

Act No. 331
Public Acts of 2016
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**STATE OF MICHIGAN
98TH LEGISLATURE
REGULAR SESSION OF 2016**

Introduced by Reps. Kesto and Tedder

ENROLLED HOUSE BILL No. 5504

AN ACT to amend 1998 PA 434, entitled "An act to define and regulate fraudulent transfers and conveyances; to set aside and modify certain transfers and conveyances; to make uniform the law of fraudulent transfers; and to repeal acts and parts of acts," 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:

Sec. 1. As used in this act:

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

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

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

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

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

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

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

- (iii) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor.
- (iv) A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.
- (b) "Asset" means property of a debtor. Asset does not include any of the following:
- (i) Property to the extent it is encumbered by a valid lien.
 - (ii) Property to the extent it is generally exempt under nonbankruptcy law.
 - (iii) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only 1 tenant.
- (c) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.
- (d) "Creditor" means a person who has a claim.
- (e) "Debt" means liability on a claim.
- (f) "Debtor" means a person who is liable on a claim.
- (g) "Insider" includes all of the following:
- (i) If the debtor is an individual, all of the following:
 - (A) A relative of the debtor or of a general partner of the debtor.
 - (B) A partnership in which the debtor is a general partner.
 - (C) A general partner in a partnership described in sub-subparagraph (B).
 - (D) A corporation of which the debtor is a director, officer, or person in control.
 - (ii) If the debtor is a corporation, all of the following:
 - (A) A director of the debtor.
 - (B) An officer of the debtor.
 - (C) A person in control of the debtor.
 - (D) A partnership in which the debtor is a general partner.
 - (E) A general partner in a partnership described in sub-subparagraph (D).
 - (F) A relative of a general partner, director, officer, or person in control of the debtor.
 - (iii) If the debtor is a partnership, all of the following:
 - (A) A general partner in the debtor.
 - (B) A relative of a general partner in, a general partner of, or a person in control of the debtor.
 - (C) Another partnership in which the debtor is a general partner.
 - (D) A general partner in a partnership described in sub-subparagraph (C).
 - (E) A person in control of the debtor.
- (iv) An affiliate, or an insider of an affiliate as if the affiliate were the debtor.
- (v) A managing agent of the debtor.
- (h) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.
- (i) "Person" means an individual, partnership, 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) "Qualified disposition" means that term as defined in section 2 of the qualified dispositions in trust act.
- (l) "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.
- (m) "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. Transfer includes payment of money, release, lease, and creation of a lien or other encumbrance. Transfer does not include any of the following:
- (i) The lapse, release, waiver, or disclaimer of a power of appointment given to a donee by a third party. As used in this subparagraph, "donee" means that term as defined in section 2 of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112.

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

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

(B) The trust is a grantor trust with regard to the person for income tax purposes under sections 671 to 679 of the internal revenue code of 1986, 26 USC 671 to 679.

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

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

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

Sec. 4. (1) Except as otherwise provided in subsection (3), 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 in either of the following:

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

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

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

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

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

(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.

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

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

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

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

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

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

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

(3) A qualified disposition is fraudulent as to the creditor whose claim arose after the qualified disposition only if the qualified disposition was made with actual intent to hinder, delay, or defraud any creditor of the debtor.

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

(a) Except as otherwise provided in subdivision (c), sections 4(1)(a) and (b) and 5(1), within the time provided in section 5813 or 5855 of the revised judicature act of 1961, 1961 PA 236, MCL 600.5813 and 600.5855.

(b) Except as otherwise provided in subdivision (c), section 5(2), within 1 year after the transfer was made or the obligation was incurred.

(c) Sections 4 and 5, with respect to a qualified disposition, the time provided in section 5 of the qualified dispositions in trust act.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

Enacting section 2. This amendatory act does not take effect unless Senate Bill No. 597 of the 98th Legislature is enacted into law.

This act is ordered to take immediate effect.



Clerk of the House of Representatives



Secretary of the Senate

Approved

Governor