

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.