Michigan
Law Revision Commission

TWENTY-THIRD ANNUAL REPORT
1988

MICHIGAN
LAW REVISION COMMISSION

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ANTHONY DEREZINSKI, *Vice Chairman*
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RICHARD C. VAN DUSEN

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MICHIGAN LAW REVISION COMMISSION
Twenty-Third Annual Report to the Legislature

To the Members of the Michigan Legislature:

The Michigan Law Revision Commission hereby presents its twenty-third annual report pursuant to Section 403 of Act No. 268 of the Public Acts of 1986.

The Commission, created by Section 401 of that Act, consists of: two members of the Senate, with one from the majority and one from the minority party, appointed by the Majority Leader of the Senate; two members of the House of Representatives, with one from the majority and one from the minority party, appointed by the Speaker of the House; the Director of the Legislative Service Bureau or his or her designee, who serves as an ex-officio member; and four members appointed by the Legislative Council. Terms of the members appointed by the Legislative Council are staggered. The Legislative Council designates the Chairman of the Commission. The Vice Chairman is elected by the Commission.

Membership

The legislative members of the Commission during 1987 were Senator Rudy Nichols of Waterford, Senator John Kelly of Detroit (through May 4th), Senator Virgil C. Smith, Jr. of Detroit (after May 4th), Representative Perry Bullard of Ann Arbor, and Representative David Honigman of West Bloomfield. As Director of the Legislative Service Bureau, Elliott Smith was an ex-officio Commission member. The appointed members of the Commission were Anthony Derezinski, David Lebenbom, Richard McLellan, and Richard C. Van Dusen. Mr. McLellan served as Chairman. Mr. Derezinski served as Vice Chairman. Professor Jerold Israel of the University of Michigan Law School served as Executive Secretary. Gary Gulliver served as the liaison between the Legislative Service Bureau and the Commission. Brief biographies of the current Commission members and staff are located at the end of this report.

The Commission's Work in 1988

The Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and to recommend needed reform.

2. To receive and consider proposed changes in law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association, and other learned bodies.

3. To receive and consider suggestions from justices, judges, legislators and other public officials, lawyers and the public generally as to defects and anachronisms in the law.

4. To recommend, from time to time, such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.

5. To encourage the faculty and students of the law schools of this state to participate in the work of the Commission.

6. To cooperate with the law revision commissions of other states and Canadian provinces.

7. To issue an annual report.

The problems to which the Commission directs it studies are largely identified through an examination by the Commission members and the Executive Secretary of the statutes and case law of Michigan, the reports of learned bodies and Commissions from other jurisdictions, and the legal literature. Other subjects are brought to the attention of the Commission by various organizations and individuals, including members of the Legislature.

The Commission's efforts during the past year have been devoted primarily to three areas. First, Commission members provided information to legislative committees relating to various proposals previously recommended by the Commission. Second, the Commission examined suggested legislation proposed by various groups involved in law revision activity. These proposals included legislation advanced by the Council of State Governments, the National Conference of Commissioners on Uniform State Laws, and the Law Revision Commissions of various jurisdictions within and without the United States (e.g., California, New York, and British Columbia). Finally, the Commission considered various problems relating to special

aspects of current Michigan law suggested by its own review of Michigan decisions and the recommendations of others.

As in previous years, the Commission studied various proposals that did not lead to legislative recommendations. In the case of certain Uniform or Model Acts, we found that the subjects treated had been considered by the Michigan legislature in recent legislation. In other instances, Uniform or Model Acts were not pursued as formal recommendations because similar or identical legislation was currently pending before the legislature upon the initiation of legislators having a special interest in the particular subject.

Three of the topics studied by the Commission over the past year have resulted in legislative recommendations. Those are:

(1) The Uniform Fraudulent Transfers Act

(2) Consolidated Receivership Statute

(3) Amendments to Delete References to Abolished Courts

Recommendations and proposed statutes on these three topics accompany this Report.

Proposals for Legislative Consideration in 1989

In addition to our new recommendations, the Commission recommends favorable consideration of the following recommendations of past years upon which no final action was taken in 1988.

(1) Uniform Transfers to Minors Act — S.B. 85, passed by the Senate. See Recommendations of the 1984 Annual Report, page 17.

(2) Amendment of the Assumed Names Act (limited partnership) — S.B. 233, passed by the Senate; H.B. 4426, passed by the House. See Recommendations of the 1984 Annual Report, page 11.

(3) Justice of the Peace Repealers. See Recommendations of the 1985 Annual Report, page 12, 1986 Annual Report, page 125.

(4) Uniform Law on Notarial Acts. See S.B. 77, passed by the Senate; H.B. 5219. See Recommendations of the 1985 Annual Report, page 17.

(5) Amendments to Delete References to Abolished Courts. See Recommendations of the 1986 Annual Report, page 127, 1987 Annual Report, page 79.

(6) Uniform Determination of Death Act, 1987 Annual Report, page 13.

Current Study Agenda

Topics on the current study agenda of the Commission are:

(1) Administrative Procedure Act (Amendments and Revisions)
(2) Assumed Names (Statewide Registration by Individuals and Partnership)
(3) Contribution Among Joint Tortfeasors
(4) Usury Statutes
(5) Medical Practice Privileges in Hospitals (Procedures for Granting and Withdrawal)
(6) Legislative Distinctions Based on City Population in Excess of 1,000,000
(7) State Law Implications of United States-Canada Free Trade Treaty
(8) Health Care Consent for Minors
(9) Health Care Information, Access and Privacy
(10) Public Officials -- Conflict of Interest and Misuse of Office
(11) Reproduction Technology
(12) Elimination of References to Abolished Courts
(13) Technical Corrections of Legislation (Legislative Process)
(14) Uniform Anatomical Gift Act
(15) Uniform Premarital Agreement Act
(16) Uniform Trade Secrets Act
(17) Uniform Real Estate Tax Apportionment Act
(18) Uniform Statutory Power of Attorney
(19) Uniform Putative and Unknown Fathers Act
(20) Uniform Custodial Trust Act
(21) Uniform Commercial Code -- Article 6 Amendments

The Commission continues to operate with its sole staff member, the part-time Executive Secretary, whose offices are in the University of Michigan Law School, Ann Arbor, Michigan 48109-1215. By using faculty members at the several Michigan law schools as consultants and law students as researchers, the Commission has been able to operate at a budget substantially lower than that of similar commissions in other jurisdictions.

The Legislative Service Bureau, through Mr. Gary Gulliver, its Director of Legal Research, has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau continues to handle the fiscal operations of the Commission under procedures established by the Legislative Council.

Prior Enactments

The following Acts have been adopted to date pursuant to recommendations of the Commission and in some cases amendments thereto by the Legislature:

1967 Legislative Session

Subject	Commission Report	Act No.
Original Jurisdiction of Court of Appeals	1966, p. 43	65
Corporation Use of Assumed Names	1966, p. 36	138
Interstate and International Judicial Procedures	1966, p. 25	178
Stockholder Action Without Meetings	1966, p. 41	201
Powers of Appointment	1966, p. 11	224
Dead Man's Statute	1966, p. 29	263

1968 Legislative Session

Subject	Commission Report	Act No.
Possibilities of Reverter and Right of Entry	1966, p. 22	13
Stockholder Approval of Mortgaging Assets	1966, p. 39	287
Corporations as Partners	1966, p. 34	288
Guardian Ad Litem	1967, p. 53	292
Emancipation of Minors	1967, p. 50	293
Jury Selection	1967, p. 23	326

1969 Legislative Session

Subject	Commission Report	Act No.
Access to Adjoining Property	1968, p. 21	55
Recognition of Acknowledgments	1968, p. 61	57
Dead Man's Statute Amendment	1969, p. 29	63
Notice of Tax Assessments	1968, p. 30	115
Antenuptial Agreements	1968, p. 27	139
Anatomical Gifts	1968, p. 39	189
Administrative Procedures Act	1967, p. 11	306
Venue Act	1968, p. 19	333

1970 Legislative Session

Subject	Commission Report	Act No.
Land Contract Foreclosures	1967, p. 55	86
Artist-Art Dealer Relationships Act	1969, p. 44	90
Minor Students Capacity to Borrow Act	1969, p. 51	107
Warranties in Sales of Art Act	1969, p. 47	121
Appeals from Probate Court Act	1968, p. 32	143
Circuit Court Commission Power of Magistrates Act	1969, p. 62	238

1971 Legislative Session

Subject	Commission Report	Act No.
Revision of Grounds for Divorce	1970, p. 7	75
Civil Verdicts by 5 of 6 Jurors In Retained Municipal Courts	1970, p. 40	158
Amendment of Uniform Anatomical Gift Act	1970, p. 45	186

1972 Legislative Session

Subject	Commission Report	Act No.
Summary Proceeding for Possession of Premises	1970, p. 16	120
Interest on Judgments Act	1969, p. 64	135
Business Corporation Act	1970, Supp.	284
Constitutional Amendment re Juries of 12	1969, p. 60	HJR "M"

1973 Legislative Session

Subject	Commission Report	Act No.
Execution and Levy in Proceedings	1970, p. 51	96
Technical Amendments to Business Corporation Act	1973, p. 8	98

1974 Legislative Session

Subject	Commission Report	Act No.
Venue in Civil Actions Against Non-Resident Corporations	1971, p. 63	52
Model Choice of Forum Act	1972, p. 60	88
Extension of Personal Jurisdiction in Domestic Relations Cases	1972, p. 53	90
Technical Amendments to the General Corporations Act	1973, p. 38	140
Technical Amendments to the Revised Judicature Act	1971, p. 7	297
1974 Technical Amendments to the Business Corporation Act	1974, p. 30	303
Amendment to "Dead Man's" Statute	1972, p. 70	305
Attachment Fees Act	1968, p. 23	306
Contribution Among Joint Tortfeasors Act	1967, p. 57	318
District Court Venue in Civil Actions	1970, p. 42	319
Elimination of Pre-judgment Garnishment	1972, p. 7	371

1975 Legislative Session

Subject	Commission Report	Act No.
Amendment of Hit-Run Provisions to Provide Specific Penalty	1973, p. 54	170
Equalization of Income Rights of Husband and Wife in Entirety Property	1974, p. 30	288
Uniform Disposition of Community Property Rights at Death Act	1973, p. 50	289
Insurance Policy in Lieu of Bond Act	1969, p. 54	290
Uniform Child Custody Jurisdiction Act	1969, p. 22	297

1976 Legislative Session

Subject	Commission Report	Act No.
Due Process in Replevin Actions	1972, p. 7	79
Qualifications of Fiduciaries	1966, p. 32	262
Revision of Revised Judicature Act Venue Provisions	1975, p. 20	375
Durable Family Power of Attorney	1975, p. 18	376

1978 Legislative Session

Subject	Commission Report	Act No.
Study Report on Juvenile Obscenity Law	1975, p. 133	33
Multiple Party Deposits	1966, p. 18	53
Amendment of Telephone and Messenger Service Act Amendments	1973, p. 48	63
Elimination of References to Abolished Courts		
a. Township By-Laws	1976, p. 74	103
b. Public Recreation Hall Licenses	1976, p. 74	138
c. Village Ordinances	1976, p. 74	189
d. Home Rule Village Ordinances	1976, p. 74	190
e. Home Rule Cities	1976, p. 74	191
f. Preservation of Property Act	1976, p. 74	237
g. Bureau of Criminal Identification	1976, p. 74	538
h. Fourth Class Cities	1976, p. 74	539
i. Election Law Amendments	1976, p. 74	540
j. Charter Townships	1976, p. 74	553
Amendments of the Plat Act	1976, p. 58	367
Amendments to Article 9 of the Uniform Commercial Code	1975, Supp.	369

1980 Legislative Session

Subject	Commission Report	Act No.
Condemnation Procedures Act	1968, p. 11	87
Technical Revision of the Code of Criminal Procedure	1978, p. 37	506

1981 Legislative Session

Subject	Commission Report	Act No.
Elimination of Reference to the Justice of the Peace: Provision on the Sheriff's Service of Process	1976, p. 74	148
Amendment of R.J.A. Section 308 (Court of Appeals Jurisdiction) in accord with R.J.A. Section 861	1980, p. 34	206

1982 Legislative Session

Subject	Commission Report	Act No.
Revised Uniform Limited Partnership Act	1980, p. 40	213
Technical Amendments to the Business Corporation Act	1980, p. 8	407
Amendment of Probate Code as to Interest on Judgments	1980, p. 37	412

1983 Legislative Session

Subject	Commission Report	Act No.
Elimination of Various Statutory References to Abolished Courts	1979, p. 9	87
Uniform Federal Lien Registration Act	1979, p. 26	102

1984 Legislative Session

Subject	Commission Report	Act No.
Study Report on Legislative Privilege		
a. Immunity in Civil Actions	1983, p. 14	27
b. Limits of Immunity in Contested Cases	1983, p. 14	28
c. Amendments to R.J.A. for Legislative Immunity	1983, p. 14	29
Disclosure of Treatment Under the Psychologist/Psychiatrist-Patient Privilege	1978, p. 28	362

1986 Legislative Session

Subject	Commission Report	Act No.
Amendments to the Uniform Limited Partnership Act	1983, p. 9	100

1987 Legislative Session

Subject	Commission Report	Act No.
Amendment to Article 8 of the U.C.C.	1984, p. 97	16
Disclosure in the Sale of Visual Art Objects Produced in Multiples	1981, p. 57	40, 53, 54

1988 Legislative Session

Subject	Commission Report	Act No.
Repeal of M.C.L. §764.9	1982, p. 9	113
Uniform Statutory Rule Against Perpetuities	1986, p. 10	417, 418
Uniform Transboundary Pollution Reciprocal Access Act	1984, p. 11	517

The Commission continues to welcome suggestions for improvement of its program and proposals.

Respectfully submitted,

Richard D. McLellan, Chairman
Anthony Derezinski, Vice Chairman
David Lebenbom
Richard C. Van Dusen
Sen. Rudy Nichols
Sen. Virgil C. Smith, Jr.
Rep. Perry Bullard
Rep. David Honigman
Elliott Smith

Date: January 31, 1989

UNIFORM FRAUDULENT TRANSFER ACT

PREFATORY NOTE

The Uniform Fraudulent Transfer Act (UFTA) (see App. B) is a proposed revision of the Uniform Fraudulent Conveyance Act (UFCA). The UFCA was adopted in Michigan as Public Act #310 of 1919, M.C.L. §§ 566.11-566.23 (App. A). The UFCA sought to codify the law of fraudulent conveyances that had developed from the English Statute of 13 Elizabeth. The UFTA builds upon this codification.

The UFTA does not change the basic structure of the UFCA. The UFCA holds void a transfer of a debtor's property with intent to defraud creditors. Responding to obvious proof problems in establishing such intent, the UFCA also provides that certain transfers made without adequate consideration will be treated as constructively fraudulent — i.e., fraudulent without regard to actual intent. When a transfer is made or an obligation is undertaken without what the UFCA describes as "fair consideration," any one of three conditions produce constructive fraud: (1) the property was transferred or the obligation undertaken when the debtor was insolvent, or when the transfer or obligation itself rendered the debtor insolvent; (2) the transfer of property or assumed obligation left the debtor with an unreasonably small amount of capital to conduct his ordinary business; (3) the transfer or obligation was made while the debtor intended to or believed he would incur greater debts than he would be able to pay. In conjunction with these provisions, UFCA defines key terms like "insolvent" and "fair consideration." Once a fraudulent conveyance is

established, remedies available to a creditor under the UFCA include voidance of the fraudulent transfer, attachment of the transferred property, and injunctions to prevent the further transfers of the property.

