

By: Representative Perry

To: Judiciary A

## 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. As used in this act:

13 (a) "Affiliate" means:

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

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

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

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

29 1. As a fiduciary or agent without sole power  
30 to vote the securities; or

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

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

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

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

41                   (i) Property to the extent it is encumbered by a  
42 valid lien;

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

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

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

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

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

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

55                   (g) "Insider" includes:

56                   (i) If the debtor is an individual,

57                   1. A relative of the debtor or of a general  
58 partner of the debtor;

59                   2. A partnership in which the debtor is a  
60 general partner;

61                   3. A general partner in a partnership  
62 described in clause 2; or

63                   4. A corporation of which the debtor is a

64 director, officer, or person in control;

65 (ii) If the debtor is a corporation,

66 1. A director of the debtor;

67 2. An officer of the debtor;

68 3. A person in control of the debtor;

69 4. A partnership in which the debtor is a

70 general partner;

71 5. A general partner in a partnership

72 described in clause 4; or

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

74 officer, or person in control of the debtor;

75 (iii) If the debtor is a partnership,

76 1. A general partner in the debtor;

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

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

79 3. Another partnership in which the debtor is

80 a general partner;

81 4. A general partner in a partnership

82 described in clause 3; or

83 5. A person in control of the debtor;

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

85 as if the affiliate were the debtor; and

86 (v) A managing agent of the debtor.

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

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

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

90 a judicial lien obtained by legal or equitable process or

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

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

93 corporation, association, organization, government or governmental

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

95 legal or commercial entity.

96 (j) "Property" means anything that may be the subject

97 of ownership.

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

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

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

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

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

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

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

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

128 SECTION 3. (1) Value is given for a transfer or an  
129 obligation if, in exchange for the transfer or obligation,

130 property is transferred or an antecedent debt is secured or  
131 satisfied, but value does not include an unperformed promise made  
132 otherwise than in the ordinary course of the promisor's business  
133 to furnish support to the debtor or another person.

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

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

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

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

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

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

155 (c) The transfer or obligation was disclosed or  
156 concealed;

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

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

161 (f) The debtor absconded;

162 (g) The debtor removed or concealed assets;

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

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

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

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

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

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

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

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

191           (n) A transfer made by a debtor may be fraudulent as to  
192 a creditor whose claim arose before the transfer was made if the  
193 transfer was made to an insider for an antecedent debt, the debtor  
194 was insolvent at that time, and the insider had reasonable cause  
195 to believe that the debtor was insolvent.

196           (3) If there is an existence of such a combination of facts  
197 which includes subsection (2)(l)(m) or (n) only, then there will  
198 be a strong presumption of fraud which can be rebutted only by  
199 clear and convincing evidence.

200           SECTION 5. For the purposes of this act:

201           (a) A transfer is made:

202                   (i) With respect to an asset that is real property  
203 other than a fixture, but including the interest of a seller or  
204 purchaser under a contract for the sale of the asset, when the  
205 transfer is so far perfected that a good-faith purchaser of the  
206 asset from the debtor against whom applicable law permits the  
207 transfer to be perfected cannot acquire an interest in the asset  
208 that is superior to the interest of the transferee; and

209                   (ii) With respect to an asset that is not real  
210 property or that is a fixture, when the transfer is so far  
211 perfected that a creditor on a simple contract cannot acquire a  
212 judicial lien otherwise than under this act that is superior to  
213 the interest of the transferee;

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

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

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

224           (e) An obligation is incurred:

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

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

229 obligee.

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

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

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

237           (c) Subject to applicable principles of equity and in  
238 accordance with applicable rules of civil procedure,

239               (i) An injunction against further disposition by  
240 the debtor or a transferee, or both, of the asset transferred or  
241 of other property;

242               (ii) Appointment of a receiver to take charge of  
243 the asset transferred or of other property of the transferee; or

244               (iii) Any other relief the circumstances may  
245 require.

