

By: Representatives Morris, McBride,  
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To: Judiciary A

HOUSE BILL NO. 1517

1 AN ACT TO PROVIDE CORPORATE SUCCESSOR LIABILITY IN CONNECTION  
2 WITH MERGERS OR CONSOLIDATIONS; TO DEFINE CERTAIN TERMS; TO  
3 PROVIDE FOR THE ESTABLISHMENT OF FAIR MARKET VALUE OF TOTAL GROSS  
4 ASSETS; TO PROVIDE FOR ADJUSTMENTS; TO AMEND SECTIONS 79-4-11.02,  
5 79-4-11.07 AND 79-25-3, MISSISSIPPI CODE OF 1972, IN CONFORMITY TO  
6 THE PROVISIONS OF THIS ACT; AND FOR RELATED PURPOSES.

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

8 **SECTION 1.** The following words and phrases shall have the  
9 meanings ascribed herein, unless the context clearly indicates  
10 otherwise:

11 (a) "Asbestos claim" means any claim, wherever or  
12 whenever made, for damages, losses, indemnification, contribution,  
13 or other relief arising out of, based on, or in any way related to  
14 asbestos, including:

15 (i) Property damage caused by the installation,  
16 presence or removal of asbestos;

17 (ii) The health effects of exposure to asbestos,  
18 including any claim for:

- 19 1. Personal injury or death;
- 20 2. Mental or emotional injury;
- 21 3. Risk of disease or other injury; or
- 22 4. The costs of medical monitoring or
- 23 surveillance; and

24 (iii) Any claim made by or on behalf of any person  
25 exposed to asbestos, or a representative, spouse, parent, child or  
26 other relative of the person.

27 (b) "Corporation" means a corporation for profit,  
28 including:

29 (i) A domestic corporation organized under the  
30 laws of this state; or

31 (ii) A foreign corporation organized under laws  
32 other than the laws of this state.

33 (c) "Successor asbestos-related liabilities" means any  
34 liabilities, whether known or unknown, asserted or unasserted,  
35 absolute or contingent, accrued or unaccrued, liquidated or  
36 unliquidated, or due or to become due, that are related in any way  
37 to asbestos claims that were assumed or incurred by a corporation  
38 as a result of or in connection with a merger or consolidation, or  
39 the plan of merger or consolidation related to the merger or  
40 consolidation, with or into another corporation or that are  
41 related in any way to asbestos claims based on the exercise of  
42 control or the ownership of stock of the corporation before the  
43 merger or consolidation. The term includes liabilities that,  
44 after the time of the merger or consolidation for which the fair  
45 market value of total gross assets is determined under Section 4,  
46 were or are paid or otherwise discharged, or committed to be paid  
47 or otherwise discharged, by or on behalf of the corporation, or by  
48 a successor of the corporation, or by or on behalf of a  
49 transferor, in connection with settlements, judgments, or other  
50 discharges in this state or another jurisdiction.

51 (d) "Successor" means a corporation that assumes or  
52 incurs, or has assumed or incurred, successor asbestos-related  
53 liabilities.

54 (e) "Transferor" means a corporation from which  
55 successor asbestos-related liabilities are or were assumed or  
56 incurred.

57 **SECTION 2.** (1) The limitations in Section 3 of this act  
58 shall apply to the following:

59 (a) A domestic corporation or a foreign corporation  
60 that has had a certificate of authority to transact business in  
61 this state and who is or has done business in this state that is a

62 successor which became a successor prior to May 13, 1968, or which  
63 is any of that successor corporation's successors but in the  
64 latter case only to the extent of the limitations of liability  
65 applied under Section 3(2) of this act;

66 (b) All asbestos claims, including asbestos claims that  
67 are pending on the effective date of this title, and all  
68 litigation involving asbestos claims, including litigation that is  
69 pending on the effective date of this title;

70 (c) Successors of a corporation to which this title  
71 applies.