The UFTA retains this basic structure of the UFCA while adding and deleting provisions to correct deficiencies in the UFCA, including: (1) the UFCA's overbroad definition of "asset" (used in determining "insolvency"); (2) the UFCA's inclusion of a partnership provision so absolute as to deem fraudulent any transfer or obligation incurred by an insolvent partnership without regard to the adequacy of consideration; (3) the lack of a timing provision establishing when a transfer or assumption of obligation is deemed to occur for the purposes of the act; (4) the unnecessary distinction drawn in the UFCA between creditors with matured claims and those with unmatured claims in the provision of remedies for fraudulent transfers; and (5) the lack of a specific time limitation for a cause of action under the UFCA. [As to the latter, Michigan had such a time limitation and the proposal retains it.]

The UFTA also takes into account changes made in related statutes and legal standards that were adopted after the enactment of the UFCA. These include: (1) the changes made in the Bankruptcy Code sections on fraudulent transfers by the Bankruptcy Reform Act of 1978; (2) the changes in the law of security transfers under the Uniform Commercial Code (M.C.L. §440.9101 et seq.); (3) the new provisions in the Model Corporations Act concerning the distribution of dividends; and (4) the new provisions in the Model Rules of Professional Conduct, which forbid a lawyer to knowingly assist a client in committing a fraud.

Undoubtedly, the most important of these new developments was the

Bankruptcy Act. Among the concepts suggested by the Bankruptcy Act and incorporated in the UFTA are (1) a new category of constructive fraudulent transfer, a preferential transfer by an insolvent to an insider-creditor who had reason to be aware of the insolvency, (2) a timing-of-transfer standard that looks to the law governing the date of perfection against a good faith purchaser; (3) the definition of adequate consideration by reference simply to reasonably equivalent value, without regard to good faith, with the transferee or obligee then given the opportunity to show his good faith to bar full application of the Act's remedies, and (4) the establishment of a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they come due.

All of these innovations and departures from the UFCA are explained in the official commentary to the UFTA, included as Appendix B infra. The commentary that we have added below incorporates the core of that commentary and adds comments on Michigan law. The proposed statute and that Michigan commentary follows:

§1. DEFINITIONS

As used in this Act:

(1) "Affiliate" means"

(i) a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

(A) as a fiduciary or agent without sole discretionary

power to vote the securities; or

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

(ii) a corporation 20 percent 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 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

(A) as a fiduciary or agent without sole power to vote the securities; or

(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 those assets are controlled by the debtor; or

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

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

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

(ii) property to the extent it is generally exempt under nonbankruptcy law; or

(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 one tenant.

(3) "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.

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

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

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

(7) "Insider" includes:

(i) if the debtor is an individual,

(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 clause (B); or

(D) a corporation of which the debtor is a director, officer, or person in control;

(ii) if the debtor is a corporation,

(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 clause (D); or

(F) a relative of a general partner, director, officer, or person in control of the debtor;

(iii) if the debtor is a partnership,

(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 clause (C); or

(E) a person in control of the debtor;

(iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(v) a managing agent of the debtor.

(8) "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.

(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 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.

(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.

MICHIGAN COMMENT TO SECTION ONE

A. "Affiliate"

The definition of "affiliate" is new. It is derived from §101(2) of the Bankruptcy Code. "Affiliate" is used in §1(7)(iv) as part of the definition of "insider," which in turn is used in describing instances of constructive fraud in sections 4 and 5.

B. "Asset"

The definition of "asset" in §1(2) of the UFTA is new, and replaces the UFCA definition found in M.C.L. §566.11. Measurement of the debtor's "assets" determines when the debtor becomes insolvent and when transfers of the debtor's property become invalid (see UFTA §2, §4, and §5).

The UFCA and the UFTA seek to protect a creditor's unsecured interest in a debtor's property. When a debtor has more liabilities than assets which such unsecured creditors can reach to collect their debts, those creditors obviously will not be able to fully satisfy their claims. The UFCA and UFTA accordingly seek to preclude transfers of property that would reduce the debtor's assets to a point where their value would not be sufficient to fully satisfy the creditors' claims. Since some of the debtor's property interests are exempt from the creditors' claims, the

calculation of the debtor's remaining "assets" for this purpose must be limited to those property interests of the debtor that are available to the unsecured creditor in satisfaction of his debt. The new definition of "asset" in the UFTA further refines that limitation.

Section 1(2)(i) excludes property from the definition of "asset" to the extent that it is subject to a valid lien. Property subject to a lien is not available to satisfy the claims of unsecured creditors until the claim of the lienholder is satisfied.

Section 1(2)(ii) excludes property that is generally exempt under nonbankruptcy law. Nonbankruptcy law is the law of a state or federal law that is not part of the Bankruptcy Code (Title 11 of the United States Code). Examples of the nonbankruptcy law exemptions interspersed throughout Michigan law are: M.C.L. §128.112 (exempting deed to cemetery plots from any execution by court); M.C.L. §400.63 (exempting social welfare benefits from execution or transfer in the event of bankruptcy); M.C.L. §38.1346 (exempting public school employees retirement funds from execution, attachment and the operation of bankruptcy laws); and the common law exemption of spendthrift trusts from execution Rose v. Southern Michigan National Bank, 255 Mich. 275, 237 N.W. 284 (1931).

The broad definition of "asset" in the UFCA, currently found in M.C.L. §566.11, includes some property interests that are beyond the reach of general creditors, and thus must be modified. That definition considers any property interest subject to any claim by any creditor to be an "asset" for the purposes of the UFCA. This encompasses property unavailable to all but the most exceptional creditor. For example, under current law, the Public School Employees' Retirement Act, M.C.L. §38.1346, excepts from its general exemption claims of alimony and child support arising from divorce judgments. Since the retirement fund would be subject to a claim of a creditor who had a special claim of alimony or child support, the public school employee's retirement fund could be considered an included asset under present law. By excluding all property interests "generally exempt," the UFTA prevents the inclusion of property interests that only would be available to creditors with unique claims, such as alimony or divorce judgments. This limitation is consistent with the Act's objective of protecting the whole class of creditors.

Section 1(2)(iii) of the UFTA similarly excludes from the definition of "asset" that property held by a debtor in a tenancy by the entirety to the extent that such property "is not subject to process by a creditor holding a claim against only one tenant." This provision would exclude all property held in a tenancy by the entirety in this state since Michigan law currently prevents the execution of property or income of property held in tenancy by the entirety by the creditors of one tenant. See Sanford v. Bertrau, 204 Mich. 244, 169 N.W. 880 (1918); SNB Bank and Trust v. Kensey, 145 Mich.App. 765, 378 N.W.2d 594 (1985). Whether such property would be considered an asset under the UFCA is unclear. Arguably, it would be included. A creditor having a claim against both tenants by the entirety could execute a claim on the property; thus the property would be subject to a possible creditor under a possible claim, literally satisfying the definition of

asset in M.C.L. §566.11 even though the property would not be subject to a claim against only one tenant.

C. "Claim"

The word "claim" is derived from §101(4) of the Bankruptcy Code, and is used in the subsequent definition of "creditor." Since the purpose of this act is primarily to protect unsecured creditors against transfers and obligations injurious to their rights, the definition is sufficiently broad to encompass all forms of claims they might have. Also, consistent with the elimination of the UFCA's unnecessary distinction between matured and unmatured claims, there is no requirement that the claim have been reduced to judgment.

D. "Creditor"

Creditor is defined by the word "claim." The term "creditor" is used in sections 4, 5, 7, and 8 of the UFTA to identify the person who may be defrauded by a transfer and to whom remedies under the act are available. Michigan law has viewed tort claimants and contingent claimants as creditors under the UFCA, see Iden v. Huber, 242 N.W. 818, 259 Mich. 3 (1932), Detroit, B.C. and W.R.R. v. Lavell, 224 Mich. 572, 195 N.W. 58 (1923); the same status will be maintained under the UFTA.

E. "Debt"

The definition of "debt" is derived from §101(ii) of the Bankruptcy Code. "Debt" is defined by reference to the definition of "claim," as it constitutes "liability on a claim." The term "debt" is used in: section 2, to define "insolvency" for the purpose of the act; section 3, to define "value" for the purposes of the act; and section 4, to determine whether a transfer results in actual fraud or a presumption of fraud.

F. "Debtor"

The definition of "debtor" is new, and also is defined by the word "claim." "Debtor" is used in sections 2, 3, 4, 5, and 8 in identifying persons who may be insolvent, who may make a transfer deemed fraudulent, and who may be subject to the remedies provided to creditors.

G. "Insider"

The definition of "insider" is derived from §101(25) of the Bankruptcy Code. A slight modification from the Bankruptcy Code definition is made in §§ 1(7)(i)(C), (ii)(E) and (iii)(D) to clarify that general partners, but not limited partners, are to be considered "insiders." Property transfers to "insiders" are indicators of fraud in some circumstances (see §4(b)(1)). A transfer by an insolvent debtor to an insider for other than a present, reasonably equivalent value, when the insider had reason to know of the insolvency, is constructively fraudulent (see §5(b)). The groups of persons categorized as insiders (e.g., relatives of the individual debtor, corporate

directors of a corporate debtor) is in keeping with the traditional view of insiders for this purpose.

H. "lien"

The definition of "lien" is taken from §101 of the Bankruptcy Code. "Lien" is used in §1(2) to determine whether a property interest is considered an "asset" and in §8 as one of the protections available to the interests of good-faith transferees when a transfer of property or the assumption of an obligation is found to have been fraudulent.

I. "Person"

The definition of "person" is taken from paragraphs (28) and (30) of §1-201 of the Uniform Commercial Code, codified in Michigan at M.C.L. §440.1201. The broad definition of "person" is used to include both individuals and entities as affiliates, creditors, insiders and debtors for the purposes of the UFTA (see §§1(1), (4), (6), (7) and §3(a)).

J. "Property"

The definition of "property" is derived from the Uniform Probate Code §1-201(33). Although that Code has not been adopted in Michigan, the definition is fairly standard. Property includes both real and personal property, whether tangible or intangible, and any interest in property whether legal or equitable. The UFCA similarly referred in its definition of "conveyance" to both tangible and intangible property. See M.C.L. §566.11.

K. "Relative"

The definition of "relative" is derived from §101(34) of the Bankruptcy Code but adds an explicit reference to the spouse and the spouse's side of the family to preclude any uncertainty as to whether the jurisdiction's common law (used as the basic guideline) includes relatives through marriage when determining the degrees of relationship.

L. "Transfer"

The word "transfer" replaces the word "conveyance" currently defined at M.C.L. §566.11. "Conveyance" was thought by the drafters of the UFTA to carry a connotation of a transaction in real estate. Since both the UFCA and the UFTA encompass all types of property transfers, the word "transfer" was substituted. The UFTA definition of "transfer" explicitly includes involuntary transfers such as sheriff sales. There are no Michigan court decisions as to whether involuntary transfers are "conveyances" as defined in M.C.L. §566.11. However, inclusion of involuntary transfers would be in conformity with Michigan law prior to the adoption of the Uniform Fraudulent Conveyance Act. In Aldrich v. Maitland, 4 Mich. 205 (1856), the Supreme Court of Michigan found that a sheriff's execution sale was subject to the same scrutiny for fraud against creditors as other transfers of the debtor's

property.

M. "Valid Lien"

The definition of "valid lien" is new. "Valid lien" is used in §2(e) to limit the measurement of debt, for the purpose of determining insolvency. That section excludes obligations secured by a creditor's lien on property that is not included as an asset. For this purpose, the lien should be "valid," i.e., effective against a subsequently obtained lien. Otherwise, the obligation would be one that would look to the debtors general assets.

§2. INSOLVENCY

(a) 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.

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

(c) A partnership is insolvent under subsection (a) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all 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.

(d) 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.

(e) 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.

MICHIGAN COMMENT TO SECTION TWO

Section 2(a). This subsection establishes the basic definition of insolvency. The insolvency of a debtor is an element in the constructive fraud created under §5. The definition of "insolvency" is derived from §101(26)(a) of the Bankruptcy Code. It basically restates the definition of "insolvency" in the UFCA, see M.C.L. §566.12(1). The critical additions to the UFCA come in the subsections that follow.

Section 2(b). This subsection creates a presumption of insolvency when a debtor is generally no longer paying his debts as they become due. The presumption of insolvency is adopted from §303(h)(1) of the Bankruptcy Code, and U.C.C. §1-201(23) (M.C.L. §440.1201(23)). Present Michigan law places the full burden of proving insolvency upon the creditor who seeks to void a transfer as fraudulent, without any presumption of insolvency arising from the nonpayment of debt. See Fricke v. Abbot, 368 Mich. 553 (1962); Dean v. Torrance, 229 Mich. 14 (1941). The proposed presumption recognizes the difficulty of proving insolvency in the bankruptcy sense when almost all evidence of insolvency is held by an antagonistic debtor who may conceal or fraudulently manipulate financial records. Practically, the failure of a debtor to pay his debts is the best evidence of insolvency, and this approach to proving insolvency is now reflected in the Bankruptcy Code. The presumption would require a creditor to prove that a debtor failed to pay his debts as they became due; the burden then shifts to the debtor to present evidence in rebuttal.

Factors considered in determining whether the presumption applies should include the amount of indebtedness, the number of debts, the proportion of the indebtedness not paid, the duration of nonpayment, and any mitigating circumstances that may excuse the failure to pay the debt. A court should also take into account the debtor's payment practices before the period of alleged nonpayment and the general payment practices in the debtor's trade or industry. These considerations are well established under bankruptcy law.

The strength of the presumption would be governed by Mich.R.Evid. 301, which provides that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains through the trial upon the party on whom it was originally cast." Mich.R.Evid. 301 is substantially identical to Fed.R.Evid. 301. Both rules reflect the Thayer or "bursting bubble" theory of rebuttable presumptions, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact (see Notes of Conference Committee, House Report on proposed Fed.R.Evid. 301, No. 93-1597). This theory contrasts with the Morgan theory, as expressed by the Uniform Rule of Evid., Rule 301(a), which imposes on the party against whom the presumption is directed the burden of rejecting it by proving more-probable-than-not that

the contrary exists.[1] The drafters of UFTA assumed, as indicated in their commentary, that the Uniform Rule approach would be applicable to subsection (c). That would not be the case in Michigan.

Section 2(c). This subsection defines "insolvency" as applied to partnerships. The definition is derived from the definition of partnership insolvency in §101(26)(B) of the Bankruptcy Code, and is very similar to a provision in the UFCA at M.C.L. §566.12(2).

