

SENATE BILL 112

Introduced by Mazurek

1/13	Introduced
1/13	Referred to Judiciary
1/20	Hearing
	Died in Committee

1 *Senate* BILL NO. 112
2 INTRODUCED BY *Mayhew*
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT REPLACING THE UNIFORM
5 FRAUDULENT CONVEYANCES ACT WITH THE UNIFORM FRAUDULENT
6 TRANSFER ACT; EXTENDING FRAUDULENT CONVEYANCE LAWS TO
7 PERSONAL PROPERTY TRANSFERS; DEFINING TRANSFERS CONSIDERED
8 FRAUDULENT; PROVIDING REMEDIES AND DEFENSES; PROVIDING FOR
9 LIMITATIONS OF CAUSES OF ACTION; AMENDING SECTION 53-5-401,
10 MCA; AND REPEALING SECTIONS 31-2-301 THROUGH 31-2-303,
11 31-2-311 THROUGH 31-2-317, AND 31-2-321 THROUGH 31-2-325,
12 MCA."

13
14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

15 NEW SECTION. **Section 1.** Short title. [Sections 1
16 through 11] may be cited as the "Uniform Fraudulent Transfer
17 Act".

18 NEW SECTION. **Section 2.** Definitions. As used in
19 [sections 1 through 11]:

20 (1) "Affiliate" means:

21 (a) a person who directly or indirectly owns,
22 controls, or holds with power to vote, 20% or more of the
23 outstanding voting securities of the debtor, other than a
24 person who holds the securities:

25 (i) as a fiduciary or agent without sole discretionary

1 power to vote the securities; or

2 (ii) solely to secure a debt, if the person has not
3 exercised the power to vote;

4 (b) a corporation 20% or more of whose outstanding
5 voting securities are directly or indirectly owned,
6 controlled, or held with power to vote, by the debtor or a
7 person who directly or indirectly owns, controls, or holds,
8 with power to vote, 20% or more of the outstanding voting
9 securities of the debtor, other than a person who holds the
10 securities:

11 (i) as a fiduciary or agent without sole power to vote
12 the securities; or

13 (ii) solely to secure a debt, if the person has not
14 exercised the power to vote;

15 (c) a person whose business is operated by the debtor
16 under a lease or other agreement or a person substantially
17 all of whose assets are controlled by the debtor; or

18 (d) a person who operates the debtor's business under
19 a lease or other agreement or controls substantially all of
20 the debtor's assets.

21 (2) "Asset" means property of a debtor, but the term
22 does not include:

23 (a) property to the extent it is encumbered by a valid
24 lien;

25 (b) property to the extent it is generally exempt

1 under nonbankruptcy law; or

2 (c) an interest in property held in tenancy by the

3 entireties to the extent it is not subject to process by a

4 creditor holding a claim against only one tenant.

5 (3) "Claim" means a right to payment, whether or not

6 the right is reduced to judgment, liquidated, unliquidated,

7 fixed, contingent, matured, unmatured, disputed, undisputed,

8 legal, equitable, secured, or unsecured.

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

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

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

12 (7) "Insider" includes:

13 (a) if the debtor is an individual:

14 (i) a relative of the debtor or of a general partner

15 of the debtor;

16 (ii) a partnership in which the debtor is a general

17 partner;

18 (iii) a general partner in a partnership described in

19 subsection (ii); or

20 (iv) a corporation of which the debtor is a director,

21 officer, or person in control;

22 (b) if the debtor is a corporation:

23 (i) a director of the debtor;

24 (ii) an officer of the debtor;

25 (iii) a person in control of the debtor;

1 (iv) a partnership in which the debtor is a general

2 partner;

3 (v) a general partner in a partnership described in

4 subsection (7)(b)(iv); or

5 (vi) a relative of a general partner, director,

6 officer, or person in control of the debtor;

7 (c) if the debtor is a partnership:

8 (i) a general partner in the debtor;

9 (ii) a relative of a general partner in, a general

10 partner of, or a person in control of the debtor;

11 (iii) another partnership in which the debtor is a

12 general partner;

13 (iv) a general partner in a partnership described in

14 subsection (7)(c)(iii); or

15 (v) a person in control of the debtor;

16 (d) an affiliate, or an insider of an affiliate as if

17 the affiliate were the debtor; and

18 (e) a managing agent of the debtor.

19 (8) "Lien" means a charge against or an interest in

20 property to secure payment of a debt or performance of an

21 obligation and includes a security interest created by

22 agreement, a judicial lien obtained by legal or equitable

23 process or proceedings, a common-law lien, or a statutory

24 lien.

25 (9) "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.

