

By: Senator(s) Doxey

To: Judiciary, Division A

SENATE BILL NO. 2781

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

subdivision or agency, business trust, estate, trust or any other legal or commercial entity.

(j) "Property" means anything that may be the subject of ownership.

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

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

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

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

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

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

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

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

SECTION 3. (1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

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

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

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

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

- (a) The transfer or obligation was to an insider;
- (b) The debtor retained possession or control of the property transferred after the transfer;
- (c) The transfer or obligation was disclosed or 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

obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation; and

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

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

SECTION 5. For the purposes of this act:

(a) A transfer is made:

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

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

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

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

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

(e) An obligation is incurred:

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

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

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

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

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

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

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

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

(iii) Any other relief the circumstances may require.

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

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

(2) Except as otherwise provided in this section, to the 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;

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

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

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

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

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

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

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

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

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

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

11-5-75. The chancery court shall have jurisdiction of causes of action filed under the Uniform Fraudulent Transfer Act. Upon such a complaint, a writ of sequestration or injunction, or both, may be issued upon like terms and conditions as such writs

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

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

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

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

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

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

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

SECTION 14. This act shall take effect and be in force from and after July 1, 2006.