Section 2(d). This subsection prevents a debtor from including property concealed or transferred to another party as an "asset" in the determination of the debtor's insolvency. Section 2(d) is derived from §101(26) of the Bankruptcy Code. Since concealed or transferred property would not usually be available to a creditor to collect a claim against the debtor, it should not be included in the sum of the debtor's assets. This follows from the general policy of the UFTA, as set forth in the commentary on the term "assets," to include only those assets available to the unsecured creditor.

Section 2(e). This subsection qualifies "debts" by excluding all those obligations that are secured by liens on the debtor's property. The definition of "asset" in the UFTA similarly does not include property as an asset to the extent that such property is subject to a valid lien. To include as a "debt" an obligation secured by a valid lien against the debtor's property would in effect count the debt in question twice: once as a burden on a specific piece of the debtor's property and once as a claim against the debtor's property in general.

§3 VALUE

(a) Value is given for a transfer or an obligation if, in exchange for

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[1] There previously was some confusion among Michigan courts as to whether the "bursting bubble" theory applied to rebuttable presumptions. Prior to the adoption of Mich.R.Evid. 301 in 1978, Michigan had adopted a modified "Morgan" approach to rebuttable presumptions (see In re Wood Estate, 374 Mich. 278 (1965)). The Wood majority held that the jury must be instructed to apply the presumption unless it finds the facts establishing the presumption have been rebutted, and if rebutted, the presumption must be presented to the jury as a conditional mandatory inference. If other consistent evidence is introduced to rebut the presumed fact itself, then the presumption merely becomes a permissible inference. Some Michigan courts still applied the Wood rule after the adoption of Mich.R.Evid. 301, even though the Wood rule was inconsistent with the "bursting bubble" theory. The Michigan Supreme Court ended the confusion with its opinion in Widmayer v. Leonard, 422 Mich. 280 (1985), which rejected the Wood rule and adopted the "bursting bubble" theory.

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.

(b) For the purposes of Sections 4(a)(2) and 5, 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.

(c) 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.

MICHIGAN COMMENT TO SECTION THREE

Section 3 would replace M.C.L. §566.13, which defines "fair consideration." This section is more limited in scope. It merely describes those transactions that will be deemed a transfer "for value." Whether value is sufficient, so as not to suggest a transfer against the interest of creditors, generally is left to other provisions. Thus, §3(a) does not require "value" to be "fair consideration" as measured by the worth of the property transferred or obligation assumed, or that the value be given in "good faith," as is required under M.C.L. §566.13(a). However, in §§ 4(a)(2), 4(b)(8), 5(a), 5(b), and 8(a) of the UFTA, the word "value" is modified with the words "reasonably equivalent" so that the UFTA would require the same basic equivalency of value in an exchange as M.C.L. §566.13(a).

Section 3(a). This provision defines "value" as any property received or antecedent debt satisfied. Section 3(a) is adapted from Bankruptcy Code §548(d)(2)(A). "Value" as defined by the UFTA is to be determined from the standpoint of a creditor seeking collection of a debt. Michigan courts have adopted this approach to value in applying the "fair consideration" standard

of the UFCA. See McCaslin v. Schouten, 294 Mich. 180 (1940); In re Anderson Industries, Inc., 55 B.R. 922 (Bankruptcy, W.D. Mich., 1985).

Unlike M.C.L. §566.13, the new definition does not differentiate between absolute transfers and transfers to secure a debt when determining whether value has been given for a transfer. M.C.L. §566.13 provides two different definitions of "fair consideration": (1) M.C.L. §566.13(a) requires an absolute transfer or property to be exchanged for a "fair equivalent" value; (2) M.C.L. §577.13(b) requires a transfer of property to secure a debt to be in proportion with the amount of the debt. The UFTA, like the Bankruptcy Code, treats the value of property transferred to secure a debt as ordinarily reasonably equivalent in value to the debt secured. If the value of the property actually exceeds the value of the debt, the excess remains available to unsecured creditors as the amount of the debt is the measure of the value of the interest in the asset that is transferred. This makes the test of M.C.L. §566.13(b) unnecessary, since the value of the interest in property transferred to secure a debt can not be disproportionately large in comparison to the amount of the debt secured. This approach of the UFTA is in accord with the Uniform Commercial Code M.C.L. §440.9311, which provides that a debtor's interest in collateral is still subject to the claims of creditors even if the title to the collateral is held by another party (see M.C.L. §440.9311, Official Comment 2). (See also Official UFTA Comment to §§3 and 4).

Section 3(a) specifically excludes unperformed promises as "value" unless the promise was made as part of the ordinary conduct of business. Generally, "fair consideration" under the UFCA has not included unperformed promises. In Grand Haven State Bank v. Church, 253 Mich. 347 (1931), the Michigan Supreme Court ruled that a daughter's promise to support her father in the future was not adequate consideration for a conveyance of the father's property to the daughter. Michigan law prior to the adoption of the UFCA act did not consider an unperformed promise adequate consideration for a transfer as against creditors Michigan Trust Co. v. Comstock, 130 Mich. 572 (1902).

The Section 3(a) exception to the general rule against treating unperformed promises as consideration is for those promises made in the ordinary conduct of business. There is no Michigan case law under the UFCA concerning this exception, but prior to the adoption of the UFCA, a federal court in Michigan found adequate consideration for a transfer of property in the unperformed promise of an attorney to provide services to a debtor. A conveyance of property in return for the promise was not voided as fraudulent in In re Pangborn, 185 F. 673 (W.D. Mich. 1910). The exception for promises made in the ordinary conduct of business also finds support in rulings of other jurisdictions under the UFCA. See the Official Comment to §3.

Section 3(b). This subsection protections a transferee buying property at a foreclosure or sheriff's sale for less than market price from the avoidance of the transfer as fraudulent. Section 3(b) overrules cases such as Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980) (see Official Comment to UFTA §3 for list of other cases with similar

holdings). Durrett held that a noncollusive foreclosure sale could be held fraudulent under the UFCA because it would not have been for "fair consideration." There is no Michigan case law under the UFCA concerning this issue. In a decision prior to the adoption of the UFCA, the Michigan Supreme Court ruled that a noncollusive foreclosure on debtor's property and subsequent sale at a price below market value was not fraudulent for lack of adequate consideration. Reeves v. Miller, 121 Mich. 311 (1899). Section 3(b) adopts the same approach as this Michigan decision, stating that the price at such a foreclosure is "reasonably equivalent value."

Section 3(c). This provision is adopted from §547(c)(1) of the Bankruptcy Code. Section 3(c) defines "present value" as that term is used in §5(b) to determine whether a transfer of property or the assumption of an obligation to an insider is fraudulent as to the transferror's creditors. The key here is the contemporaneous quality of the exchange.

§4 TRANSFERS FRAUDULENT AS TO PRESENT AND FUTURE CREDITORS

(a) 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:

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

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

(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; or

(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.

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

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

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

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) 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;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

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

MICHIGAN COMMENT TO SECTION FOUR

Section 4 replaces M.C.L. §§ 566.15, 566,16 and 566.17. If a transfer or the assumption of an obligation is found to be fraudulent under the terms of this section, a creditor may seek the remedies provided for in §7. A good-faith transferee of a debtor's fraudulent transfer, or a good-faith obligee, may limit the remedies of a creditor under §8.

Section 4(a)(1). This provision is derived from M.C.L. §566.17. Under this subsection, a transfer of a debtor's property or a debtor's assumption

of an obligation with actual intent to defraud his creditors is considered fraudulent. The language describing that intent ("to hinder, delay, or defraud") is identical to the language in §566.17.

Section 4(a)(2). This provision establishes the first of the conditions establishing constructive fraud. It is derived from M.C.L. §§ 566.15 and 566.16. Constructive fraud is established when the conditions of either §§ 4(a)(2)(i) or (ii) are present in a transfer of property or the assumption of an obligation by a debtor for less than "reasonably equivalent value." Section 4(a)(2)(i), like M.C.L. §566.15, deals with the situation when the result of the transfer is to leave the debtor with insufficient assets to carry on his or her business. The UFTA substitutes "unreasonably small assets in relation to the business or transaction" for the words "unreasonably small capital" in the UFCA. The reference to "capital" is ambiguous in that it may refer to net worth or to the par value of stock or to the consideration received for stock issued. The special meanings of "capital" in corporate law have no relevance in the law of fraudulent transfers, so the UFTA uses the word "asset" instead.

Section 4(a)(2)(ii) is the counterpart of M.C.L. §566.16, dealing with the situation in which the debtor intended, believed, or reasonably should have believed, that the debtor would thereby incur debts beyond his means to pay as they came due. The primary change here is the addition of the phrase "should have believed." M.C.L. §566.16 simply uses "intends or believes."

Section 4(a)(2) substitutes the term "reasonably equivalent value" for "fair consideration" under the UFCA. The definition of "fair consideration" under M.C.L. §566.13(a) initially mandates that the exchange have been a "fair equivalent" in value. Although UFTA §3 provides a more refined definition of value (see the Commentary supra), the concepts of value of a "fair equivalent" and "reasonably equivalent" are similar. However, "fair consideration" under M.C.L. §556.13(a) also adds the requirement that the transfer be in "good faith." The impact of this "good faith" requirement upon the concept of "fair consideration" is unclear. Michigan courts have measured "fair consideration" from the standpoint of the creditor. See McCaslin v. Schouten, 294 Mich. 180 (1940); Dunn v. Minnema, 323 Mich. 689 (1949). This approach to determining "fair consideration" discounts the relevance of the "good faith" of a transfer: from the standpoint of a creditor, the "good faith" of a transfer is not important if the transfer rendered the debtor execution proof. Accordingly, Michigan courts have generally ignored the "good faith" requirement when determining whether there was a lack of "fair consideration"; any mention of "good faith" is limited to a verbatim quotation of M.C.L. §566.13 (for example, Nicholson v. Scott, 50 F.Supp. 209 (E.D. Mich. 1943)). The UFTA removes the "good faith" requirement; the key is whether the transfer was for reasonably equivalent value. A showing of good faith by the transferee may, however, result in certain protections under the remedy-limitation provisions of section 8.

Section 4(b). This section provides a nonexclusive list of circumstances that are appropriate for consideration in assessing whether there was actual fraudulent intent under subsection (a)(1). The UFCA does not include a similar list in its actual fraud provision, M.C.L. §566.17.

However, most but not all of the factors have been recognized in Michigan courts as indicators of actual fraud. These indicators of fraud are not conclusive but are more or less strong or weak according to their nature and number concurring in the same case and may be overcome by evidence establishing the bona fides of the transaction Bentley v. Caille, 289 Mich. 74 (1939). A list of cases in other states treating indicators of fraud may be found in the Official Comment to UFTA §4. What follows is a brief review of Michigan authority.

1. Section 4(b)(1). A transfer to an "insider" (see §1(7)) is an indicator of fraud. Although Michigan courts have not used the word "insider," they have found the transfer of a debtor's property to a person who has a confidential relationship with the debtor to be evidence of fraud. Transfer of a debtor's property to family members is subject to close scrutiny. See Linke v. Goodrich, 30 Mich.App. 228 (1971); Bentley v. Caille, 289 Mich. 74 (1939). Transfer of the property of a debtor corporation, partnership or individual to business associates also has been viewed as evidence of fraud. See Wiseman v. United Dairies, 324 Mich. 473 (1949); Dry Wall Co. v. Wolfe-Gilchrist, 53 Mich.App. 215 (1974).

2. Section 4(b)(2). The continued possession of the transferred property by the debtor/transferror after the transfer is evidence of fraud. Both retention of possession and of a life estate in the transferred property have been considered indicators of fraud in Michigan rulings. See Lewis v. Rice, 61 Mich. 97 (1886); Bentley v. Caille, 289 Mich. 74 (1939).

3. Section 4(b)(3). The concealment of a transfer is evidence of fraud. An example of the use of this indicator of fraud in Michigan is found in Barnes v. Wayne Circuit Judge, 81 Mich. 374 (1890). There, the court inferred fraud from the sale of a debtor's property, the buying of bonds with the proceeds of the sale, and the subsequent concealment of the bonds.

4. Section 4(b)(4). A correlation between a transfer of the debtor's and a pending or threatened lawsuit against the debtor is an indicator of fraud. A transfer of a property interest when a claim is pending has been recognized by Michigan courts as evidence of an intent to defraud creditors. See Farrell v. Paulus, 309 Mich. 441 (1944). An earlier Michigan case found such transfers to be legal fraud, regardless of the debtor's intent. Fosher v. Whelpley, 123 Mich. 350 (1900).

5. Section 4(b)(5). A transfer of nearly all a debtor's assets is evidence of fraud. There is no Michigan case law dealing with this specific indicator of fraud. Of course, if the transfer makes the debtor insolvent, there would be constructive fraud under M.C.L. §566.14 if there was no "fair consideration."

6. Section 4(b)(6). The disappearance of a debtor is an indicator of fraud. No Michigan case law considers this particular factor.

7. Section 4(b)(7). The removal or concealment of assets becomes a indicator of fraud under §4(b)(7). Michigan courts have not previously dealt with this indicator of fraud.

8. Section 4(b)(8). This subsection looks to whether the value of the consideration received was reasonably equivalent to the value of the asset transferred or obligation incurred. Reasonably equivalent value received obviously is an indicator of a lack of intent to defraud. On the other side, under Michigan law, inadequate consideration is an indicator of fraud, but can not of itself establish fraudulent intent. See Lackawanna Pants Mfg. Co. v. Wiseman, 133 F.2d 482 (6th Cir. 1949).

9. Section 4(b)(9). Consideration under this subsection is given to whether the debtor was insolvent or became insolvent shortly after the transfer. Transfer of property by an insolvent debtor is a indicator of fraud under Michigan law, but is not necessarily conclusive proof of an actual fraudulent intent. See Cross v. Wagenmaker, 329 Mich. 100 (1951); Hartsema v. Addison Coal and Coke Co., 286 Mich. 296 (1938).

10. Section 4(b)(10). The reference here is to the debtor's incurrence of a large debt shortly before or after the transfer of the debtor's property. Past Michigan decisions have not considered this factor. However, if the large debt causes the debtor to become insolvent, the debtor's insolvency is an indicator of fraud. See comment 9 above.

11. Section 4(b)(11). A transfer of a debtor's property to a lienor with a claim against the property, and the subsequent transfer of the property by the lienor to an insider of the debtor, is another possible indicator of fraud. Here too, Michigan case law is silent.

As noted in the Official Commentary, none of the above provisions conflict with the application of the U.C.C. provisions codified at M.C.L. §440.2402(2) (retention of goods by a merchant-seller not considered fraudulent if retained in good faith and in the regular course of trade for a commercially reasonable amount of time), M.C.L. §440.9205 (grant of liberty by secured creditor to debtor to use, commingle, or dispose of personal property collateral or account for its proceeds does not impute fraud), M.C.L. §440.9301(1)(b) (nonpossessory security interest must be accompanied by notice-filing to be effective against the claims of a lien creditor), and M.C.L. §440.6105 (bulk transfer ineffective against transferror's creditors unless transferee gives notice to the creditors within ten days).

§5 TRANSFERS FRAUDULENT AS TO PRESENT CREDITORS

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a 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.

(b) A transfer made by a debtor is 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.

