(c) If applicable law does not permit the transfer to be perfected as provided in paragraph (a), the transfer is made when it becomes effective between the debtor and the transferee;

(d) A transfer is not made until the debtor has acquired rights in the asset transferred;

(e) An obligation is incurred:

(i) If oral, when it becomes effective between the parties; or

(ii) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

SECTION 6. (1) In an action for relief against a transfer or obligation under this act, a creditor, subject to the limitations in Section 7, may obtain:

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

(b) An attachment or other provisional remedy against the asset transferred or other property of the transferee;

(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 so orders, may levy execution on the asset transferred or its proceeds.

SECTION 7. (1) A transfer or obligation is not voidable under Section 4(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Section 6(1)(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. The judgment may be entered against:

(a) The first transferee of the asset or the person for

whose benefit the transfer was made; or

(b) Any subsequent transferee other than a good-faith transferee or obligee who took for value or from any subsequent transferee or obligee.

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

(4) Notwithstanding voidability of a transfer or an obligation under this act, a 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 interest in the asset transferred;

(b) Enforcement of any obligation incurred; or

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

(5) A transfer is not voidable under Section 4(2)(l), (m) or (n) 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 Article 9 of the Uniform Commercial Code.

(6) A transfer is not voidable under Section 4(2)(n):

(a) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless 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

295 debtor.

296 SECTION 8. A cause of action with respect to a fraudulent
297 transfer or obligation under this act is extinguished unless
298 action is brought:

299 (a) Under Section 4(1), within four (4) years after the
300 transfer was made or the obligation was incurred or, if later,
301 within one (1) year after the transfer or obligation was or could
302 reasonably have been discovered by the claimant;

303 (b) Under Section 4(2)(l) or (m), within four (4) years
304 after the transfer was made or the obligation was incurred; or

305 (c) Under Section 4(2)(n), within one (1) year after
306 the transfer was made or the obligation was incurred.

307 SECTION 9. Unless displaced by the provisions of this act,
308 the principles of law and equity, including the law merchant and
309 the law relating to principal and agent, estoppel, laches, fraud,
310 misrepresentation, duress, coercion, mistake, insolvency, or other
311 validating or invalidating cause, supplement its provisions.

312 SECTION 10. This act shall be applied and construed to
313 effectuate its general purpose to make uniform the law with
314 respect to the subject of this act among states enacting it.

315 SECTION 11. Sections 1 through 11 of this act may be cited
316 as the "Uniform Fraudulent Transfer Act."

317 SECTION 12. Section 11-5-75, Mississippi Code of 1972, is
318 amended as follows:

319 11-5-75. Except as otherwise provided by Sections 1 through
320 11 of this act, the chancery court shall have jurisdiction of
321 bills exhibited by creditors who have not obtained judgments at
322 law, or, having judgments, have not had executions returned
323 unsatisfied, whether their debts be due or not, to set aside
324 fraudulent conveyances of property, or other devices resorted to
325 for the purpose of hindering, delaying or defrauding creditors;
326 and may subject the property to the satisfaction of the demands of
327 such creditors as if complainants had judgments and execution

thereon returned "no property found." Upon such a bill, a writ of sequestration or injunction, or both, may be issued upon like terms and conditions as such writs may be issued in other cases, and subject to such proceedings and provisions thereafter as are applicable in other cases of such writs; and the chancellor of the proper district shall have power and authority to grant orders for receivers, in same manner as if the creditor had recovered judgment and had execution returned "no property found." The creditor in such case shall have a lien upon the property described therein from the filing of his bill, except as against bona fide purchasers before the service of process upon the defendant in such bill.

SECTION 13. Section 15-3-3, Mississippi Code of 1972, is amended as follows:

15-3-3. Except as otherwise provided in Sections 1 through 11 of this act, every gift, grant, or conveyance of lands, tenements, or hereditaments, goods or chattels, or of any rent, common or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, or execution had or made and contrived of malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures, or to defraud or deceive those who shall purchase the same lands, tenements, or hereditaments, or any rent, profit, or commodity out of them, shall be deemed and taken only as against the person or persons, his, her, or their heirs, successors, executors, administrators, or assigns, and every of them whose debts, suits, demands, estates, or interests by such guileful and covinous devices and practices shall or might be in any wise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

Moreover, if any conveyance be of goods or chattels, and be not on consideration deemed valuable in law, it shall be taken to be fraudulent within this section, unless the same be by will duly proved and recorded, or by writing acknowledged or proved, and such writing, if the same be for real estate, shall be acknowledged or proved and filed for record in the county where the land conveyed is situated, and, if for personal property, then in the county where the donee shall reside or the property shall be. The proof or acknowledgment in either case shall be taken or made and certified in the same manner as conveyances of lands and tenements are by law directed to be acknowledged or proved, unless, in the case of personal property, possession shall really and bona fide remain with the donee.

And in like manner, where any loan of goods or chattels shall be pretended to have been made to any person, the possession thereof having remained with said person or with those claiming under him for the space of three (3) years without demand made and pursued by due course of law on the part of the pretended lender, or where any reservation or limitation shall be pretended to have been made of a use of property by way of condition, reversion, remainder, or otherwise in goods or chattels, the possession thereof having remained in another or those claiming under him for a space of three (3) years without demand made and pursued by due course of law on the part of the one making such pretended reservation or limitation, the same shall be taken to be fraudulent within this statute as to the creditors and purchasers of the persons so remaining in possession, and the absolute property shall be deemed to be with the possession, unless such loan, reservation, or limitation were declared by will or by writing, proved or acknowledged, and filed for record.

SECTION 14. Section 15-3-5, Mississippi Code of 1972, is amended as follows:

15-3-5. Except as otherwise provided in Sections 1 through

394 11 of this act, Section 15-3-3 shall not extend to any estate or
395 interest in any lands, goods or chattels, or any rents, common, or
396 profit out of the same, which shall be upon good consideration and
397 bona fide lawfully conveyed or assured to any person or persons,
398 bodies-politic or corporate, nor shall it in any case extend to
399 creditors whose debts were contracted after such fraudulent act,
400 unless made with intent to defraud them, and though a conveyance
401 or contract be decreed void as to prior creditors, it shall not,
402 on that account, be void as to subsequent creditors or purchasers.
403 SECTION 15. This act shall take effect and be in force from
404 and after July 1, 1999.