72 (2) The limitations in Section 3 of this act shall not apply  
73 to:

74 (a) Workers' compensation benefits paid by or on behalf  
75 of an employer to an employee under this state's workers'  
76 compensation act or a comparable workers' compensation law of  
77 another jurisdiction;

78 (b) Any claim against a corporation that does not  
79 constitute a successor asbestos-related liability;

80 (c) An insurance company, as that term is defined in  
81 Section 83-5-5; or

82 (d) Any obligations under the National Labor Relations  
83 Act (29 USCS Section 151 et seq.), as amended, or under any  
84 collective bargaining agreement.

85 **SECTION 3.** (1) Except as further limited in subsection (2)  
86 of this section, the cumulative successor asbestos-related  
87 liabilities of a corporation are limited to the fair market value  
88 of the total gross assets of the transferor determined as of the  
89 time of the merger or consolidation. The corporation does not  
90 have any responsibility for successor asbestos-related liabilities  
91 in excess of this limitation.

92 (2) If the transferor had assumed or incurred successor  
93 asbestos-related liabilities in connection with a prior merger or  
94 consolidation with a prior transferor, then the fair market value

95 of the total assets of the prior transferor, determined as of the  
96 time of such earlier merger or consolidation, shall be substituted  
97 for the limitation set forth in subsection (1) of this section,  
98 for purposes of determining the limitation of liability of a  
99 corporation.

100 **SECTION 4.** (1) A corporation may establish the fair market  
101 value of total gross assets for the purpose of the limitations  
102 under Section 3 of this act through any method reasonable under  
103 the circumstances, including:

104 (a) By reference to the going concern value of the  
105 assets or to the purchase price attributable to or paid for the  
106 assets in an arm's-length transaction; or

107 (b) In the absence of other readily available  
108 information from which fair market value can be determined, by  
109 reference to the value of the assets recorded on a balance sheet.  
110 A showing by the successor of a reasonable determination of fair  
111 market value of total assets if prima facie evidence of the fair  
112 market value of those assets.

113 (2) Total gross assets include intangible assets.

114 (3) Total gross assets include the aggregate coverage under  
115 any applicable liability insurance that was issued to the  
116 transferor whose assets are being valued for purposes of this  
117 title and which insurance has been collected or is collectable to  
118 cover successor asbestos-related liabilities (except compensation  
119 for liabilities arising from workers' exposure to asbestos solely  
120 during the course of their employment by the transferor). A  
121 settlement of a dispute concerning such insurance coverage entered  
122 into by a transferor or successor with the insurers of the  
123 transferor before the enactment of this title shall be  
124 determinative of the aggregate coverage of such liability  
125 insurance to be included in the calculation of the transferor's  
126 total gross assets.

127           (4) After a successor has established a reasonable  
128 determination of the fair market value of total assets under this  
129 title, a claimant that disputes that determination of the fair  
130 market value has the burden of establishing a different fair  
131 market value of those assets.

132           **SECTION 5.** (1) Except as provided in subsections (2), (3)  
133 and (4) of this section, the fair market value of total gross  
134 assets at the time of a merger or consolidation increases annually  
135 at a rate equal to the sum of:

136                   (a) The prime rate as listed in the first edition of  
137 the Wall Street Journal published for each calendar year since the  
138 merger or consolidation, unless the prime rate is not published in  
139 that edition of the Wall Street Journal, in which case any  
140 reasonable determination of the prime rate on the first business  
141 day of the year may be used; and

142                   (b) One percent (1%).

143           (2) The rate in subsection (1) of this section is not  
144 compounded.

145           (3) The adjustment of fair market value of total gross  
146 assets continues as provided under subsection (1) of this section  
147 until the date the adjusted value is exceeded by the cumulative  
148 amounts of successor asbestos-related liabilities paid or  
149 committed to be paid by or on behalf of the corporation or a  
150 predecessor, or by or on behalf of a transferor, after the time of  
151 the merger or consolidation for which the fair market value of  
152 total gross assets is determined.

153           (4) No adjustment of the fair market value of total gross  
154 assets shall be applied to any liability insurance otherwise  
155 included in the definition of the total gross assets by Section  
156 4(3) of this act.