MICHIGAN COMMENT TO SECTION FIVE

Section 5(a). This subsection would replace M.C.L. §566.14. Under this provision, constructive fraud arises from a transfer of property or an assumption of an obligation without receiving reasonably equivalent value if (i) the debtor was then insolvent, or (ii) the transfer of property or assumption of the obligation rendered the debtor insolvent. This category of fraudulent transfer renders the transaction voidable only by a creditor in existence at the time. A "present creditor" is defined as a creditor having a valid claim against the debtor at the time of the transfer; a "future creditor," in contrast, is a creditor with a claim maturing after the transfer. M.C.L. §566.14 uses the broader phrase "fair consideration," rather than reasonably equivalent value -- a difference previously explored in the commentary to §4. Also M.C.L. §566.14 does not by its terms limit this constructive fraud provision to actions by present creditors ("fraudulent as to creditors"). There is no Michigan case law under the UFCA dealing with the possible limitation of the application of M.C.L. §566.14 to claims by present creditors. However, the UFCA clearly was intended to impose such a limit, as noted in the Official Commentary to UFTA §5. M.C.L. §566.17, in contrast to M.C.L. §566.14, states that a transfer with intent to defraud "is fraudulent as to both present and future creditors." The explicit inclusion of a "future" creditors in M.C.L. §566.17 supports a reading of M.C.L. §566.14 as limited to claims by present creditors. Moreover, such a limitation followed from Michigan case

law prior to the adoption of the Uniform Fraudulent Conveyance Act, which required the proof of an actual intent to defraud to void transfers against subsequent or future creditors. See Cole v. Brown, 114 Mich. 396 (1897); Lovell v. Denison, 171 Mich. 599 (1912).

Section 5(b). This is a new provision on constructive fraud. It applies to existing creditors where the transfer was made to an insider for an antecedent debt, the debtor was insolvent, and the insider had reasonable cause to know of that insolvency. This provision arguably is inconsistent with Michigan decisions holding that a transfer of a debtor's property to an insider in satisfaction of an antecedent debt does not in itself constitute a fraudulent transfer. In Hartford Acc. & Indem. Co. v. Jirasek, 254 Mich. 131 (1931), the Michigan Supreme Court held that the good-faith transfer of real estate by a debtor to his brother in satisfaction of a preexisting debt was valid against the debtor's creditors. John A. Parks Co. v. Discount Corp., 294 Mich. 316 (1940), allowed as valid a transfer of corporate assets to corporate officers in satisfaction of an antecedent debt when the debtor corporation was on the brink of bankruptcy. Subsection (b) would make such transfers fraudulent as to present creditors where the debtor was insolvent and the insider had reasonable cause to so believe. The above court decisions did not directly consider these additional factors, and subsection (b) might therefore be distinguished. However, those opinions also did not suggest that the case would be decided differently if these factors existed and it is likely that they were in fact present in both cases.

Section 5 does not include a provision similar to M.C.L. §566.18. In its first subsection, M.C.L. §566.18 voids as fraudulent all transfers of partnership property or obligations by the partnership to the individual partners if the partnership is insolvent, or will be rendered insolvent by the transfer or obligation. Section 5(b) would void such transfers of partnership property or incurred obligations if the transfers or obligations were to secure antecedent debt, and the partner (an insider) to whom the transfer or obligation was made had reason to know that the partnership was or would be made insolvent at the time of the transfer. Otherwise, the partnership transfer would be governed by subsection 5(a) and applicable only where there was not reasonably equivalent value. Where the partner lacks the reasonable cause required by subsection 5(b), there is no reason to treat an exchange for reasonably equivalent value any differently than if the party had not been a partner.

The presence of subsection 5(a) eliminates the need for the second subsection of M.C.L. §566.18, which applies to transfers to persons not partners without fair consideration.

§6. WHEN TRANSFER IS MADE OR OBLIGATION IS INCURRED

For the purposes of this Act:

(1) 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;

(2) if applicable law permits the transfer to be perfected as provided in paragraph (1) 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;

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

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

(5) 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.

MICHIGAN COMMENT TO SECTION SIX

The UFCA does not specify when a transfer is completed or effectual for the purposes of the act. The UFTA defines the time of a transfer. This time constitutes the point at which the solvency or insolvency of the debtor is measured (see §2), and from which the statute of limitations may run (see §9).

Section 6(1). This provision fixes the time of most property transfers as the date of perfection against a good faith purchaser from the transferror. It is adapted from §548(d)(1) of the Bankruptcy Code. Perfection against a good faith purchaser is effected by notice-filing, recordation, or delivery of possession. The governing provisions are found in the Uniform Commercial Code. See M.C.L. §§ 440.9302, 440.9304, and 440.9305 (perfection of security transfers described).

Section 6(2). This provision fixes the time of transfer for those transfers perfectible but not yet perfected against subsequent purchasers. Such transfers are considered perfected immediately before the filing of an action to void them. Without this provision, unperfected transfers would arguably be immune from attack.

Section 6(3). This subsection provides a time of transfer for those transfers that are not usually perfected, such as a gift, sale of personal property, or creation of a security interest in inventory. If the transfer is not perfectible, it is considered completed when the transferror effectively parts with his interest in the property. See also §1(12).

Section 6(4). This subsection requires that a transferror have a present interest in a property before the property can be transferred for the purposes of the UFTA. This prevents a debtor from recording or filing a transfer before the debtor has a property interest that would be subject to the creditors' claims. The predating of a transfer could circumvent §§ 4(a)(2) and 5 by allowing a debtor to perfect a transfer at an earlier point, when solvent, even though the present interest came into being when one of those provisions would be applicable. Cf. Bankruptcy Code §547(e); U.C.C. §9-203(1)(c) at M.C.L. §440.9203(1)(c).

Section 6(5). This subsection is designed to respond to an uncertainty raised by Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979 (2d Cir. 1981), insofar as that case suggests that a guarantee is incurred when advances covered by the guarantee are made, rather than when the guarantee becomes effective between the parties (the usual standard, applied in this subsection). There is no Michigan case law similar to Rubin.

§7. REMEDIES OF CREDITORS

(a) In an action for relief against a transfer or obligation under this Act, a creditor, subject to the limitations in Section 8, may obtain:

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

(2) an attachment against the asset transferred or other property of the transferee insofar as authorized under section 4001 of Public Act 236 of 1961, as amended, being section 600.4001 of the Michigan Compiled Laws, and applicable court rules;

(3) subject to applicable principles of equity and in accordance with applicable court rules and statutes,

(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.

(b) 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.

MICHIGAN COMMENT TO SECTION SEVEN

Section 7 of the Uniform Fraudulent Transfer Act replaces M.C.L. §§ 566.19, 566.20. The remedies provided in this section are subject to the limitations and defenses in §8.

Section 7(a). This subsection sets forth the remedies for a fraudulent transfer that are generally available to creditors. The UFTA eliminates the distinction between matured and unmatured claims in M.C.L. §566.19 and §566.20, as the distinction was found too confusing and unnecessary. Under the UFTA, a creditor with a matured or unmatured claim can: (i) void a transfer to the extent necessary to satisfy the creditor's claim; (ii) attach the asset transferred or other assets of the transferee; (iii) enjoin a transfer by the debtor or a transferee; or (iv) appoint a receiver over the property transferred or other property of the debtor or transferee. M.C.L. §566.19 provides only the first two remedies listed above to creditors with matured claims. The equitable remedies of the issuance of an injunction or the appointment of a receiver to a creditor are noted only in M.C.L. §566.20, dealing with claims that have not yet matured. Since there is no reason not to allow these equitable remedies as well to creditors with a matured claim, the UFTA makes all four remedies available to creditors with any type of claim.

The remedies specified in subsections (2) and (3) are subject to the limitations otherwise imposed under in Michigan law. Thus, the attachment remedy would be limited to cases where the remedy is needed to establish jurisdiction. In 1974, Public Act 371 amended §4001 of the R.J.A. to eliminate the former provision which allowed prejudgment attachment where the plaintiff asserted that there had been a fraudulent conveyance. Although M.C.L. §566.19(1)(b), providing for attachment, was not amended, that provision obviously was subject to the limits imposed in §600.4001. In subsection (3), because various statutes and court rules may be applicable, a cross-reference simply is made to "applicable court rules and statutes."

Section 7(b). This subsection clarifies the eligibility of both matured and unmatured claims to the remedies provided in §7(a). A claim is "matured" if there is a judgment against the debtor on the creditor's claim. M.C.L. §566.20 currently provides remedies for claims not yet matured. However, Michigan courts have offered contradictory opinions as to whether judgment is required before a creditor is entitled to the application of the remedies in M.C.L. §566.20. Thus, Michigan cases have required a judgment against the debtor before allowing an injunction preventing the transfer of property, Irwin v. V.S. Meese, 325 Mich. 349 (1949), or granting any relief to the creditor at all, Gillen v. Wakefield State Bank, 246 Mich. 158 (1929). These decisions presumably require a claim to be matured before allowing the application of the M.C.L. §566.20 remedies for unmatured claims. Recently, however, the Michigan Supreme Court ruled that a judgment in a wrongful death suit was not necessary before beginning an action under the UFCA. Churchill v. Palmer, 57 Mich. 210 (1974). This is in accord with §566.20. Section 7(b) continues this policy and makes clear that a creditor does not need a judgment against a debtor before seeking the remedies in §7(a).

Section 7(c). This subsection reserves one remedy for the exclusive use of creditors with matured claims. Like M.C.L. §566.19(b), it requires that a creditor's claim be matured before the court can levy execution on the asset transferred.

§8. DEFENSES, LIABILITY, AND PROTECTION OF TRANSFEREE

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

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Section 7(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

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

(2) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

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

(d) Notwithstanding voidability of a transfer or an obligation under this Act, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to

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

(2) enforcement of any obligation incurred; or

(3) a reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under Section 4(a)(2) or Section 5 if the transfer results from:

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

(2) enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code, being section 440.9501 et seq. of the Michigan Compiled Laws.

(f) A transfer is not voidable under Section 5(b):

(1) 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;

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

(3) 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.

MICHIGAN COMMENT TO SECTION EIGHT

Section 8 limits the application of the creditor's remedies under §7. The section protects the interests of good-faith transferees when a transfer is deemed fraudulent.

Section 8(a). This subsection replaces M.C.L. §566.19(2). A transferee may prevent the voidance of a fraudulent transfer by proving he received the property in good faith, without fraudulent intent, and for a reasonably equivalent value. This would be consistent with current case law suggesting a transferee bears the burden of proving good faith after a creditor has established the elements of a fraudulent transfer. See Jaffe v. Ackerman, 279 Mich. 304 (1937). See also M.C.L. §600.6131 (transferee has the burden of proof showing good faith if the creditor establishes that there is a judgment against the debtor and that the fraudulent conveyance took place).

Section 8(b). This provision is derived from §550(a) of the Bankruptcy Code. Section 8(b) limits the voidance of a transfer to the extent necessary to satisfy the creditor's claims. If the value of the asset is greater than the creditor's claim, the transferee retains the remaining value after the claim is satisfied.

Section 8(c). Where the judgment under subsection (b) is based upon the value of the asset transferred, this provision requires that such value be ascertained as at the time of the transfer, unless the equities require some adjustment. Thus, the transferee should gain the benefit of appreciation due to improvements he or she made. Basically, by its provision that the court shall look to the equities, subsection (c) allows leeway for adjustment, depending on what caused the appreciation or depreciation in value subsequent to the transfer.

Michigan case law has limited a creditor's recovery to the value of the transferred asset at the time of the transfer. See Equitable Life Assur. Soc. of the United States v. Hitchcock, 270 Mich. 72 (1935) (limiting creditor's right to recovery to the cash surrender value of a life insurance policy at the time of the fraudulent transfer). If the value of the transferred asset was uncertain at the time of the transfer, the court has put the burden on the transferee to prove that the voidance would be inequitable Wright v. Brown, 317 Mich. 561 (1947). Michigan law has also allowed for equitable adjustment of a creditor's recovery when certain conditions exist. Conditions recognized as requiring a court to equitably reduce a creditor's recovery include: (1) a good faith transferee's payment of mortgage or removal of other encumbrances on the transferred property, Cutcheon v. Buchanan, 88 Mich. 594 (1891); and (2) improvements made on a transferred property by a good-faith transferee, How v. Camp, Walk. Ch. 427 (1844). A condition recognized as requiring an equitable increase in the creditor's recovery was the profit gained by the transferee from the use of the transferred property. See Pierce v. Hall, 35 Mich. 194 (1876) (creditor allowed to attach both transferred land and the crop existing on the land at the time of transfer).

Section 8(d). This subsection would replace M.C.L. §566.19(2), and is an adaption of §548 of the Bankruptcy Code. M.C.L. §566.19(2) provides that a good-faith transferee who gave less than fair consideration may keep the transferred property to secure repayment of the consideration he had paid to the debtor. Section 8(d) would expand the remedies available to a good faith transferee who had given value to the debtor, but still had a void transfer (e.g., because the consideration was not reasonably equivalent). That transferee is entitled to a lien against the transferred property, judicial enforcement of obligations incurred, and reduction in the judgment against the transferee. These additional remedies make it easier for a good-faith transferee to protect his interest in or recover the consideration paid for a transferred property. The Official Comment states that an insider covered by §5(b) would not be a good faith transferee because that section applies only if he has reasonable cause to believe the debtor was insolvent. Likewise, the bad faith of a transferee can be established under Michigan law by a showing that the transferee had sufficient facts to make him aware of fraud, together with a lack of fair

consideration. See Spencer v. Miller, 279 Mich. 194 (1937).

Section 8(e). This subsection provides additional protection to certain transfers. Sec. 8(e)(1) rejects the rule adopted in In re Ferris, 415 F.Supp. 33 (W.D. Okla. 1976), that termination of a lease on default in accordance with its terms and applicable law may constitute a fraudulent transfer. There is no Michigan case law which addresses the question of whether a termination of a lease is a fraudulent transfer.

Section 8(e)(2) protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement of a secured creditor's rights pursuant to and in compliance with the provisions of section 5 of Article 9 of the Uniform Commercial Code (M.C.L. §440.9501 et seq.). Although a secured creditor may enforce rights in collateral without a sale under M.C.L. §440.9502 or M.C.L. §440.9505, the creditor must proceed in good faith (M.C.L. §440.9103) and in a "commercially reasonable" manner. The provisions of subsection (e)(2) follow an approach similar to that adopted by Michigan courts with respect to the transfer of property to a secured creditor. Before the adoption of the UFCA, Michigan courts recognized the validity of property transfers to satisfy a secured claim. Thus, it was held that mortgagees may foreclose on the property of an insolvent mortgagor in an honest effort to secure their claims. See Pierce v. Johnson, 93 Mich. 125 (1892); Hyde v. Shank, 93 Mich. 535 (1892).

Section 8(f). This subsection provides additional defenses against the avoidance of a transfer to an insider deemed preferential under Sec. 5(b). Since preferential transfers to insiders arguably are acceptable under Michigan law (see comment to sec. 5(b), supra), there are no comparable defenses in the present Michigan case law.

