

By: Senator(s) Ross

To: Judiciary, Division A

SENATE BILL NO. 2357

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)(l), (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, 2005.