157           **SECTION 6.** The courts in this state shall apply, to the  
158 fullest extent permissible under the United States Constitution,

159 this state's substantive law, including the limitation under this  
160 act, to the issue of successor asbestos-related liabilities.

161 **SECTION 7.** Section 79-4-11.02, Mississippi Code of 1972, is  
162 amended as follows:

163 79-4-11.02. (a) One or more domestic corporations may merge  
164 with a domestic or foreign corporation or other entity pursuant to  
165 a plan of merger.

166 (b) A foreign corporation, or a domestic or foreign other  
167 entity, may be a party to the merger, or may be created by the  
168 terms of the plan of merger, only if:

169 (1) The merger is permitted by the laws under which the  
170 corporation or other entity is organized or by which it is  
171 governed; and

172 (2) In effecting the merger, the corporation or other  
173 entity complies with such laws and with its articles of  
174 incorporation or organizational documents.

175 (c) The plan of merger must include:

176 (1) The name of each corporation or other entity that  
177 will merge and the name of the corporation or other entity that  
178 will be the survivor of the merger;

179 (2) The terms and conditions of the merger;

180 (3) The manner and basis of converting the shares of  
181 each merging corporation and interest of each merging other entity  
182 into shares or other securities, interests, obligations, rights to  
183 acquire shares or other securities, cash, other property, or any  
184 combination of the foregoing;

185 (4) The articles of incorporation of any corporation,  
186 or the organizational documents of any other entity to be created  
187 by the merger, or if a new corporation or other entity is not to  
188 be created by the merger, any amendments to the survivor's  
189 articles of incorporation, or organizational documents; and

190 (5) Any other provisions required by the laws under  
191 which any party to the merger is organized or by which it is

192 governed, or by the articles of incorporation or organizational  
193 documents of any such party.

194 (d) The terms described in subsections (c)(2) and (c)(3) may  
195 be made dependent on facts ascertainable outside of the plan of  
196 merger, provided that those facts are objectively ascertainable.  
197 The term "facts" includes, but is not limited to, the occurrence  
198 of any event, including a determination or action by any person or  
199 body, including the corporation.

200 (e) The plan of merger may also include a provision that the  
201 plan may be amended prior to filing the articles of merger with  
202 the Secretary of State, provided that if the shareholders of a  
203 domestic corporation that is a party to the merger are required or  
204 permitted to vote on the plan, the plan must provide that  
205 subsequent to approval of the plan by such shareholders the plan  
206 may not be amended to:

207 (1) Change the amount or kind of shares or other  
208 securities, interests, obligations, rights to acquire shares or  
209 other securities, cash, or other property to be received by the  
210 shareholders of or owners of interests in any party to the merger  
211 upon conversion of their shares or interests under the plan;

212 (2) Change the articles of incorporation of any  
213 corporation or the organizational documents of any other entity,  
214 that will survive or be created as a result of the merger, except  
215 for changes permitted by Section 79-4-10.05 or by comparable  
216 provisions of the laws under which the foreign corporation or  
217 other entity is organized or governed; or

218 (3) Change any of the other terms or conditions of the  
219 plan if the change would adversely affect such shareholders in any  
220 material respect.

221 (f) Liability from a merger shall be limited as provided in  
222 Sections 1 through 5 of House Bill No. 1517, 2004 Regular Session.

223 **SECTION 8.** Section 79-4-11.07, Mississippi Code of 1972, is  
224 amended as follows:

225 79-4-11.07. (a) When a merger becomes effective:

226 (1) The corporation or other entity that is designated  
227 in the plan of merger as the survivor continues or comes into  
228 existence, as the case may be;

229 (2) The separate existence of every corporation or  
230 other entity that is merged into the survivor ceases;

231 (3) All property owned by, and every contract right  
232 possessed by, each corporation or other entity that merges into  
233 the survivor is vested in the survivor without reversion or  
234 impairment;

235 (4) All liabilities of each corporation or other entity  
236 that is merged into the survivor are vested in the survivor  
237 subject to the limitations as provided in Sections 1 through 5 of  
238 House Bill No. 1517, 2004 Regular Session;