Section 8(f)(1) is adapted from Bankruptcy Code §547(c)(4), which permits a preferred creditor to set off the amount of new value that the creditor subsequently advanced to the debtor without security, as against the recovery of the voidable preference by the trustee. The same principal is here applied to the insider who has subsequently advanced new value to the debtor. The new value may consist not only of money, goods, or services delivered on unsecured credit, but also of the release of a valid lien. It does not include an obligation substituted for a prior obligation. If the insider receiving the preference thereafter extends new credit to the debtor but also takes security from the debtor, the injury to the other creditors resulting from the preference remains undiminished by the new credit.

Section 8(f)(2) is derived from Bankruptcy Code §547(c)(2), which excepts certain payments made in the ordinary course of business of financial affairs from avoidance by the trustee in bankruptcy as preferential transfers. Whether a transfer was in the "ordinary course" requires a consideration of the pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer challenged under sec. 5(b).

Section 8(f)(3) is new, and reflects a policy judgment that an insider who has previously extended credit to a debtor should not be deterred from

extending further credit to a debtor in a good faith effort to save the debtor from a forced liquidation in bankruptcy or otherwise. A similar rationale has sustained the taking of security from an insolvent debtor for an advance to enable the debtor to stave off bankruptcy and extricate himself from financial stringency. See Armstrong v. Cook, 95 Mich. 257 (1893). The amount of the present value given, the size of the antecedent debt secured, and the likelihood of success for the rehabilitative effort are all relevant considerations in determining whether the transfer was actually made in good faith.

§9. EXTINGUISHMENT OF CAUSE OF ACTION

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(a)(1), 4(a)(2), and 5(a), within the time period specified in sections 5813 and 5855 of the Revised Judicature Act, being sections 600.5813 and 600.5855 of the Compiled Laws; or

(c) under Section 5(b), within one year after the transfer was made or the obligation was incurred.

MICHIGAN COMMENT TO SECTION NINE

The Uniform Fraudulent Transfer Act adds its own statute of limitations for actions taken under the act. The UFCA contains no such provision, but actions under the UFCA would be subject to M.C.L. §600.5813, which generally requires a party to bring suit within six years of the time a cause of action accrued. If the fraudulent conveyance is concealed from the defrauded parties, M.C.L. §600.5855 extends the limitation time period to two years after the claimant could have discovered the fraudulent transfer. The UFTA differentiates between the causes of action in its creation of time limitations for claims, and also differs from the current Michigan law in this regard.

The UFTA's proposed provisions are as follows:

(a) If there is a claim of actual fraudulent intent (see §4(a)(1)), the limitation period is 4 years from the accrual of a cause of action, with a one-year extension if the claimant could not have

reasonably discovered the fraudulent transfer within the regular time period.

(b) If a claim is based on traditional constructive fraud (see §4(a)(2) and §5(a)) without proof of actual fraudulent intent, the cause of action is limited to a period of four years, without any extension for a claimant's failure to discover the fraudulent transaction.

(c) If the claim arises from the transfer of a debtor's property to an insider in violation of §5(b), the cause of action expires one year from its accrual.

Whether the provisions of subsections (a) and (b) offer any benefit over the application of M.C.L. §600.5813 and §600.5855 is debatable. Because of the innovative nature of the §5(b) fraud provision encompassing insider transfers, notwithstanding that the transfer was for equivalent value, a shorter time period would seem appropriate here. But there is no apparent reason why a violation of §4(a)(1) (actual fraudulent intent) should be subject to a time period of four years (with a one year extension for the non-discoverable transfer) while other fraud actions in this state are subjection to a period of six years (with a two year extension). So too, there is nothing in the nature of a constructive fraud that calls for a time period two years shorter than generally applied in this state. Accordingly, the standard time periods, as provided in the Revised Judicature Act, will continue to apply under this proposal except for the 5(b) provision. As for claims under that provision, the proposal adopts the one-year period proposed in the UFTA. Subsection (a) lumps together claims under 4(a), 4(b), and 5(a), and makes both RJA provisions applicable to each. Of course, where there is fraudulent concealment as required under §600.5855, the claim ordinarily will arise under 4(a), but such concealment can also occur after the event in connection with a 4(b) or 5(a) claim.

§10. SUPPLEMENTARY PROVISIONS

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.

MICHIGAN COMMENT TO SECTION TEN

This section of the UFTA is adopted from M.C.L. §566.21. The addition of "laches" to the areas of law supplementing the UFTA clarifies that the inclusion of a limitation-of-action provision in the UFTA does not negate the possible application of the rule of laches in Michigan. An example of the use of laches in the application of the Uniform Fraudulent Conveyance Act is the case of Dunn v. Minnema, 323 Mich. 687 (1949).

§11. UNIFORMITY OF APPLICATION AND CONSTRUCTION

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.

§12. SHORT TITLE

This Act may be cited as the Uniform Fraudulent Transfer Act.

§13. REPEAL

Public Act 310 of 1919, being sections 566.11 to 566.21 of the Michigan Compiled Laws, is here repealed.

MICHIGAN COMMENT TO SECTIONS ELEVEN, TWELVE, THIRTEEN

Sections 11 and 12 are standard. Adoption of the UFTA would require repeal of the UFCA, Public Act #310 of 1919 as provided in section 13.

UNIFORM FRAUDULENT CONVEYANCE ACT

This table lists the jurisdictions which have adopted the Uniform Law, showing the enacting law, the effective date, and the statutory citation. For Judicial constructions and explanation of variations in text in these other jurisdictions, see Uniform Laws Annotated (U.L.A.)

State	Laws	Effective date	Present form of act
Arizona	1919, c. 131	3-21-1919 *	A.R.S. §§ 44-1001 to 44-1013.
California	1939, p. 166	7-2-1939 *	West's Ann.Civ.Code, §§ 3439-3439.12.
Delaware	1919, c. 207	4-3-1919 *	6 Del.C. §§ 1301-1312.
Maryland	1920, c. 395	4-9-1920 *	Code 1957, art. 39B, §§ 1-14.
Massachusetts	1924, c. 147	7-1-1924	M.G.L.A. c. 109A §§ 1-13.
Michigan	1919, No. 310	5-13-1919 *	M.C.L.A. §§ 566.11-566.23.
Minnesota	1921, c. 415	1-1-1922	M.S.A. §§ 513.20 to 513.32.
Montana	1945, c. 126	2-26-1945 *	R.C.M.1947, §§ 29-101 to 29-112.
Nevada	1931, c. 217	7-1-1931	N.R.S. 112.010 to 112.130.
New Hampshire	1919, c. 63	3-20-1919 *	RSA 545:1 to 545:12.
New Jersey	1919, c. 213	4-15-1919 *	N.J.S.A. 25:2-7 to 25:2-19.
New Mexico	1959, c. 116	3-30-1959 *	1953 Comp. §§ 50-14-1 to 50-14-13.
New York	1925, c. 254	4-1-1925	McKinney's Debtor and Creditor Law, §§ 270-281.
North Dakota			NDCC 13-02-01 to 13-02-11.
Ohio	1961, p. 1006	10-23-1961	R.C. §§ 1336.01-1336.12
Oklahoma	1965, c. 447	6-29-1965 *	24 Okl.St.Ann. §§ 101-111.
Pennsylvania	1921, p. 1045	5-21-1921 *	39 P.S. §§ 351-363.
South Dakota	1919, c. 209	3-14-1919 *	SDC 23.0201 to 23.0212.
Tennessee	1919, c. 125	4-16-1919 *	T.C.A. §§ 64-308 to 64-321
Utah	1925, c. 42	5-12-1925	U.C.A.1953, 25-1-1 to 25-1-16.
Virgin Islands	1957, Act No. 160	9-1-1957	28 V.I.C. §§ 201-212.
Washington	1945, c. 136	3-15-1945 *	RCWA 19.40.010-19.40.120.
Wisconsin	1919, c. 470	7-1-1919 *	W.S.A. 242.01-242.13.
Wyoming	1929, c. 8	2-2-1929 *	W.S.1957, §§ 34-137 to 34-149.

* Date of approval.

Cross References

This act not limited by act governing rights of payees of non-transferable United States savings bonds, see § 720.81.

P.A.1919, No. 310. Eff. Aug. 14

AN ACT concerning fraudulent conveyances and to make uniform the law relating thereto.

The People of the State of Michigan enact:

DEFINITION OF TERMS

566.11 Definitions

Sec. 1. In this act "assets" of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets. "Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance. "Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent. "Debt" includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

566.12 Insolvency

Sec. 2. (1) A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.

(2) In determining whether a partnership is insolvent there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription.

566.13 Fair consideration

Sec. 3. Fair consideration is given for property, or obligation;

(a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

(b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained.

566.14 Conveyance by insolvent

Sec. 4. Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

566.15 Conveyances by persons in business

Sec. 5. Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

566.16 Conveyances by a person about to incur debts

Sec. 6. Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

566.17 Conveyance made with intent to defraud

Sec. 7. Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

566.18 Conveyance of partnership property

Sec. 8. Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred;

(a) To a partner, whether with or without a promise by him to pay partnership debts, or

(b) To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

566.19 Rights of creditors whose claims have matured

Sec. 9. (1) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such purchaser;

(a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

(b) Disregard the conveyance and attach or levy execution upon the property conveyed.

(2) A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.

566.20 Rights of creditors whose claims have not matured

Sec. 10. Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured, he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,

(a) Restrain the defendant from disposing of his property,

(b) Appoint a receiver to take charge of the property,

(c) Set aside the conveyance or annul the obligation, or

(d) Make any order which the circumstances of the case may require.

566.21 Cases not provided for in act

Sec. 11. In any case not provided for in this act, the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause shall govern.

566.22 Construction of act

Sec. 12. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

566.23 Short title

Sec. 13. This act may be cited as the uniform fraudulent conveyance act.

UNIFORM FRAUDULENT TRANSFER ACT

1984 ACT

Historical Note

The Uniform Fraudulent Transfer Act was approved by the National Conference of Commissioners on Uniform State Laws in 1984.

PREFATORY NOTE

The Uniform Fraudulent Conveyance Act was promulgated by the Conference of Commissioners on Uniform State Laws in 1918. The Act has been adopted in 25 jurisdictions, including the Virgin Islands. It has also been adopted in the sections of the Bankruptcy Act of 1938 and the Bankruptcy Reform Act of 1978 that deal with fraudulent transfers and obligations.

The Uniform Act was a codification of the "better" decisions applying the Statute of 13 Elizabeth. See Analysis of H.R. 12339, 74th Cong., 2d Sess. 213 (1936). The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of fraudulent transfer was part of the law of every American jurisdiction. Since the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on badges of fraud. The weight given these badges varied greatly from jurisdiction, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on the evidence of actual intent. An important reform effected by the Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing an action to avoid a transfer as fraudulent. See American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 67 A.L.R. 244 (1929) (per C.J. Cardozo).

The Conference was persuaded in 1979 to appoint a committee to undertake a study of the Uniform Act with a view to preparing the draft of a revision. The Conference was influenced by the following considerations:

(1) The Bankruptcy Reform Act of 1978 has made numerous changes in the section of that Act dealing with fraudulent transfers and obligations, thereby substantially reducing the correspondence of the provisions of the federal bankruptcy law on fraudulent transfers with the Uniform Act.

(2) The Committee on Corporate Laws of the Section of Corporations, Banking & Business Law of the American Bar Association, engaged in revising the Model Corporation Act, suggested that the Conference review provisions of the Uniform Act with a view to determining whether the Acts are consistent in respect to the treatment of dividend distributions.

(3) The Uniform Commercial Code, enacted at least in part by all 50 states, had substantially modified related rules of law regulating transfers of personal property, notably by facilitating the making and perfection of security transfers against attack by unsecured creditors.

(4) Debtors and trustees in a number of cases have avoided foreclosure of security interests by invoking the fraudulent transfer section of the Bankruptcy Reform Act.

(5) The Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, forbid a lawyer to counsel or to assist a client in conduct that the lawyer knows is fraudulent.

The Drafting Committee appointed by the Conference held its first meeting in January of 1983. A first reading of a draft of the revision of the Uniform Fraudulent Conveyance Act was had at the Conference's meeting in Boca Raton, Florida, on July 27, 1983. The Committee held four meetings in addition to a meeting held in connection with the Conference meeting in Boca Raton. Meetings were also attended by the following representatives of interested organizations:

Robert Rosenberg, Esq., of the American Bar Association;

Richard Cherin, Esq., of the Commercial Financial Services Committee of the Corporation, Banking and Business Law Section of the American Bar Association;

Robert Zinman, Esq., of the American College of Real Estate Lawyers;

Bruce Bernstein, Esq., of the National Commercial Finance Association;

Ernest E. Specks, Esq., of the Real Property, Probate and Trust Law Section of the American Bar Association.

The Committee determined to rename the Act the Uniform Fraudulent Transfer Act in recognition of its applicability to transfers of personal property as well as real property, "conveyance" having a connotation restricting it to a transfer of personal property. As noted in Comment (2) accompanying § 1(2) and Comment (8) accompanying § 4, however, this Act, like the original Uniform Act, does not purport to cover the whole law of voidable transfers and obligations. The limited scope of the original Act did not impair its effectiveness in achieving uniformity in the areas covered. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 405 (1933).

The basic structure and approach of the Uniform Fraudulent Conveyance Act are preserved in the Uniform Fraudulent Transfer Act. There are two sections in the new Act delineating what transfers and obligations are fraudulent. Section 4(a) is an adaptation of three sections of the U.F.C.A.; § 5(a) is an adaptation of another section of the U.F.C.A.; and § 5(b) is new. One section of the U.F.C.A. (§ 8) is not carried forward into the new Act because deemed to be redundant in part and in part susceptible of inequitable application. Both Acts declare a transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors to be fraudulent. Both Acts render a transfer made or obligation incurred without adequate consideration to be constructively fraudulent—*i.e.*, without regard to the actual intent of the parties—under one of the following conditions:

(1) the debtor was left by the transfer or obligation with unreasonably small assets for a transaction or the business in which he was engaged;

(2) the debtor intended to incur, or believed that he would incur, more debts than he would be able to pay; or

(3) the debtor was insolvent at the time or as a result of the transfer or obligation.

As under the original Uniform Fraudulent Conveyance Act a transfer or obligation that is constructively fraudulent because insolvency concurs with or follows failure to receive adequate consideration is voidable only by a creditor in existence at the time the transfer occurs or the obligation is incurred. Either an existing or subsequent creditor may avoid a transfer or obligation for inadequate consideration when accompanied by the financial condition specified in § 4(a)(2)(i) or the mental state specified in § 4(a)(2)(ii).

Reasonably equivalent value is required in order to constitute adequate consideration under the revised Act. The revision follows the Bankruptcy Code in eliminating good faith on the part of the transferee or obligee as an issue in the determination of whether adequate consideration is given by a transferee or obligee. The new Act, like the Bankruptcy Act, allows the transferee or obligee to show good faith in defense after a creditor establishes that a fraudulent transfer has been made or a fraudulent obligation has been incurred. Thus a showing by a defendant that a reasonable equivalent has been given in good faith for a transfer or obligation is a complete defense although the debtor is shown to have intended to hinder, delay, or defraud creditors.