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

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

253        (2) Except as otherwise provided in this section, to the  
254 extent a transfer is voidable in an action by a creditor under  
255 Section 6(1)(a), the creditor may recover judgment for the value  
256 of the asset transferred, as adjusted under subsection (3), or the  
257 amount necessary to satisfy the creditor's claim, whichever is  
258 less. The judgment may be entered against:

259           (a) The first transferee of the asset or the person for  
260 whose benefit the transfer was made; or

261           (b) Any subsequent transferee other than a good-faith



262 transferee or obligee who took for value or from any subsequent  
263 transferee or obligee.

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

268 (4) Notwithstanding voidability of a transfer or an  
269 obligation under this act, a good-faith transferee or obligee is  
270 entitled, to the extent of the value given the debtor for the  
271 transfer or obligation, to:

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

274 (b) Enforcement of any obligation incurred; or

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

277 (5) A transfer is not voidable under Section 4(2)(l), (m) or  
278 (n) if the transfer results from:

279 (a) Termination of a lease upon default by the debtor  
280 when the termination is pursuant to the lease and applicable law;  
281 or

282 (b) Enforcement of a security interest in compliance  
283 with Article 9 of the Uniform Commercial Code.

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

285 (a) To the extent the insider gave new value to or for  
286 the benefit of the debtor after the transfer was made unless the  
287 new value was secured by a valid lien;

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

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

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

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

301            (b) Under Section 4(2)(1) or (m), within four (4) years  
302 after the transfer was made or the obligation was incurred; or

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

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

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

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

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

317            11-5-75. Except as otherwise provided by Sections 1 through  
318 11 of this act, the chancery court shall have jurisdiction of  
319 bills exhibited by creditors who have not obtained judgments at  
320 law, or, having judgments, have not had executions returned  
321 unsatisfied, whether their debts be due or not, to set aside  
322 fraudulent conveyances of property, or other devices resorted to  
323 for the purpose of hindering, delaying or defrauding creditors;  
324 and may subject the property to the satisfaction of the demands of  
325 such creditors as if complainants had judgments and execution  
326 thereon returned "no property found." Upon such a bill, a writ of

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

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

340 15-3-3. Except as otherwise provided in Sections 1 through  
341 11 of this act, every gift, grant, or conveyance of lands,  
342 tenements, or hereditaments, goods or chattels, or of any rent,  
343 common or other profit or charge out of the same, by writing or  
344 otherwise, and every bond, suit, judgment, or execution had or  
345 made and contrived of malice, fraud, covin, collusion, or guile,  
346 to the intent or purpose to delay, hinder, or defraud creditors of  
347 their just and lawful actions, suits, debts, accounts, damages,  
348 penalties, or forfeitures, or to defraud or deceive those who  
349 shall purchase the same lands, tenements, or hereditaments, or any  
350 rent, profit, or commodity out of them, shall be deemed and taken  
351 only as against the person or persons, his, her, or their heirs,  
352 successors, executors, administrators, or assigns, and every of  
353 them whose debts, suits, demands, estates, or interests by such  
354 guileful and covinous devices and practices shall or might be in  
355 any wise disturbed, hindered, delayed, or defrauded, to be clearly  
356 and utterly void; any pretense, color, feigned consideration,  
357 expressing of use, or any other matter or thing to the contrary  
358 notwithstanding.

359 Moreover, if any conveyance be of goods or chattels, and be

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

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

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

391         15-3-5. Except as otherwise provided in Sections 1 through  
392 11 of this act, Section 15-3-3 shall not extend to any estate or

393 interest in any lands, goods or chattels, or any rents, common, or  
394 profit out of the same, which shall be upon good consideration and  
395 bona fide lawfully conveyed or assured to any person or persons,  
396 bodies-politic or corporate, nor shall it in any case extend to  
397 creditors whose debts were contracted after such fraudulent act,  
398 unless made with intent to defraud them, and though a conveyance  
399 or contract be decreed void as to prior creditors, it shall not,  
400 on that account, be void as to subsequent creditors or purchasers.

401 SECTION 15. This act shall take effect and be in force from  
402 and after July 1, 1999.