239 (5) The name of the survivor may, but need not be,  
240 substituted in any pending proceeding for the name of any party to  
241 the merger whose separate existence ceased in the merger;

242 (6) The articles of incorporation or organizational  
243 documents of the survivor are amended to the extent provided in  
244 the plan of merger;

245 (7) The articles of incorporation or organizational  
246 documents of a survivor that is created by the merger become  
247 effective; and

248 (8) The shares of each corporation that is a party to  
249 the merger, and the interests in an other entity that is a party  
250 to a merger, that are to be converted under the plan of merger  
251 into shares, interests, obligations, rights to acquire securities,  
252 other securities, cash, other property, or any combination of the  
253 foregoing, are converted and the former holders of such shares or  
254 interests are entitled only to the rights provided to them in the  
255 plan of merger or to any rights they may have under Title 79,  
256 Chapter 4, Article 13.



257 (b) When a share exchange becomes effective, the shares of  
258 each domestic corporation that are to be exchanged for shares or  
259 other securities, interests, obligations, rights to acquire shares  
260 or securities, other securities, cash, other property, or any  
261 combination of the foregoing, are entitled only to the rights  
262 provided to them in the plan of share exchange or to any rights  
263 they may have under Title 79, Chapter 4, Article 13.

264 (c) Any shareholder of a domestic corporation that is a  
265 party to a merger or share exchange who, prior to the merger or  
266 share exchange, was liable for the liabilities or obligations of  
267 such corporation, shall not be released from such liabilities or  
268 obligations by reason of the merger or share exchange.

269 (d) Upon a merger becoming effective, a foreign corporation,  
270 or a foreign other entity, that is the survivor of the merger is  
271 deemed to:

272 (1) Appoint the Secretary of State as its agent for  
273 service of process in a proceeding to enforce the rights of  
274 shareholders of each domestic corporation that is a party to the  
275 merger who exercise appraisal rights; and

276 (2) Agree that it will promptly pay the amount, if any,  
277 to which such shareholders are entitled under Title 79, Chapter 4,  
278 Article 13.

279 **SECTION 9.** Section 79-25-3, Mississippi Code of 1972, is  
280 amended as follows:

281 79-25-3. In Sections 79-25-3 through 79-25-9, the following  
282 terms have the meanings ascribed herein:

283 (a) "Affiliate," including the term "affiliated  
284 person," means a person that, directly or indirectly, through one  
285 or more intermediaries, controls, or is controlled by, or is under  
286 common control with, a specified person.

287 (b) "Announcement date" means the first general public  
288 announcement of the proposal or intention to make a proposal of a

289 business combination or its first communication generally to  
290 shareholders of the corporation, whichever is earlier.

291 (c) "Associate," when used to indicate a relationship  
292 with any person, means:

293 (i) Any corporation or organization (other than  
294 the corporation or a subsidiary of the corporation) of which such  
295 person is an officer, director or partner, or is, directly or  
296 indirectly, the beneficial owner of ten percent (10%) or more of  
297 any class of equity securities;

298 (ii) Any trust or other estate in which such  
299 person has a substantial beneficial interest or as to which such  
300 person serves as trustee or in a similar fiduciary capacity; and

301 (iii) Any relative or spouse of such person, or  
302 any relative of such spouse, who has the same home as such person  
303 or who is a director or officer of the corporation or any of its  
304 affiliates.

305 (d) "Beneficial owner," when used with respect to any  
306 voting stock, means a person:

307 (i) That, individually or with any of its  
308 affiliates or associates, beneficially owns voting stock, directly  
309 or indirectly; or

310 (ii) That, individually or with any of its  
311 affiliates or associates, has:

312 (A) The right to acquire voting stock  
313 (whether such right is exercisable immediately or only after the  
314 passage of time), pursuant to any agreement, arrangement or  
315 understanding, or upon the exercise of conversion rights, exchange  
316 rights, warrants or options, or otherwise; or

317 (B) The right to vote voting stock pursuant  
318 to any agreement, arrangement or understanding; or

319 (iii) That has any agreement, arrangement or  
320 understanding for the purpose of acquiring, holding, voting,  
321 exercising investment power over, or disposing of voting stock

322 with any other person that beneficially owns, or whose affiliates  
323 or associates beneficially own, directly or indirectly, such  
324 shares of voting stock.