A good faith transferee or obligee who has given less than a reasonable equivalent is nevertheless allowed a reduction in a liability to the extent of the value given. The new Act, like the Bankruptcy Code, eliminates the provision of the Uniform Fraudulent Conveyance Act that enables a creditor to attack a security transfer on the ground that the value of the property transferred is disproportionate to the debt secured. The premise of the new Act is that the value of the interest transferred for security is measured by and thus corresponds exactly to the debt secured. Foreclosure of a debtor's interest by a regularly conducted, noncollusive sale on default under a mortgage or other security agreement may not be avoided under the Act as a transfer for less than a reasonably equivalent value.

The definition of insolvency under the Act is adapted from the definition of the term in the Bankruptcy Code. Insolvency is presumed from proof of a failure generally to pay debts as they become due.

The new Act adds a new category of fraudulent transfer, namely, a preferential transfer by an insolvent insider to a creditor who had reasonable cause to believe the debtor to be insolvent. An insider is defined in much the same way as in the Bankruptcy Code and includes a relative, also defined as in the Bankruptcy Code, a director or officer of a corporate debtor, a partner, or a person in control of a debtor. This provision is available only to an existing creditor. Its premise is that an insolvent debtor is obliged to pay debts to creditors not related to him before paying those who are insiders.

The new Act omits any provision directed particularly at transfers or obligations of insolvent partnership debtors. Under § 8 of the Uniform Fraudulent Conveyance Act any transfer made or obligation incurred by an insolvent partnership to a partner is fraudulent without regard to intent or adequacy of consideration. So categorical a condemnation of a partnership transaction with a partner may unfairly prejudice the interests of a partner's separate creditors. The new Act also omits as redundant a provision in the original Act that makes fraudulent a transfer made or obligation incurred by an insolvent partnership for less than a fair consideration to the partnership.

Section 7 lists the remedies available to creditors under the new Act. It eliminates as unnecessary and confusing a differentiation made in the original Act between the remedies available to holders of matured claims and those holding unmatured claims. Since promulgation of the Uniform Fraudulent Conveyance Act the Supreme Court has imposed restrictions on the availability and use of prejudgment remedies. As a result many states have amended their statutes and rules applicable to such remedies, and it is frequently unclear whether a state's procedures include a prejudgment remedy against a fraudulent transfer or obligation. A bracketed paragraph is included in Section 7 for adoption by those states that elect to make such a remedy available.

Section 8 prescribes the measure of liability of a transferee or obligee under the Act and enumerates defenses. Defenses against avoidance of a preferential transfer to an insider under § 5(b) include an adaptation of defenses available under § 547(c)(2) and (4) of the Bankruptcy Code when such a transfer is sought to be avoided as a preference by the trustee in bankruptcy. In addition a preferential transfer may be justified when shown to be made pursuant to a good faith effort to stave off forced liquidation and rehabilitate the debtor. Section 8 also precludes avoidance, as a constructively fraudulent transfer, of the termination of a lease on default or the enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

The new Act includes a new section specifying when a transfer is made or an obligation is incurred. The section specifying the time when a transfer occurs is adapted from Section 548(d) of the Bankruptcy Code. Its premise is that if the law prescribes a mode for making the transfer a matter of public record or notice, it is not deemed to be made for any purpose under the Act until it has become such a matter of record or notice.

The new Act also includes a statute of limitations that bars the right rather than the remedy on expiration of the statutory periods prescribed. The law governing limitations on actions to avoid fraudulent transfers among the states is unclear and full of diversity. The Act recognizes that laches and estoppel may operate to preclude a particular creditor from pursuing a remedy against a fraudulent transfer or obligation even though the statutory period of limitations has not run.

UNIFORM FRAUDULENT TRANSFER ACT

Section

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§ 1. Definitions

As used in this [Act]:

(1) "Affiliate" means:

(i) a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

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

(ii) a corporation 20 percent 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 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

(A) as a fiduciary or agent without sole power to vote the securities; or

(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; or

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

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

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

(ii) property to the extent it is generally exempt under nonbankruptcy law; or

(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 one tenant.

(3) "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.

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

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

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

(7) "Insider" includes:

(i) if the debtor is an individual,

(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 clause (B); or

(D) a corporation of which the debtor is a director, officer, or person in control;

(ii) if the debtor is a corporation,

(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 clause (D); or

(F) a relative of a general partner, director, officer, or person in control of the debtor;

(iii) if the debtor is a partnership,

(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 clause (C); or

(E) a person in control of the debtor;

(iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(v) a managing agent of the debtor.

(8) "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.

(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 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.

(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.

(1) The definition of "affiliate" is derived from § 101(2) of the Bankruptcy Code.

(2) The definition of "asset" is substantially to the same effect as the definition of "assets" in § 1 of the Uniform Fraudulent Conveyance Act. The definition in this Act, unlike that in the earlier Act, does not, however, require a determination that the property is liable for the debts of the debtor. Thus, an unliquidated claim for damages resulting from personal injury or a contingent claim of a surety for reimbursement, contribution, or subrogation may be counted as an asset for the purpose of determining whether the holder of the claim is solvent as a debtor under § 2 of this Act, although applicable law may not allow such an asset to be levied on and sold by a creditor. *Cf.* Manufacturers & Traders Trust Co. v. Goldman (*In re* Ollag Construction Equipment Corp.), 578 F.2d 904, 907–09 (2d Cir.1978).

Subparagraphs (i), (ii), and (iii) provide clarification by excluding from the term not only generally exempt property but also an interest in a tenancy by the entirety in many states and an interest that is generally beyond reach by unsecured creditors because subject to a valid lien. This Act, like its predecessor and the Statute of 13 Elizabeth, declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims. The laws protecting valid liens against impairment by levying creditors, exemption statutes, and the rules restricting levyability of interest in entireties property are limitations on the rights and remedies of unsecured creditors, and it is therefore appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of "asset" for the purposes of this Act.

A creditor of a joint tenant or tenant in common may ordinarily collect a judgment by process against the tenant's interest, and in some states a creditor of a tenant by the entirety may likewise collect a judgment by process against the tenant's interest. See 2 American Law of Property 10, 22, 28–32 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 48 Am.Bankr.L.J. 255, 258–59 (1974). The levyable interest of such a tenant is included as an asset under this Act.

The definition of "assets" in the Uniform Fraudulent Conveyance Act excluded property that is exempt from liability for debts. The definition did not, however, exclude all property that can not be reached by a creditor through judicial proceedings to collect a debt. Thus, it included the interest of a tenant by the entirety although in nearly half the states such an interest can not be subjected to liability for a debt unless it is an obligation owned jointly by the debtor with his or her cotenant by the entirety. See 2 American Law of Property 29 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 48 Am.Bankr.L.J. 255, 258 (1974). The definition in this Act requires exclusion of interests in property held by tenants by the entirety that are not subject to collection process by a creditor without a right to proceed against both tenants by the entirety as joint debtors.

The reference to "generally exempt" property in § 1(2)(ii) recognizes that all exemptions are subject to exceptions. Creditors having special rights against generally exempt property typically include claimants for alimony, taxes, wages, the purchase price of the property, and labor or materials that improve the property. See Uniform Exemptions Act § 10 and the accompanying Comment. The fact that a particular creditor may reach generally exempt property by resorting to judicial process does not warrant its inclusion as an asset in determining whether the debtor is insolvent.

Since this Act is not an exclusive law on the subject of voidable transfers and obligations (see Comment (8) to § 4 *infra*), it does not preclude the holder of a claim that may be collected by process against property generally exempt as to other creditors from obtaining relief from a transfer of such property that hinders, delays, or defrauds the holder of such a claim. Likewise the holder of an unsecured claim enforceable against tenants by the entirety is not precluded by the Act from pursuing a remedy against a transfer of property held by the entirety that hinders, delays, or defrauds the holder of such a claim.

Nonbankruptcy law is the law of a state or federal law that is not part of the Bankruptcy Code, Title 11 of the United States Code. The definition of an "asset" thus does not include property that would be subject to administration for the benefit of creditors under the Bankruptcy Code unless it is subject under other applicable law, state or federal, to process for the collection of a creditor's claim against a single debtor.

(3) The definition of "claim" is derived from § 101(4) of the Bankruptcy Code. Since the purpose of this Act is primarily to protect unsecured creditors against transfers and obligations injurious to their rights, the words "claim" and "debt" as used in the Act generally have reference to an unsecured claim and debt. As the context may indicate, however, usage of the terms is not so restricted. See, *e.g.* §§ 1(1)(i)(B) and 1(8).

(4) The definition of "creditor" in combination with the definition of "claim" has substantially the same effect as the definition of "creditor" under § 1 of the Uniform Fraudulent Conveyance Act. As under that Act, the holder of an unliquidated tort claim or a contingent claim may be a creditor protected by this Act.

(5) The definition of "debt" is derived from § 101(11) of the Bankruptcy Code.

(6) The definition of "debtor" is new.

(7) The definition of "insider" is derived from § 101(28) of the Bankruptcy Code. The definition has been restricted in clauses (i)(C), (ii)(E), and (iii)(D) to make clear that a partner is not an insider of an individual, corporation, or partnership if any of these latter three persons is only a limited partner. The definition of "insider" in the Bankruptcy Code does not purport to make a limited partner an insider of the partners or of the partnership with which the limited partner is associated, but it is susceptible of a contrary interpretation and one which would extend unduly the scope of the defined relationship when the limited partner is not a person in control of the partnership. The definition of "insider" in this Act also differs from the definition in the Bankruptcy Code in omitting the reference in 11 U.S.C. § 101(28)(D) to an elected official or relative of such an official as an insider of a municipality. As in the Bankruptcy Code (see 11 U.S.C. § 102 (3)), the word "includes" is not limiting, however. Thus, a court may find a person living with an individual for an extended time in the same household or as a permanent companion to have the kind of close relationship intended to be covered by the term "insider." Likewise, a trust may be found to be an insider of a beneficiary.

(8) The definition of "lien" is derived from paragraphs (30), (31), (43), and (45) of § 101 of the Bankruptcy Code, which define "judicial lien," "lien," "security interest," and "statutory lien" respectively.

(9) The definition of "person" is adapted from paragraphs (28) and (30) of § 1-201 of the Uniform Commercial Code, defining "organization" and "person" respectively.

(10) The definition of "property" is derived from § 1-201(33) of the Uniform Probate Code. Property includes both real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable.

(11) The definition of "relative" is derived from § 101(37) of the Bankruptcy Code but is explicit in its references to the spouse of a debtor in view of uncertainty as to whether the common law determines degrees of relationship by affinity.

(12) The definition of "transfer" is derived principally from § 101(48) of the Bankruptcy Code. The definition of "conveyance" in § 1 of the Uniform Fraudulent Conveyance Act was similarly comprehensive and the references in this Act to "payment of money, release, lease, and the creation of a lien or incumbrance" are derived from the Uniform Fraudulent Conveyance Act. While the definition in the Uniform Fraudulent Conveyance Act did not explicitly refer to an involuntary transfer, the decisions under that Act were generally consistent with an interpretation that covered such a transfer. See, *e.g.* Hearn 45 St. Corp. v. Jano, 283 N.Y. 139, 27 N.E.2d 814, 128 A.L.R. 1285 (1940) (execution and foreclosure sales); Lefkowitz v. Finkelstein Trading Corp., 14 F.Supp. 898, 899 (S.D.N.Y. 1936) (execution sale); Langan v. First Trust & Deposit Co., 277 App.Div. 1090, 101 N.Y.S.2d 36 (4th Dept. 1950), *aff'd* 302 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); Catabene v. Wallner, 16 N.J. Super. 597, 602, 85 A.2d 300, 302 (1951) (mortgage foreclosure).

(13) The definition of "valid lien" is new. A valid lien includes an equitable lien that may not be defeated by a judicial lien creditor. See, *e.g.*, Pearlman v. Reliance Insurance Co., 371 U.S. 132, 136 (1962) (upholding a surety's equitable lien in respect to a fund owing a bankrupt contractor).

§ 2. Insolvency

(a) 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.

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

(c) A partnership is insolvent under subsection (a) 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.

(d) 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].

(e) 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.

COMMENT

(1) Subsection (a) is derived from the definition of "insolvent" in § 101 (29)(A) of the Bankruptcy Code. The definition in subsection (a) and the correlated definition of partnership insolvency in subsection (c) contemplate a fair valuation of the debts as well as the assets of the debtor. As under the definition of the same term in § 2 of the Uniform Fraudulent Conveyance Act exempt property is excluded from the computation of the value of the assets. See § 1(2) *supra*. For similar reasons interests in valid spendthrift trusts and interests in tenancies by the entireties that cannot be severed by a creditor of only one tenant are not included. See the Comment to § 1(2) *supra*. Since a valid lien also precludes an unsecured creditor from collecting the creditor's claim from the encumbered interest in a debtor's property, both the encumbered interest and the debt secured thereby are excluded from the computation of insolvency under this Act. See § 1(2) *supra* and subsection (e) of this section.

(2) Section 2(b) establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. Such general nonpayment is a ground for the filing of an involuntary petition under § 303(h)(1) of the Bankruptcy Code. See also U.C.C. § 1-201(23), which declares a person to be "insolvent" who "has ceased to pay his debts in the ordinary course of business." The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency as defined in § 2(a) is more probable than its existence. See Uniform Rules of Evidence (1974 Act), Rule 310(a). The 1974 Uniform Rule 301(a) conforms to the Final Draft of Federal Rule 301 as submitted to the United States Supreme Court by the Advisory Committee on Federal Rules of Evidence. "The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed is rejected as according presumptions too 'slight and evanescent' an effect." Advisory Committee's Note to Rule 301. See also 1 J. Weinstein & M. Berger, Evidence ¶ 301 [01] (1982).

The presumption is established in recognition of the difficulties typically imposed on a creditor in proving insolvency in the bankruptcy sense, as provided in subsection (a). See generally Levit, The Archaic Concept of Balance-Sheet Insolvency, 47 Am.Bankr.L.J. 215 (1973). Not only is the relevant information in the possession of a noncooperative debtor but the debtor's records are more often than not incomplete and inaccurate. As a practical matter, insolvency is most cogently evidenced by a general cessation of payment of debts, as has long been recognized by the laws of other countries and is now reflected in the Bankruptcy Code. See Honsberger, Failure to Pay One's Debts Generally as They Become Due: The Experience of France and Canada, 54 Am.Bankr.L.J. 153 (1980); J. MacLachlan, Bankruptcy 13,

63–64, 436 (1956). In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged. The case law that has developed under § 303(h)(1) of the Bankruptcy Code has not required a showing that a debtor has failed or refused to pay a majority in number and amount of his or her debts in order to prove general nonpayment of debts as they become due. See, *e.g.* Hill v. Cargill, Inc. (*In re* Hill), 8 B.R. 779, 3 C.B.C.2d 920 (Bk.D.Minn.1981) (nonpayment of three largest debts held to constitute general nonpayment, although small debts were being paid); *In re* All Media Properties, Inc., 5 B.R. 126, 6 B.C.D. 586, 2 C.B.C.2d 449 (Bk. S.D.Tex.1980) (missing significant number of payments or regularly missing payments significant in amount said to constitute general nonpayment; missing payments on more than 50% of aggregate of claims said not to be required to show general nonpayment; nonpayment for more than 30 days after billing held to establish nonpayment of a debt when it is due); *In re* Kreidler Import Corp., 4 B.R. 256, 6 B.C.D. 608, 2 C.B.C.2d 159 (Bk.D.Md. 1980) (nonpayment of one debt constituting 97% of debtor's total indebtedness held to constitute general nonpayment). A presumption of insolvency does not arise from nonpayment of a debt as to which there is a genuine bona fide dispute, even though the debt is a substantial part of the debtor's indebtedness. *Cf.* 11 U.S.C. § 303(h)(1), as amended by § 426(b) of Public Law No. 98–882, the Bankruptcy Amendments and Federal Judgeship Act of 1984.

