

HOUSE BILL No. 5317

November 6, 1991, Introduced by Rep. Perry Bullard and referred to the Committee on Judiciary.

A bill to enact the uniform fraudulent transfer act; and to repeal certain acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. This act shall be known and may be cited as "the
2 uniform fraudulent transfer act".

3 Sec. 2. As used in this act:

4 (a) "Affiliate" means any of the following:

5 (i) A person who directly or indirectly owns, controls, or
6 holds with power to vote, 20% or more of the outstanding voting
7 securities of the debtor, except a person who holds the securi-
8 ties under either of the following circumstances:

9 (A) As a fiduciary or agent without sole discretionary power
10 to vote the securities.

11 (B) Solely to secure a debt, if the person has not exercised
12 the power to vote.

1 (ii) A corporation 20% or more of whose outstanding voting
2 securities are directly or indirectly owned, controlled, or held
3 with power to vote by the debtor or a person who directly or
4 indirectly owns, controls, or holds, with power to vote, 20% or
5 more of the outstanding voting securities of the debtor, except a
6 person who holds the securities under either of the following
7 circumstances:

8 (A) As a fiduciary or agent without sole power to vote the
9 securities.

10 (B) Solely to secure a debt, if the person has not in fact
11 exercised the power to vote.

12 (iii) A person whose business is operated by the debtor
13 under a lease or other agreement, or a person substantially all
14 of whose assets are controlled by the debtor.

15 (iv) A person who operates the debtor's business under a
16 lease or other agreement or controls substantially all of the
17 debtor's assets.

18 (b) "Asset" means property of a debtor, but does not include
19 any of the following:

20 (i) Property to the extent it is encumbered by a valid
21 lien.

22 (ii) Property to the extent it is generally exempt under
23 nonbankruptcy law.

24 (iii) An interest in property held in tenancy by the entire-
25 ties to the extent it is not subject to process by a creditor
26 holding a claim against only 1 tenant.

1 (c) "Claim" means a right to payment, whether or not the
2 right is reduced to judgment, liquidated, unliquidated, fixed,
3 contingent, matured, unmatured, disputed, undisputed, legal,
4 equitable, secured, or unsecured.

5 (d) "Creditor" means a person who has a claim.

6 (e) "Debt" means liability on a claim.

7 (f) "Debtor" means a person who is liable on a claim.

8 (g) "Insider" includes:

9 (i) If the debtor is an individual, any of the following:

10 (A) A relative of the debtor or of a general partner of the
11 debtor.

12 (B) A partnership in which the debtor is a general partner.

13 (C) A general partner in a partnership described in subpara-
14 graph (B).

15 (D) A corporation of which the debtor is a director, offi-
16 cer, or person in control.

17 (ii) If the debtor is a corporation, any of the following:

18 (A) A director of the debtor.

19 (B) An officer of the debtor.

20 (C) A person in control of the debtor.

21 (D) A partnership in which the debtor is a general partner.

22 (E) A general partner in a partnership described in subpara-
23 graph (D).

24 (F) A relative of a general partner, director, officer, or
25 person in control of the debtor.

26 (iii) If the debtor is a partnership, any of the following:

1 (A) A general partner in the debtor.

2 (B) A relative of a general partner in, a general partner
3 of, or a person in control of the debtor.

4 (C) Another partnership in which the debtor is a general
5 partner.

6 (D) A general partner in a partnership described in subpara-
7 graph (C).

8 (E) A person in control of the debtor.

9 (iv) An affiliate, or an insider of an affiliate as if the
10 affiliate were the debtor.

11 (v) A managing agent of the debtor.

12 (h) "Lien" means a charge against or an interest in property
13 to secure payment of a debt or performance of an obligation, and
14 includes a security interest created by agreement, a judicial
15 lien obtained by legal or equitable process or proceedings, a
16 common-law lien, or a statutory lien.

17 (i) "Person" means an individual, partnership, corporation,
18 association, organization, government or governmental subdivision
19 or agency, business trust, estate, trust, or any other legal or
20 commercial entity.

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

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

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

6 (m) "Valid lien" means a lien that is effective against the
7 holder of a judicial lien subsequently obtained by legal or equi-
8 table process or proceedings.