325 (e) "Business combination" means:

326 (i) Subject to the limitations provided in House  
327 Bill No. 1517, 2004 Regular Session, unless the merger,  
328 consolidation or share exchange does not alter the contract rights  
329 of the stock as expressly set forth in the certificate of  
330 incorporation or change or convert in whole or in part any of the  
331 outstanding shares of stock of the corporation, any merger,  
332 consolidation, share exchange or similar transaction of the  
333 corporation or any subsidiary with any interested shareholder or  
334 any other corporation (whether or not itself an interested  
335 shareholder) which is, or after the merger, consolidation or share  
336 exchange would be, an affiliate of an interested shareholder that  
337 was an interested shareholder prior to the transaction; or

338 (ii) Any sale, lease, transfer or other  
339 disposition, other than in the ordinary course of business, in one  
340 transaction or a series of transactions, to or with any interested  
341 shareholder or any affiliate of any interested shareholder (other  
342 than the corporation or any of its subsidiaries) of any assets of  
343 the corporation or any subsidiary having, at the time the  
344 transactions are approved by the board of directors of the  
345 corporation, an aggregate market value of twenty percent (20%) or  
346 more of the total market value of the outstanding stock of the  
347 corporation or of its assets, all as of the end of its most  
348 recently ended fiscal quarter, whichever is lower; or

349 (iii) The issuance or transfer by the corporation,  
350 or any subsidiary (in one transaction or a series of transactions)  
351 of any securities of the corporation or any subsidiary which have  
352 an aggregate market value of five percent (5%) or more of the  
353 total market value of the outstanding stock of the corporation to  
354 any interested shareholder or any affiliate of any interested

355 shareholder (other than the corporation or any of its  
356 subsidiaries), except pursuant to the exercise of warrants or  
357 rights to purchase securities offered pro rata to all holders of  
358 the corporation's voting stock or any other method affording  
359 substantially equal treatment to the holders of voting stock; or

360 (iv) The adoption of any plan or proposal for the  
361 liquidation, dissolution of or similar transaction involving the  
362 corporation in which anything other than cash will be received by  
363 an interested shareholder or any affiliate or any interested  
364 shareholder; or

365 (v) Any reclassification of securities (including  
366 any reverse stock split), or recapitalization of the corporation,  
367 or any merger, consolidation or share exchange of the corporation  
368 with any of its subsidiaries which has the effect, directly or  
369 indirectly, in one transaction or a series of transactions, of  
370 increasing by five percent (5%) or more of the total number of  
371 outstanding shares, the proportionate share of the outstanding  
372 shares of any class of equity securities of the corporation or any  
373 subsidiary which is directly or indirectly owned by any interested  
374 shareholder or any affiliate or associate of any interested  
375 shareholder, except as a result of immaterial changes due to  
376 fractional share adjustments.

377 (f) "Common stock" means any stock other than preferred  
378 or preference stock.

379 (g) "Continuing director" means any member of the board  
380 of directors of the corporation, while such person is a member of  
381 the board of directors, who is not an affiliate or associate or  
382 representative of the interested shareholder and was a member of  
383 the board of directors prior to the time that the interested  
384 shareholder became an interested shareholder, and any successor of  
385 a continuing director, while such successor is a member of the  
386 board of directors, who is not an affiliate or associate or  
387 representative of the interested shareholder and is recommended or

388 elected to succeed the continuing director by a majority of  
389 continuing directors.

390 (h) "Control," including the terms "controlling,"  
391 "controlled by" and "under common control with," means the  
392 possession, directly, indirectly or beneficially, of the power,  
393 directly or indirectly, to direct or cause the direction of the  
394 management and policies of a person, whether through the ownership  
395 of voting securities, by contract, or otherwise. The beneficial  
396 ownership of ten percent (10%) or more of the votes entitled to be  
397 cast by a corporation's voting stock creates a presumption of  
398 control.