(3) Subsection (c) is derived from the definition of partnership insolvency in § 101(29)(B) of the Bankruptcy Code. The definition conforms generally to the definition of the same term in § 2(2) of the Uniform Fraudulent Conveyance Act.

(4) Subsection (d) follows the approach of the definition of "insolvency" in § 101(29) of the Bankruptcy Code by excluding from the computation of the value of the debtor's assets any value that can be realized only by avoiding a transfer of an interest formerly held by the debtor or by discovery or pursuit of property that has been fraudulently concealed or removed.

(5) Subsection (e) is new. It makes clear the purpose not to render a person insolvent under this section by counting as a debt an obligation secured by property of the debtor that is not counted as an asset. See also Comments to §§ 1(2) and 2(a) *supra*.

§ 3. Value

(a) 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.

(b) For the purposes of Sections 4(a)(2) and 5, 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.

(c) 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.

COMMENT

(1) This section defines "value" as used in various contexts in this Act, frequently with a qualifying adjective. The word appears in the following sections:

4(a)(2) ("reasonably equivalent value");

4(b)(8) ("value ... reasonably equivalent");

5(a) ("reasonably equivalent value");

5(b) ("present, reasonably equivalent value");

8(a) ("reasonably equivalent value");

8(b), (c), (d), and (e) ("value");

8(f)(1) ("new value"); and

8(f)(3) ("present value").

(2) Section 3(a) is adapted from § 548(d)(2)(A) of the Bankruptcy Code. See also § 3(a) of the Uniform Fraudulent Conveyance Act. The definition in Section 3 is not exclusive. "Value" is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. The definition does not specify all the kinds of consideration that do not constitute value for the purposes of this Act—*e.g.*, love and affection. See, *e.g.*, United States v. West, 299 F.Supp. 661, 666 (D.Del. 1969).

(3) Section 3(a) does not indicate what is "reasonably equivalent value" for a transfer or obligation. Under this Act, as under § 548(a)(2) of the Bankruptcy Code, a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a discrepancy between the value of the asset transferred and the debt secured, since the amount of the debt is the measure of the value of the interest in the asset that is transferred. See, *e.g.*, Peoples-Pittsburgh Trust Co., v. Holy Family Polish Nat'l Catholic Church, Carnegie, Pa., 341 Pa. 390, 19 A.2d 360 (1941). If, however, a transfer purports to secure more than the debt actually incurred or to be incurred, it may be found to be for less than a reasonably equivalent value. See *e.g.*, *In re* Peoria Braumeister Co., 138 F.2d 520, 523 (7th Cir. 1943) (chattel mortgage securing a $3,000 note held to be fraudulent when the debt secured was only $2,500); Hartford Acc. & Indemnity Co. v. Jirasek, 254 Mich. 131, 140, 235 N.W. 836, 839 (1931) (quitclaim deed given as mortgage held to be fraudulent to the extent the value of the property transferred exceeded the indebtedness secured). If the debt is a fraudulent obligation under this Act, a transfer to secure it as well as the obligation would be vulnerable to attack as fraudulent. A transfer to satisfy or secure an antecedent debt owed an insider is also subject to avoidance under the conditions specified in Section 5(b).

(4) Section 3(a) of the Uniform Fraudulent Conveyance Act has been thought not to recognize that an unperformed promise could constitute fair consideration. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 414 (1933). Courts construing these provisions of the prior law nevertheless have held unperformed promises to constitute value in a variety of circumstances. See, *e.g.*, Harper v. Lloyd's Factors, Inc., 214 F.2d 662 (2d Cir. 1954) (transfer of money for promise of factor to discount transferor's purchase-money notes given to fur dealer); Schlecht v. Schlecht, 168 Minn. 168, 176–77, 209 N.W. 883, 886–87 (1926) (transfer for promise to make repairs and improvements on transferor's homestead); Farmer's Exchange Bank v. Oneida Motor Truck Co., 202 Wis. 266, 232 N.W. 536 (1930) (transfer in consideration of assumption of certain of transferor's liabilities); see also Hummel v. Cernocky, 161 F.2d 685 (7th Cir. 1947) (transfer in consideration of cash, assumption of a mortgage, payment of certain debts, and agreement to pay other debts). Likewise a transfer in consideration of a negotiable note discountab.. at a commercial bank, or the purchase from an established, solvent institution of an insurance policy, annuity, or contract to provide care and accommodations clearly appears to be for value. On the other hand, a transfer for an unperformed promise by an individual to support a parent or other transferor has generally been held voidable as a fraud on creditors of the transferor. See, *e.g.*, Springfield Ins. Co. v. Fry, 267 F.Supp. 693 (N.D.Okla. 1967); Sandler v. Parlapiano, 236 App.Div. 70, 258 N.Y.Supp. 88 (1st Dep't 1932); Warwick Municipal Employees Credit Union v. Higham, 106 R.I. 363, 259 A.2d 852 (1969); Hulsether v. Sanders, 54 S.D. 412, 223 N.W. 335 (1929); Cooper v. Cooper, 22 Tenn.App. 473, 477, 124 S.W.2d 264, 267 (1939); Note, Rights of Creditors in Property Conveyed in Consideration of Future Support, 45 Iowa L.Rev. 546, 550–62 (1960). This Act adopts the view taken in the cases cited in deter-

mining whether an unperformed promise is value.

(5) Subsection (b) rejects the rule of such cases as Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980) (nonjudicial foreclosure of a mortgage avoided as a fraudulent transfer when the property of an insolvent mortgagor was sold for less than 70% of its fair value); and Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir.1981), *cert. denied*, 454 U.S. 1164 (1982) (nonjudicial foreclosure held to be fraudulent transfer if made without fair consideration). Subsection (b) adopts the view taken in Lawyers Title Ins. Corp. v. Madrid (*In re* Madrid), 21 B.R. 424 (B.A.P. 9th Cir.1982), *aff'd on another ground*, 725 F.2d 1197 (9th Cir.1984), that the price bid at a public foreclosure sale determines the fair value of the property sold. Subsection (b) prescribes the effect of a sale meeting its requirements, whether the asset sold is personal or real property. The rule of this subsection applies to a foreclosure by sale of the interest of a vendee under an installment land contract in accordance with applicable law that requires or permits the foreclosure to be effected by a sale in the same manner as the foreclosure of a mortgage. See G. Osborne, G. Nelson, & D. Whitman, *Real Estate Finance Law* 83–84, 95–97 (1979). The premise of the subsection is that "a sale of the collateral by the secured party as the normal consequence of default ... [is] the safest way of establishing the fair value of the collateral ...." 2 G. Gilmore, Security Interests in Personal Property 1227 (1965).

If a lien given an insider for a present consideration is not perfected as against a subsequent bona fide purchaser or is so perfected after a delay following an extension of credit secured by the lien, foreclosure of the lien may result in a transfer for an antecedent debt that is voidable under Section 5(b) *infra*. Subsection (b) does not apply to an action under Section 4(a)(1) to avoid a transfer or obligation because made or incurred with actual intent to hinder, delay, or defraud any creditor.

(6) Subsection (c) is an adaptation of § 547(c)(1) of the Bankruptcy Code. A transfer to an insider for an antecedent debt may be voidable under § 5(b) *infra*.

§ 4. Transfers Fraudulent as to Present and Future Creditors

(a) 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:

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

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

(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; or

(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.

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

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

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

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) 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;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

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

COMMENT

(1) Section 4(a)(1) is derived from § 7 of the Uniform Fraudulent Conveyance Act. Factors appropriate for consideration in determining actual intent under paragraph (1) are specified in subsection (b).

(2) Section 4(a)(2) is derived from §§ 5 and 6 of the Uniform Fraudulent Conveyance Act but substitutes "reasonably equivalent value" for "fair consideration." The transferee's good faith was an element of "fair consideration" as defined in § 3 of the Uniform Fraudulent Conveyance Act, and lack of fair consideration was one of the elements of a fraudulent transfer as defined in four sections of the Uniform Act. The transferee's good faith is irrelevant to a determination of the adequacy of the consideration under this Act, but lack of good faith may be a basis for withholding protection of a transferee or obligee under § 8 *infra*.

(3) Unlike the Uniform Fraudulent Conveyance Act as originally promulgated, this Act does not prescribe different tests when a transfer is made for the purpose of security and when it is intended to be absolute. The premise of this Act is that when a transfer is for security only, the equity or value of the asset that exceeds the amount of the debt secured remains available to unsecured creditors and thus cannot be regarded as the subject of a fraudulent transfer merely because of the encumbrance resulting from an otherwise valid security transfer. Disproportion between the value of the asset securing the debt and the size of the debt secured does not, in the absence of circumstances indicating a purpose to hinder, delay, or defraud creditors, constitute an impermissible hindrance to the enforcement of other creditors' rights against the debtor-transferor. *Cf.* U.C.C. § 9–311.

(4) Subparagraph (i) of § 4(a)(2) is an adaptation of § 5 of the Uniform Fraudulent Conveyance Act but substitutes "unreasonably small [assets] in relation to the business or transaction" for "unreasonably small capital." The reference to "capital" in the Uniform Act is ambiguous in that it may refer to net worth or to the par value of stock or to the consideration received for stock issued. The special meanings of "capital" in corporation law have no relevance in the law of fraudulent transfers. The subparagraph focuses attention on whether the amount of all the assets retained by the debtor was inadequate, *i.e.*, unreasonably small, in light of the needs of the business or transaction in which the debtor was engaged or about to engage.

(5) Subsection (b) is a nonexclusive catalogue of factors appropriate for consideration by the court in determining whether the debtor had an actual intent to hinder, delay, or defraud one or more creditors. Proof of the existence of any one or more of the factors enumerated in subsection (b) may be relevant evidence as to the debtor's actual intent but does not create a presumption that the debtor has made a fraudulent transfer or incurred a fraudulent obligation. The list of factors includes most of the badges of fraud that have been recognized by the courts in construing and applying the Statute of 13 Elizabeth and § 7 of the Uniform Fraudulent Conveyance Act. Proof of the presence of certain badges in combination establishes fraud conclusively—*i.e.*, without regard to the actual intent of the parties—when they concur as provided in § 4(a)(2) or in § 5. The fact that a transfer has been made to a relative or to an affiliated corporation has not been regarded as a badge of fraud sufficient to warrant avoidance when

unaccompanied by any other evidence of fraud. The courts have uniformly recognized, however, that a transfer to a closely related person warrants close scrutiny of the other circumstances, including the nature and extent of the consideration exchanged. See 1 G. Glenn, Fraudulent Conveyances and Preferences § 307 (Rev. ed. 1940). The second, third, fourth, and fifth factors listed are all adapted from the classic catalogue of badges of fraud provided by Lord Coke in Twyne's Case, 3 Coke 80b, 76 Eng.Rep. 809 (Star Chamber 1601). Lord Coke also included the use of a trust and the recitation in the instrument of transfer that it "was made honestly, truly, and bona fide," but the use of the trust is fraudulent only when accompanied by elements or badges specified in this Act, and recitals of "good faith" can no longer be regarded as significant evidence of a fraudulent intent.

(6) In considering the factors listed in § 4(b) a court should evaluate all the relevant circumstances involving a challenged transfer or obligation. Thus the court may appropriately take into account all indicia negativing as well as those suggesting fraud, as illustrated in the following reported cases:

(a) Whether the transfer or obligation was to an insider: Salomon v. Kaiser (*In re* Kaiser), 722 F.2d 1574, 1582–83 (2d Cir.1983) (insolvent debtor's purchase of two residences in the name of his spouse and the creation of a dummy corporation for the purpose of concealing assets held to evidence fraudulent intent); Banner Construction Corp. v. Arnold, 128 So.2d 893 (Fla.Dist.App. 1961) (assignment by one corporation to another having identical directors and stockholders constituted a badge of fraud); Travelers Indemnity Co. v. Cormaney, 258 Iowa 237, 138 N.W.2d 50 (1965) (transfer between spouses said to be a circumstance that shed suspicion on the transfer and that with other circumstances warranted avoidance); Hatheway v. Hanson, 230 Iowa 386, 297 N.W. 824 (1941) (transfer from parent to child said to require a critical examination of surrounding circumstances, which, together with other indicia of fraud, warranted avoidance); Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (transfer from daughter to mother said to be indicative of fraud but transfer held not to be fraudulent due to adequacy of consideration and delivery of possession by transferor).

(b) Whether the transferor retained possession or control of the property after the transfer: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (retention of property by transferor said to be a badge of fraud and, together with other badges, to warrant avoidance of transfer); Stephens v. Reginstein, 89 Ala. 561, 8 So. 68 (1890) (transferor's retention of control and management of property and business after transfer held material in determining transfer to be fraudulent); Allen v. Massey, 84 U.S. (17 Wall.) 351 (1872) (joint possession of furniture by transferor and transferee considered in holding transfer to be fraudulent); Warner v. Norton, 61 U.S. (20 How.) 448 (1857) (surrender of possession by transferor deemed to negate allegations of fraud).

(c) Whether the transfer or obligation was concealed or disclosed: Walton v. First National Bank, 13 Colo. 265, 22 P. 440 (1889) (agreement between parties to conceal the transfer from the public said to be one of the strongest badges of fraud); Warner v. Norton, 61 U.S. (20 How.) 448 (1857) (although secrecy said to be a circumstance from which, when coupled with other badges, fraud may be inferred, transfer was held not to be fraudulent when made in good faith and transferor surrendered possession); W.T. Raleigh Co. v. Barnett, 253 Ala. 433, 44 So.2d 585 (1950) (failure to record a deed in itself said not to evidence fraud, and transfer held not to be fraudulent).

(d) Whether, before the transfer was made or obligation was incurred, a creditor sued or threatened to sue the debtor: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (transfer held to be fraudulent when causally connected to pendency of litigation and accompanied by other badges of fraud); Pergrem v. Smith, 255 S.W.2d 42 (Ky.App.1953) (transfer in anticipation of suit deemed to be a badge of fraud; transfer held fraudulent when accompanied by insolvency of transferor who was related to transferee); Bank of Sun Prairie v. Hovig, 218 F.Supp. 769 (W.D.Ark.1963) (although threat or pendency of litigation said to be an indicator of fraud, transfer was held not to be fraudulent when adequate consideration and good faith were shown).