9 Sec. 3. (1) A debtor is insolvent if the sum of the
10 debtor's debts is greater than all of the debtor's assets at a
11 fair valuation.

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

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

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

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

26 Sec. 5. (1) Value is given for a transfer or an obligation
27 if, in exchange for the transfer or obligation, property is

1 transferred or an antecedent debt is secured or satisfied, but
2 value does not include an unperformed promise made otherwise than
3 in the ordinary course of the promisor's business to furnish sup-
4 port to the debtor or another person.

5 (2) For the purposes of section 7(1)(a) and section 9, a
6 person gives a reasonably equivalent value if the person acquires
7 an interest of the debtor in an asset pursuant to a regularly
8 conducted, noncollusive foreclosure sale or execution of a power
9 of sale for the acquisition or disposition of the interest of the
10 debtor upon default under a mortgage, deed of trust, or security
11 agreement.

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

15 Sec. 7. (1) A transfer made or obligation incurred by a
16 debtor is fraudulent as to a creditor, whether the creditor's
17 claim arose before or after the transfer was made or the obliga-
18 tion was incurred, if the debtor made the transfer or incurred
19 the obligation under either of the following circumstances:

20 (a) With actual intent to hinder, delay, or defraud any
21 creditor of the debtor.

22 (b) Without receiving a reasonably equivalent value in
23 exchange for the transfer or obligation, and either of the fol-
24 lowing circumstances exists:

25 (i) The debtor was engaged or was about to engage in a busi-
26 ness or a transaction for which the remaining assets of the

1 debtor were unreasonably small in relation to the business or
2 transaction.

3 (ii) The debtor intended to incur, or believed or reasonably
4 should have believed that he or she would incur, debts beyond his
5 or her ability to pay as they became due.

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

8 (a) The transfer or obligation was to an insider.

9 (b) The debtor retained possession or control of the prop-
10 erty transferred after the transfer.

11 (c) The transfer or obligation was disclosed or concealed.

12 (d) Before the transfer was made or obligation was incurred,
13 the debtor had been sued or threatened with suit.

14 (e) The transfer was of substantially all the debtor's
15 assets.

16 (f) The debtor absconded.

17 (g) The debtor removed or concealed assets.

18 (h) The value of the consideration received by the debtor
19 was reasonably equivalent to the value of the asset transferred
20 or the amount of the obligation incurred.

21 (i) The debtor was insolvent or became insolvent shortly
22 after the transfer was made or the obligation was incurred.

23 (j) The transfer occurred shortly before or shortly after a
24 substantial debt was incurred.

25 (k) The debtor transferred the essential assets of the busi-
26 ness to a lienor who transferred the assets to an insider of the
27 debtor.

1 Sec. 9. (1) A transfer made or obligation incurred by a
2 debtor is fraudulent as to a creditor whose claim arose before
3 the transfer was made or the obligation was incurred if the
4 debtor made the transfer or incurred the obligation without
5 receiving a reasonably equivalent value in exchange for the
6 transfer or obligation and the debtor was insolvent at that time
7 or the debtor became insolvent as a result of the transfer or
8 obligation.

9 (2) A transfer made by a debtor is fraudulent as to a credi-
10 tor whose claim arose before the transfer was made if the trans-
11 fer was made to an insider for an antecedent debt, the debtor was
12 insolvent at that time, and the insider had reasonable cause to
13 believe that the debtor was insolvent.

14 Sec. 11. For the purposes of this act:

15 (a) A transfer is made with respect to an asset that is real
16 property other than a fixture, but including the interest of a
17 seller or purchaser under a contract for the sale of the asset,
18 when the transfer is so far perfected that a good-faith purchaser
19 of the asset from the debtor against whom applicable law permits
20 the transfer to be perfected cannot acquire an interest in the
21 asset that is superior to the interest of the transferee.

22 (b) A transfer is made with respect to an asset that is not
23 real property or that is a fixture, when the transfer is so far
24 perfected that a creditor on a simple contract cannot acquire a
25 judicial lien otherwise than under this act that is superior to
26 the interest of the transferee.

1 (c) If applicable law permits the transfer to be perfected
2 as provided in paragraph (a) or (b) and the transfer is not so
3 perfected before the commencement of an action for relief under
4 this act, the transfer is deemed made immediately before the com-
5 mencement of the action.

