

HOUSE BILL No. 5504

March 22, 2016, Introduced by Reps. Kesto and Tedder and referred to the Committee on Judiciary.

A bill to amend 1998 PA 434, entitled "Uniform fraudulent transfer act," by amending sections 1, 4, and 9 (MCL 566.31, 566.34, and 566.39), section 1 as amended by 2009 PA 44.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. As used in this act:

2 (a) "Affiliate" means 1 or more of the following:

3 (i) A person who directly or indirectly owns, controls, or
4 holds with power to vote 20% or more of the outstanding voting
5 securities of the debtor, other than a person who holds the
6 securities in either of the following circumstances:

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

9 (B) Solely to secure a debt, if the person has not exercised

1 the power to vote.

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

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

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

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

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

19 (b) "Asset" means property of a debtor. ~~, but the term ASSET~~
20 does not include any of the following:

21 (i) Property to the extent it is encumbered by a valid 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
25 entirety to the extent it is not subject to process by a creditor
26 holding a claim against only 1 tenant.

27 (c) "Claim" means a right to payment, whether or not the right

1 is reduced to judgment, liquidated, unliquidated, fixed,
2 contingent, matured, unmatured, disputed, undisputed, legal,
3 equitable, secured, or unsecured.

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

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

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

7 (g) "Insider" includes all of the following:

8 (i) If the debtor is an individual, all of the following:

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

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

12 (C) A general partner in a partnership described in sub-
13 subparagraph (B).

14 (D) A corporation of which the debtor is a director, officer,
15 or person in control.

16 (ii) If the debtor is a corporation, all of the following:

17 (A) A director of the debtor.

18 (B) An officer of the debtor.

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

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

21 (E) A general partner in a partnership described in sub-
22 subparagraph (D).

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

25 (iii) If the debtor is a partnership, all of the following:

26 (A) A general partner in the debtor.

27 (B) A relative of a general partner in, a general partner of,

1 or a person in control of the debtor.

2 (C) Another partnership in which the debtor is a general
3 partner.

4 (D) A general partner in a partnership described in sub-
5 subparagraph (C).

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

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

9 (v) A managing agent of the debtor.

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

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

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

21 **(K) "QUALIFIED DISPOSITION" MEANS THAT TERM AS DEFINED IN**
22 **SECTION 2 OF THE QUALIFIED DISPOSITIONS IN TRUST ACT.**

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

1 (M) ~~(L)~~—"Transfer" means every mode, direct or indirect,
2 absolute or conditional, voluntary or involuntary, of disposing of
3 or parting with an asset or an interest in an asset. Transfer
4 includes payment of money, release, lease, and creation of a lien
5 or other encumbrance. Transfer does not include any of the
6 following:

7 (i) The lapse, release, waiver, or disclaimer of a power of
8 appointment given to a donee by a third party. As used in this
9 subparagraph, "donee" means that term as defined in section 2 of
10 the powers of appointment act of 1967, 1967 PA 224, MCL 556.112.

11 (ii) The disposing of or parting with an asset or interest in
12 an asset held in trust to the person who created the trust if all
13 of the following apply:

14 (A) The trust is an irrevocable trust for the benefit of third
15 parties.

16 (B) The trust is a grantor trust with regard to the person for
17 income tax purposes ~~pursuant to~~ **UNDER** sections 671 to 679 of the
18 internal revenue code **OF 1986**, 26 USC 671 to 679.

19 (C) The trustee has the discretionary authority to reimburse
20 or advance trust property to the person for taxes concerning income
21 attributable to the trust property.

22 (D) The disposing of or parting with the asset or interest in
23 the asset is the exercise by the trustee of the discretionary
24 authority described in sub-subparagraph (C).

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

1 Sec. 4. (1) ~~A~~**EXCEPT AS OTHERWISE PROVIDED IN SUBSECTION (3),**
2 **A** transfer made or obligation incurred by a debtor is fraudulent as
3 to a creditor, whether the creditor's claim arose before or after
4 the transfer was made or the obligation was incurred, if the debtor
5 made the transfer or incurred the obligation in either of the
6 following:

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

9 (b) Without receiving a reasonably equivalent value in
10 exchange for the transfer or obligation, and the debtor did either
11 of the following:

12 (i) Was engaged or was about to engage in a business or a
13 transaction for which the remaining assets of the debtor were
14 unreasonably small in relation to the business or transaction.

15 (ii) Intended to incur, or believed or reasonably should have
16 believed that he or she would incur, debts beyond his or her
17 ability to pay as they became due.

18 (2) In determining actual intent under subsection (1)(a) **OR**
19 **(3)**, consideration may be given, among other factors, to whether 1
20 or more of the following occurred:

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

22 (b) The debtor retained possession or control of the property
23 transferred after the transfer.

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

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

27 (e) The transfer was of substantially all of the debtor's

1 assets.

2 (f) The debtor absconded.

3 (g) The debtor removed or concealed assets.

4 (h) The value of the consideration received by the debtor was
5 reasonably equivalent to the value of the asset transferred or the
6 amount of the obligation incurred.

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

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

11 (k) The debtor transferred the essential assets of the
12 business to a lienor who transferred the assets to an insider of
13 the debtor.

14 **(3) A QUALIFIED DISPOSITION IS FRAUDULENT AS TO THE CREDITOR**
15 **WHOSE CLAIM AROSE AFTER THE QUALIFIED DISPOSITION ONLY IF THE**
16 **QUALIFIED DISPOSITION WAS MADE WITH ACTUAL INTENT TO HINDER, DELAY,**
17 **OR DEFRAUD ANY CREDITOR OF THE DEBTOR.**

18 Sec. 9. A cause of action with respect to a fraudulent
19 transfer or obligation under this act is extinguished unless action
20 is brought under 1 or more of the following:

21 (a) ~~Sections~~**EXCEPT AS OTHERWISE PROVIDED IN SUBDIVISION (C),**
22 **SECTIONS 4(1)(a) and (b) and 5(1), within the time period specified**
23 **PROVIDED in sections**~~SECTION 5813 and OR 5855~~ of the revised
24 judicature act of 1961, 1961 PA 236, MCL 600.5813 and 600.5855.

25 (b) ~~Section~~**EXCEPT AS OTHERWISE PROVIDED IN SUBDIVISION (C),**
26 **SECTION 5(2), within 1 year after the transfer was made or the**
27 obligation was incurred.

1 (C) SECTIONS 4 AND 5, WITH RESPECT TO A QUALIFIED DISPOSITION,
2 THE TIME PROVIDED IN SECTION 5 OF THE QUALIFIED DISPOSITIONS IN
3 TRUST ACT.

4 Enacting section 1. This amendatory act does not take effect
5 unless Senate Bill No.____ or House Bill No. 5505 (request no.
6 H02132'15 *) of the 98th Legislature is enacted into law.