

By: Senator(s) Tollison

To: Judiciary, Division A

SENATE BILL NO. 2953

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 AND 15-3-3, 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 more
 18 of the outstanding voting securities of the debtor, other than a
 19 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)(1), (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
196 was insolvent at that time, and the insider had reasonable cause
197 to believe that the debtor was insolvent.

198 (3) If there exists a combination of facts such as described
199 in subsection (2)(1), (m) or (n) only, then there will be a strong
200 presumption of fraud which can be rebutted only by clear and
201 convincing evidence.

202 **SECTION 5.** For the purposes of this act:

203 (a) A transfer is made:

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

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

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

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

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

226 (e) An obligation is incurred:

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

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

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

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

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

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

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

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

246 (iii) Any other relief the circumstances may
247 require.

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

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

255 (2) Except as otherwise provided in this section, to the
256 extent a transfer is voidable in an action by a creditor under

257 Section 6(1)(a), the creditor may recover judgment for the value
258 of the asset transferred, as adjusted under subsection (3), or the
259 amount necessary to satisfy the creditor's claim, whichever is
260 less. The judgment may be entered against:

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

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

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

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

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

276 (b) Enforcement of any obligation incurred; or

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

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

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

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

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

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

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

292 (c) If made pursuant to a good-faith effort to
293 rehabilitate the debtor and the transfer secured present value
294 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)(1) 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. The chancery court shall have jurisdiction of
320 causes of action filed under the Uniform Fraudulent Transfer Act.
321 Upon such a complaint, a writ of sequestration or injunction, or
322 both, may be issued upon like terms and conditions as such writs

323 may be issued in other cases, and subject to such proceedings and
324 provisions thereafter as are applicable in other cases of such
325 writs; and the chancellor of the proper district shall have power
326 and authority to grant orders for receivers, in same manner as if
327 the creditor had recovered judgment and had execution returned "no
328 property found." The creditor in such case shall have a lien upon
329 the property described therein from the filing of his complaint,
330 except as against bona fide purchasers before the service of
331 process upon the defendant in the complaint.

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

334 15-3-3. Every gift, grant or conveyance of lands, tenements,
335 or hereditaments, goods or chattels, or of any rent, common or
336 other profit or charge out of the same, by writing or otherwise,
337 and every bond, suit, judgment or execution had or made and
338 contrived of malice, fraud, covin, collusion or guile, to the
339 intent or purpose to delay, hinder or defraud creditors of their
340 just and lawful actions, suits, debts, accounts, damages,
341 penalties or forfeitures, or to defraud or deceive those who shall
342 purchase the same lands, tenements or hereditaments, or any rent,
343 profit or commodity out of them, shall be deemed and taken only as
344 against the person or persons, his, her or their heirs,
345 successors, executors, administrators or assigns, and every of
346 them whose debts, suits, demands, estates or interests by such
347 guileful and covinous devices and practices shall or might be in
348 any wise disturbed, hindered, delayed or defrauded, to be clearly
349 and utterly void; any pretense, color, feigned consideration,
350 expressing of use, or any other matter or thing to the contrary
351 notwithstanding.

352 Moreover, if any conveyance be of goods or chattels, and be
353 not on consideration deemed valuable in law, it shall be taken to
354 be fraudulent within this section, unless the same be by will duly
355 proved and recorded, or by writing acknowledged or proved, and

356 such writing, if the same be for real estate, shall be
357 acknowledged or proved and filed for record in the county where
358 the land conveyed is situated, and, if for personal property, then
359 in the county where the donee shall reside or the property shall
360 be. The proof or acknowledgment in either case shall be taken or
361 made and certified in the same manner as conveyances of lands and
362 tenements are by law directed to be acknowledged or proved,
363 unless, in the case of personal property, possession shall really
364 and bona fide remain with the donee.

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

382 The provisions of this section are supplemental to the
383 Uniform Fraudulent Transfer Act.

384 **SECTION 14.** This act shall take effect and be in force from
385 and after July 1, 2004.