6 (d) If applicable law does not permit the transfer to be
7 perfected as provided in paragraph (a) or (b), the transfer is
8 made when it becomes effective between the debtor and the
9 transferee.

10 (e) A transfer is not made until the debtor has acquired
11 rights in the asset transferred.

12 (f) An obligation is incurred as follows:

13 (i) If oral, when it becomes effective between the parties.

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

16 Sec. 13. (1) In an action for relief against a transfer or
17 obligation under this act, a creditor, subject to the limitations
18 in section 15, may obtain any of the following:

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

21 (b) Subject to applicable principles of equity and in
22 accordance with applicable rules of civil procedure, any of the
23 following:

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

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

3 (iii) Any other relief the circumstances may require.

4 (2) If a creditor has obtained a judgment on a claim against
5 the debtor, the creditor, if the court so orders, may levy execu-
6 tion on the asset transferred or its proceeds.

7 Sec. 15. (1) A transfer or obligation is not voidable under
8 section 7(1)(a) against a person who took in good faith and for a
9 reasonably equivalent value or against any subsequent transferee
10 or obligee.

11 (2) Except as otherwise provided in this section, to the
12 extent a transfer is voidable in an action by a creditor under
13 section 13(1)(a), the creditor may recover judgment for the value
14 of the asset transferred, as adjusted under subsection (3), or
15 the amount necessary to satisfy the creditor's claim, whichever
16 is less. The judgment may be entered against 1 or both of the
17 following:

18 (a) The first transferee of the asset or the person for
19 whose benefit the transfer was made.

20 (b) Any subsequent transferee other than a good-faith trans-
21 feree who took for value or from any subsequent transferee.

22 (3) If the judgment under subsection (2) is based upon the
23 value of the asset transferred, the judgment must be for an
24 amount equal to the value of the asset at the time of the trans-
25 fer, subject to adjustment as the equities may require.

26 (4) Notwithstanding voidability of a transfer or an
27 obligation under this act, a good-faith transferee or obligee is

1 entitled, to the extent of the value given the debtor for the
2 transfer or obligation, to 1 or more of the following:

3 (a) A lien on or a right to retain any interest in the asset
4 transferred.

5 (b) Enforcement of any obligation incurred.

6 (c) A reduction in the amount of the liability on the
7 judgment.

8 (5) A transfer is not voidable under section 7(1)(b) or sec-
9 tion 9 if the transfer results from either of the following:

10 (a) Termination of a lease upon default by the debtor when
11 the termination is pursuant to the lease and applicable law.

12 (b) Enforcement of a security interest in compliance with
13 article 9 of the uniform commercial code, Act No. 174 of the
14 Public Acts of 1962, being sections 440.9101 to 440.9994 of the
15 Michigan Compiled Laws.

16 (6) A transfer is not voidable under section 9(2) as
17 follows:

18 (a) To the extent the insider gave new value to or for the
19 benefit of the debtor after the transfer was made unless the new
20 value was secured by a valid lien.

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

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

1 Sec. 17. A cause of action with respect to a fraudulent
2 transfer or obligation under this act is extinguished unless
3 action is brought:

4 (a) Under section 7(1)(a), within 4 years after the transfer
5 was made or the obligation was incurred or, if later, within 1
6 year after the transfer or obligation was or could reasonably
7 have been discovered by the claimant.

8 (b) Under section 7(1)(b) or 9(1), within 4 years after the
9 transfer was made or the obligation was incurred.

10 (c) Under section 9(2), within 1 year after the transfer was
11 made or the obligation was incurred.

12 Sec. 19. Unless displaced by the provisions of this act,
13 the principles of law and equity, including the law merchant and
14 the law relating to principal and agent, estoppel, laches, fraud,
15 misrepresentation, duress, coercion, mistake, insolvency, or
16 other validating or invalidating cause, supplement its
17 provisions.

18 Sec. 21. This act shall be applied and construed to effec-
19 tuate its general purpose to make uniform the law with respect to
20 the subject of this act among states enacting it.

21 Sec. 23. Act No. 310 of the Public Acts of 1919, being sec-
22 tions 566.11 to 566.23 of the Michigan Compiled Laws, is
23 repealed.