399 (i) "Corporation," means any domestic corporation, as  
400 defined in Section 79-3-3(a), Mississippi Code of 1972, which  
401 corporation's principal place of business is located in  
402 Mississippi or which corporation has substantial assets in  
403 Mississippi, provided that such corporation has securities listed  
404 on a securities exchange registered under the Securities Exchange  
405 Act of 1934.

406 A corporation shall not include:

407 (i) Any state or national bank or any bank holding  
408 company or any affiliate thereof authorized by the appropriate  
409 regulatory authority to be owned by any of the above; or

410 (ii) Any state or federal savings and loan  
411 association, savings bank or similar savings institution, and any  
412 holding company or other affiliate of any state or federal savings  
413 and loan association, savings bank or similar savings institution.

414 (j) "Determination date" means the date on which an  
415 interested shareholder first became an interested shareholder.

416 (k) "Equity security" or "security" means:

417 (i) Any stock or similar security, certificate of  
418 interest, or participation in any profit sharing agreement, voting  
419 trust certificate, or certificate of deposit for an equity  
420 security;

421                   (ii) Any security convertible, with or without  
422 consideration, into an equity security, or any warrant or other  
423 security carrying any right to subscribe to or purchase an equity  
424 security; or

425                   (iii) Any put, call, straddle or other option or  
426 privilege of buying an equity security from or selling an equity  
427 security to another without being bound to do so.

428                   (1) "Interested shareholder" means any person or  
429 associated group of persons acting in concert (other than the  
430 corporation and/or any subsidiaries) that:

431                   (i) Is the beneficial owner, directly or  
432 indirectly, of twenty percent (20%) or more of the voting power of  
433 the outstanding voting stock of the corporation; or

434                   (ii) Is an affiliate of the corporation and at any  
435 time within the two-year period immediately prior to the date in  
436 question was the beneficial owner, directly or indirectly, of  
437 twenty percent (20%) or more of the voting power of the then  
438 outstanding voting stock of the corporation.

439                   For the purpose of determining whether a person or group of  
440 persons is an interested shareholder, the number of shares of  
441 voting stock deemed to be outstanding shall include shares deemed  
442 owned by the person or group of persons through application of  
443 paragraph (d) of this subsection.

444                   (m) "Market value" means:

445                   (i) In the case of stock, the highest closing sale  
446 price during the thirty-day period immediately preceding the date  
447 in question of a share of such stock on the composite tape for New  
448 York Exchange listed stocks, or, if such stock is not quoted on  
449 the composite tape, on the New York Stock Exchange, or if such  
450 stock is not listed on such exchange, on the principal United  
451 States Securities Exchange registered under the Securities  
452 Exchange Act of 1934 on which such stock is listed, or, if such  
453 stock is not listed on any such exchange, the highest closing bid

454 quotation with respect to a share of such stock during the  
455 thirty-day period preceding the date in question on the National  
456 Association of Securities Dealers, Inc., automated quotations  
457 system or any system then in use.

458                   (ii) In the case of property other than cash or  
459 stock, the fair market value of such property on the date in  
460 question as determined by a majority of the continuing directors  
461 of the corporation in good faith.

462                   (n) "Subsidiary" means any corporation of which voting  
463 stock having a majority of the voting stock is owned, directly or  
464 indirectly, by the corporation.

465                   (o) "Valuation date" means:

466                   (i) For a business combination voted upon or  
467 consented to by shareholders, the latter of the day prior to the  
468 date of the shareholders vote or consent or the day twenty (20)  
469 days prior to the consummation of the business combination; and

470                   (ii) For a business combination not voted upon or  
471 consented to by shareholders, the date of the consummation of the  
472 business combination.

473                   (p) "Voting stock" means shares of capital stock of the  
474 corporation entitled to vote generally in the election of  
475 directors.

476                   **SECTION 10.** This act shall take effect and be in force from  
477 and after its passage.