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

(11) "Relative" means:

(a) an individual related by consanguinity within the third degree as determined by the common law;

(b) a spouse or an individual related to a spouse within the third degree as so determined; or

(c) an individual in an adoptive relationship within the third degree.

(12) "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.

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

NEW SECTION. Section 3. Insolvency. (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 is generally not paying his 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 [sections 1 through 11].

(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.

NEW SECTION. Section 4. Value. (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 5(1)(b) and section 6], 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

1 sale or execution of a power of sale for the acquisition or
2 disposition of the interest of the debtor upon default under
3 a mortgage, deed of trust, or security agreement.

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

8 NEW SECTION. Section 5. Transfers fraudulent as to
9 present and future creditors. (1) A transfer made or
10 obligation incurred by a debtor is fraudulent as to a
11 creditor, whether the creditor's claim arose before or after
12 the transfer was made or the obligation was incurred, if the
13 debtor made the transfer or incurred the obligation:

14 (a) with actual intent to hinder, delay, or defraud
15 any creditor of the debtor; or

16 (b) without receiving a reasonably equivalent value in
17 exchange for the transfer or obligation, and the debtor:

18 (i) was engaged or was about to engage in a business
19 or a transaction for which the remaining assets of the
20 debtor were unreasonably small in relation to the business
21 or transaction; or

22 (ii) intended to incur, or believed or reasonably
23 should have believed that he would incur, debts beyond his
24 ability to pay as they became due.

25 (2) In determining actual intent under subsection

1 (1)(a), consideration may be given, among other factors, to
2 whether:

3 (a) the transfer or obligation was to an insider;

4 (b) the debtor retained possession or control of the
5 property transferred after the transfer;

6 (c) the transfer or obligation was disclosed or
7 concealed;

8 (d) before the transfer was made or obligation was
9 incurred, the debtor had been sued or threatened with suit;

10 (e) the transfer was of substantially all the debtor's
11 assets;

12 (f) the debtor absconded;

13 (g) the debtor removed or concealed assets;

14 (h) the value of the consideration received by the
15 debtor was reasonably equivalent to the value of the asset
16 transferred or the amount of the obligation incurred;

17 (i) the debtor was insolvent or became insolvent
18 shortly after the transfer was made or the obligation was
19 incurred;

20 (j) the transfer occurred shortly before or shortly
21 after a substantial debt was incurred; or

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

25 NEW SECTION. Section 6. Transfers fraudulent as to

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

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

14 NEW SECTION. Section 7. When transfer is made or
 15 obligation is incurred. For the purposes of [sections 1
 16 through 11]:

17 (1) a transfer is made:

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

1 (b) with respect to an asset that is not real property
 2 or that is a fixture, when the transfer is so far perfected
 3 that a creditor on a simple contract cannot acquire a
 4 judicial lien otherwise than under [sections 1 through 11]
 5 that is superior to the interest of the transferee;

6 (2) if applicable law permits the transfer to be
 7 perfected as provided in subsection (1) and the transfer is
 8 not so perfected before the commencement of an action for
 9 relief under [sections 1 through 11], the transfer is deemed
 10 made immediately before the commencement of the action;

11 (3) if applicable law does not permit the transfer to
 12 be perfected as provided in subsection (1), the transfer is
 13 made when it becomes effective between the debtor and the
 14 transferee;

15 (4) a transfer is not made until the debtor has
 16 acquired rights in the asset transferred;

17 (5) an obligation is incurred:

18 (a) if oral, when it becomes effective between the
 19 parties; or

20 (b) if evidenced by a writing, when the writing
 21 executed by the obligor is delivered to or for the benefit
 22 of the obligee.

23 NEW SECTION. Section 8. Remedies of creditors. (1) In
 24 an action for relief against a transfer or obligation under
 25 [sections 1 through 11], a creditor, subject to the

1 limitations in [section 9], may obtain:

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

4 (b) an attachment or other provisional remedy against
5 the asset transferred or other property of the transferee in
6 accordance with the procedure prescribed by Title 27,
7 chapter 18; or

8 (c) subject to applicable principles of equity and in
9 accordance with applicable rules of civil procedure:

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

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

15 (iii) any other relief the circumstances may require.

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

19 **NEW SECTION. Section 9. Defenses, liability, and**
20 **protection of transferee.** (1) A transfer or obligation is
21 not voidable under [section 5(1)(a)] against a person who
22 took in good faith and for a reasonably equivalent value or
23 against any subsequent transferee or obligee.

24 (2) Except as otherwise provided in this section, to
25 the extent a transfer is voidable in an action by a creditor

1 under [section 8(1)(a)], the creditor may recover judgment
2 for the value of the asset transferred, as adjusted under
3 subsection (3), or the amount necessary to satisfy the
4 creditor's claim, whichever is less. The judgment may be
5 entered against:

6 (a) the first transferee of the asset or the person
7 for whose benefit the transfer was made; or

8 (b) any subsequent transferee other than a good-faith
9 transferee who took for value or from any subsequent
10 transferee.

11 (3) If the judgment under subsection (2) is based upon
12 the value of the asset transferred, the judgment must be for
13 an amount equal to the value of the asset at the time of the
14 transfer, subject to adjustment as the equities may require.

15 (4) Notwithstanding voidability of a transfer or an
16 obligation under [sections 1 through 11], a good-faith
17 transferee or obligee is entitled, to the extent of the
18 value given the debtor for the transfer or obligation, to:

19 (a) a lien on or a right to retain any interest in the
20 asset transferred;

21 (b) enforcement of any obligation incurred; or

22 (c) a reduction in the amount of the liability on the
23 judgment.

24 (5) A transfer is not voidable under [section 5(1)(b)]
25 or section 6] if the transfer results from:

(a) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(b) enforcement of a security interest in compliance with Title 30, chapter 9.

(6) A transfer is not voidable under [section 6(2)]:

(a) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made, unless the 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.

NEW SECTION. Section 10. Extinguishment of cause of action. A cause of action with respect to a fraudulent transfer or obligation under [sections 1 through 11] is extinguished unless action is brought:

(1) under [section 5(1)(a)], within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) under [section 5(1)(b) or 6(1)], within 4 years after the transfer was made or the obligation was incurred;

or

(3) under [section 6(2)], within 1 year after the transfer was made or the obligation was incurred.

NEW SECTION. Section 11. Supplementary provisions. Unless displaced by the provisions of [sections 1 through 11], 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.

NEW SECTION. Section 12. Uniformity of application and construction. [Sections 1 through 11] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of [sections 1 through 11] among states enacting it.

Section 13. Section 53-5-401, MCA, is amended to read:

"53-5-401. Old-age assistance recovery. (1) Upon the death of any recipient of old-age assistance, the department of social and rehabilitation services shall execute and present a claim against the estate of such person within the time specified in the published notice to creditors in the estate matter for the total amount of assistance paid under Chapter 82, Laws of 1937, as amended. No claim shall be enforced against any real estate of a recipient while it is occupied by the surviving spouse or dependent as a home.

(2) Every transfer of property made by deed, grant, bargain, sale, or gift by any recipient of old-age assistance and recorded subsequent to his having received such assistance shall be presumed to have been made without fair-consideration value, as the term "~~fair--consideration~~" "value" is defined by 31-2-303 [section 4], and with the intent to defeat the purposes of this section. These presumptions are disputable and may be controverted by competent evidence.

(3) If the federal law so requires, the federal government shall be entitled to a share of any amounts collected from recipients or their estates in proportion to the amount which it has contributed to the grants recovered, and the amount due the United States shall be promptly paid by the state to the United States government. The remaining portion of the amount collected shall be distributed to the state and county in proportion to the total amount paid by each."

NEW SECTION. Section 14. Repealer. Sections 31-2-301 through 31-2-303, 31-2-311 through 31-2-317, and 31-2-321 through 31-2-325, MCA, are repealed.

NEW SECTION. Section 15. Codification instruction. [Sections 1 through 12] are intended to be codified as an integral part of Title 31, chapter 2, part 3, and the provisions of Title 31, chapter 2, part 3, apply to

1 [sections 1 through 12].

-End-

SENATE BILL NO. 113

INTRODUCED BY *Frank Gilbert* *Heather Lynch*
BY REQUEST OF THE DEPARTMENT OF FAMILY SERVICES *Noble Stoppel*

A BILL FOR AN ACT ENTITLED: "AN ACT TO IMPOSE A PENALTY FOR AIDING A RESIDENT'S FAILURE TO RETURN TO A YOUTH CORRECTIONAL FACILITY; AMENDING SECTION 53-30-215, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 53-30-215, MCA, is amended to read:

"53-30-215. Penalty for aiding resident in leaving or not returning to a youth correctional facility. (1) A person who is guilty of an offense if he:

(a) permits or assists a resident of any a youth correctional facility to leave a facility without permission;

(b) permits or assists a resident's failure to return to a youth correctional facility from which he had permission to leave;

(c) or--who furnishes or attempts to furnish to such a resident a tool, weapon, or other article with the intent of aiding him to leave without permission or to not return; or

(d) or--who harbors or conceals a resident who has left without permission.

(2) ~~shall~~---on Upon conviction of a violation of subsection (1), a person shall be punished by imprisonment for a term of not less than 6 months or more than 2 years or by a fine not exceeding \$1,000 or by both such fine and imprisonment."

NEW SECTION. **Section 2.** Effective date. [This act] is effective on passage and approval.

-End-