(e) Whether the transfer was of substantially all the debtor's assets: Walbrun v. Babbitt, 83 U.S. (16 Wall.) 577 (1872) (sale by insolvent retail shop owner of all of his inventory in a single transaction held to be fraudulent); Cole v. Mercantile Trust Co., 133 N.Y. 164, 30 N.E. 847 (1892) (transfer of all property before plaintiff could obtain a judgment held to be fraudulent); Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (although transfer of all assets said to indicate fraud, transfer held not to be fraudulent because full consideration was paid and transferor surrendered possession).

(f) Whether the debtor had absconded: *In re* Thomas, 199 F. 214 (N.D.N.Y.1912) (when debtor collected all of his money and property with the intent to abscond, fraudulent intent was held to be shown).

(g) Whether the debtor had removed or concealed assets: Bentley v. Young, 210 F. 202 (S.D.N.Y.1914), *aff'd*, 223 F. 536 (2d Cir.1915) (debtor's removal of goods from store to conceal their whereabouts and to sell them held to render sale fraudulent); Cioli v. Kenourgios, 59 Cal.App. 690, 211 P. 838 (1922) (debtor's sale of all assets and shipment of proceeds out of the country held to be fraudulent notwithstanding adequacy of consideration).

(h) Whether 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: Toomay v. Graham, 151 S.W.2d 119 (Mo.App.1941) (although mere inadequacy of consideration said not to be a badge of fraud, transfer held to be fraudulent when accompanied by badges of fraud); Texas Sand Co. v. Shield, 381 S.W.2d 48 (Tex.1964) (inadequate consideration said to be an indicator of fraud, and transfer held to be fraudulent because of inadequate consideration, pendency of suit, family relationship of transferee, and fact that all non-exempt property was transferred); Weigel v. Wood, 355 Mo. 11, 194 S.W.2d 40 (1946) (although inadequate consideration said to be a badge of fraud, transfer held not to be fraudulent when inadequacy not gross and not accompanied by any other badge; fact that transfer was from father to son held not sufficient to establish fraud).

(i) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation was incurred: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (insolvency of transferor said to be a badge of fraud and transfer held fraudulent when accompanied by other badges of fraud); Bank of Sun Prairie v. Hovig, 218 F.Supp. 769 (W.D.Ark.1963) (although the insolvency of the debtor said to be a badge of fraud, transfer held not fraudulent when debtor was shown to be solvent, adequate consideration was paid, and good faith was shown, despite the pendency of suit); Wareheim v. Bayliss, 149 Md. 103, 131 A. 27 (1925) (although insolvency of debtor acknowledged to be an indicator of fraud, transfer held not to be fraudulent when adequate consideration was paid and whether debtor was insolvent in fact was doubtful).

(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred: Commerce Bank of Lebanon v. Halladale A Corp., 618 S.W.2d 288, 292 (Mo. App.1981) (when transferors incurred substantial debts near in time to the transfer, transfer was held to be fraudulent due to inadequate consideration, close family relationship, the debtor's retention of possession, and the fact that almost all the debtors' property was transferred).

(7) The effect of the two transfers described in § 4(b)(11), if not avoided, may be to permit a debtor and a lienor to deprive the debtor's unsecured creditors of access to the debtor's assets for the purpose of collecting their claims while the debtor, the debtor's affiliate or insider, and the lienor arrange for the beneficial use or disposition of the assets in accordance with their interests. The kind of disposition sought to be reached here is exemplified by that found in Northern Pacific Co. v. Boyd, 228 U.S. 482 (1913), the leading case in establishing the absolute priority doctrine in reorganization law. There the Court held that a reorganization whereby the secured creditors and the management-owners re-

tained their economic interests in a railroad through a foreclosure that cut off claims of unsecured creditors against its assets was in effect a fraudulent disposition (*id.* at 502–05). See Frank, Some Realistic Reflections on Some Aspects of Corporate Reorganization, 19 Va.L.Rev. 541, 693 (1933). For cases in which an analogous injury to unsecured creditors was inflicted by a lienor and a debtor, see Jackson v. Star Sprinkler Corp. of Florida, 575 F.2d 1223, 1231–34 (8th Cir.1978); Heath v. Helmick, 173 F.2d 157, 161–62 (9th Cir.1949); Toner v. Nuss, 234 F.S. 457, 461–62 (E.D.Pa.1964); and see *In re* Spotless Tavern Co., Inc., 4 F.Supp. 752, 753, 755 (D.Md.1933).

(8) Nothing in § 4(b) is intended to affect the application of §§ 2–402(2), 9–205, 9–301, or 6–105 of the Uniform Commercial Code. Section 2–402(2) recognizes the generally prevailing rule that retention of possession of goods by a seller may be fraudulent but limits the application of the rule by negating any imputation of fraud from "retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification." Section 9–205 explicitly negates any imputation of fraud from the grant of liberty by a secured creditor to a debtor to use, commingle, or dispose of personal property collateral or to account for its proceeds. The section recognizes that it does not relax prevailing requirements for delivery of possession by a pledgor. Moreover, the section does not mitigate the general requirement of § 9–301(1)(b) that a nonpossessory security interest in personal property must be accompanied by notice-filing to be effective against a levying creditor. Finally, like the Uniform Fraudulent Conveyance Act this Act does not pre-empt the statutes governing bulk transfers, such as Article 6 of the Uniform Commercial Code. Compliance with the cited sections of the Uniform Commercial Code does not, however, insulate a transfer or obligation from avoidance. Thus a sale by an insolvent debtor for less than a reasonably equivalent value would be voidable under this Act notwithstanding compliance with the Uniform Commercial Code.

§ 5. Transfers Fraudulent as to Present Creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a 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.

(b) A transfer made by a debtor is 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.

COMMENT

(1) Subsection (a) is derived from § 4. of the Uniform Fraudulent Conveyance Act. It adheres to the limitation of the protection of that section to a creditor

who extended credit before the transfer or obligation described. As pointed out in Comment (2) accompanying § 4, this Act substitutes "reasonably equivalent value" for "fair consideration."

(2) Subsection (b) renders a preferential transfer—*i.e.*, a transfer by an insolvent debtor for or on account of an antecedent debt—to an insider vulnerable as a fraudulent transfer when the insider had reasonable cause to believe that the debtor was insolvent. This subsection adopts for general application the rule of such cases as Jackson Sound Studios, Inc. v. Travis, 473 F.2d 503 (5th Cir. 1973) (security transfer of corporation's equipment to corporate principal's mother perfected on eve of bankruptcy of corporation held to be fraudulent); *In re* Lamie Chemical Co., 296 F. 24 (4th Cir. 1924)(corporate preference to corporate officers and directors held voidable by receiver when corporation was insolvent or nearly so and directors had already voted for liquidation); Stuart v. Larson, 298 F. 223 (8th Cir. 1924), noted 38 Harv.L.Rev. 521 (1925) (corporate preference to director held voidable). See generally 2 G. Glenn, Fraudulent Conveyances and Preferences 386 (Rev. ed. 1940). Subsection (b) overrules such cases as Epstein v. Goldstein, 107 F.2d 755, 757 (2d Cir. 1939) (transfer by insolvent husband to wife to secure his debt to her sustained against attack by husband's trustee); Hartford Accident & Indemnity Co. v. Jirasek, 254 Mich. 131, 139, 235 N.W. 836, 839 (1931) (mortgage given by debtor to his brother to secure an antecedent debt owed the brother sustained as not fraudulent).

(3) Subsection (b) does not extend as far as § 8(a) of the Uniform Fraudulent Conveyance Act and § 548(b) of the Bankruptcy Code in rendering voidable a transfer or obligation incurred by an insolvent partnership to a partner, who is an insider of the partnership. The transfer to the partner is not vulnerable to avoidance under § 4(b) unless the transfer was for an antecedent debt and the partner had reasonable cause to believe that the partnership was insolvent. The cited provisions of the Uniform Fraudulent Conveyance Act and the Bankruptcy Act make any transfer by an insolvent partnership to a partner voidable. Avoidance of the partnership transfer without reference to the partner's state of mind and the nature of the consideration exchanged would be unduly harsh treatment of the creditors of the partner and unduly favorable to the creditors of the partnership.

§ 6. When Transfer is Made or Obligation is Incurred

For the purposes of this [Act]:

(1) 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;

(2) if applicable law permits the transfer to be perfected as provided in paragraph (1) 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;

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

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

(5) 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.

COMMENT

(1) One of the uncertainties in the law governing the avoidance of fraudulent transfers and obligations is the difficulty of determining when the cause of action arises. Subsection (b) clarifies this point in time. For transfers of real estate section 6(1) fixes the time as the date of perfection against a good faith purchaser from the transferor and for transfers of fixtures and assets constituting personalty, the time is fixed as the date of perfection against a judicial lien creditor not asserting rights under this Act. Perfection typically is effected by notice-filing, recordation, or delivery of unequivocal possession. See U.C.C. §§ 9–302, 9–304, and 9–305 (security interest in personal property perfected by notice-filing or delivery of possession to transferee); 4 American Law of Property §§ 17.10–17.12 (1952) (recordation of transfer or delivery of possession to grantee required for perfection against bona fide purchaser from grantor). The provision for postponing the time a transfer is made until its perfection is an adaptation of § 548(d)(1) of the Bankruptcy Code. When no steps are taken to perfect a transfer that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to avoid it; without such a provision to cover that eventuality, an unperfected transfer would arguably be immune to attack. Some transfers—*e.g.*, an assignment of a bank account, creation of a security interest in money, or execution of a marital or premarital agreement for the disposition of property owned by the parties to the agreement—may not be amenable to perfection as against a bona fide purchaser or judicial lien creditor. When a transfer is not perfectible as provided in paragraph (1), the transfer occurs for the purpose of this Act when the transferor effectively parts with an interest in the asset as provided in § 1(12) *supra*.

(2) Paragraph (4) requires the transferor to have rights in the asset transferred before the transfer is made for the purpose of this section. This provision makes clear that its purpose may not be circumvented by notice-filing or recordation of a document evidencing an interest in an asset to be acquired in the future. *Cf.* Bankruptcy Code § 547(e); U.C.C. § 9–203(1)(c).

(3) Paragraph (5) is new. It is intended to resolve uncertainty arising from Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 989-91, 997 (2d Cir. 1981), insofar as that case holds that an obligation of guaranty may be deemed to be incurred when advances covered by the guaranty are made rather than when the guaranty first became effective between the parties. Compare Rosenberg, Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware, 125 U.Pa.L.Rev. 235, 256–57 (1976).

An obligation may be avoided as fraudulent under this Act if it is incurred under the circumstances specified in § 4(a) or § 5(a). The debtor may receive reasonably equivalent value in exchange for an obligation incurred even though the benefit to the debtor is indirect. See Rubin v. Manufacturers Hanover Trust Co., 661 F.2d at 991–92; Williams v. Twin City Co., 251 F.2d 678, 681 (9th Cir. 1958); Rosenberg, *supra* at 243–46.

§ 7. Remedies of Creditors

(a) In an action for relief against a transfer or obligation under this [Act], a creditor, subject to the limitations in Section 8, may obtain:

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

[(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by [ ];]

(3) 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.

(b) 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.

COMMENT

(1) This section is derived from §§ 9 and 10 of the Uniform Fraudulent Conveyance Act. Section 9 of that Act specified the remedies of creditors whose claims have matured, and § 10 enumerated the remedies available to creditors whose claims have not matured. A creditor holding an unmatured claim may be denied the right to receive payment for the proceeds of a sale on execution until his claim has matured, but the proceeds may be deposited in court or in an interest-bearing account pending the maturity of the creditor's claim. The remedies specified in this section are not exclusive.

(2) The availability of an attachment or other provisional remedy has been restricted by amendments of statutes and rules of procedure to reflect views of the Supreme Court expressed in Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969), and its progeny. This judicial development and the procedural changes that followed in its wake do not preclude resort to attachment by a creditor in seeking avoidance of a fraudulent transfer or obligation. See, *e.g.*, Britton v. Howard Sav. Bank, 727 F.2d 315, 317–20 (3d Cir.1984); Computer Sciences Corp. v. Sci-Tek Inc., 367 A.2d 658, 661 (Del. Super. 1976); Great Lakes Carbon Corp. v. Fontana, 54 A.D.2d 548, 387 N.Y.S.2d 115 (1st Dep't 1976). Section 7(a)(2) continues the authorization for the use of attachment contained in § 9(b) of the Uniform Fraudulent Conveyance Act, or of a similar provisional remedy, when the state's procedure provides therefor, subject to the constraints imposed by the due process clauses of the United States and state constitutions.

(3) Subsections (a) and (b) of § 10 of the Uniform Fraudulent Conveyance Act authorized the court, in an action on a fraudulent transfer or obligation, to restrain the defendant from disposing of his property, to appoint a receiver to take charge of his property, or to make any order the circumstances may require. Section 10, however, applied only to a creditor whose claim was unmatured. There is no reason to restrict the availability of these remedies to such a creditor, and the courts have not so restricted them. See, *e.g.*, Lipskey v. Voloshen, 155 Md. 139, 143–45, 141 Atl. 402, 404–05 (1928) (judgment creditor granted injunction against disposition of property by transferee, but appointment of receiver denied for lack of sufficient showing of need for such relief); Matthews v. Schusheim, 36 Misc.2d 918, 922–23, 235 N.Y.S.2d 973, 976–77, 991–92 (Sup.Ct. 1962) (injunction and appointment of receiver granted to holder of claims for fraud, breach of contract, and alimony arrearages; whether creditor's claim was mature said to be immaterial); Oliphant v. Moore, 155 Tenn. 359, 362–63, 293 S.W. 541, 542 (1927) (tort creditor granted injunction restraining alleged tortfeasor's disposition of property).

(4) As under the Uniform Fraudulent Conveyance Act, a creditor is not required to obtain a judgment against the debtor-transferor or to have a matured claim in order to proceed under subsection (a). See § 1(3) & (4) *supra*; American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929); 1 G. Glenn, Fraudulent Conveyances and Preferences 129 (Rev.ed. 1940).

(5) The provision in subsection (b) for a creditor to levy execution on a fraudulently transferred asset continues the availability of a remedy provided in § 9(b) of the Uniform Fraudulent Conveyance Act. See, *e.g.*, Doland v. Burns Lbr. Co., 156 Minn. 238, 194 N.W. 636 (1923); Montana Ass'n of Credit Management v. Hergert, 181 Mont. 442, 449, 453, 593 P.2d 1059, 1063, 1065 (1979); Corbett v. Hunter, 292 Pa.Super. 123, 128, 436 A.2d 1036, 1038 (1981); see also American Surety Co. v. Conner, 251 N.Y. 1, 6, 166 N.E. 783, 784, 65 A.L.R. 244, 247 (1929) ("In such circumstances he [the creditor] might find it necessary to indemnify the sheriff and, when the seizure was erroneous, assumed the risk of error"); McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 441-42 (1933).

(6) The remedies specified in § 7, like those enumerated in §§ 9 and 10 of the Uniform Fraudulent Conveyance Act, are cumulative. Lind v. O. N. Johnson Co., 204 Minn. 30, 40, 282 N.W 661, 667, 119 A.L.R. 940 (1939) (Uniform Fraudulent Conveyance Act held not to impair or limit availability of the "old practice" of obtaining judgment and execution returned unsatisfied before proceeding in equity to set aside a transfer); Conemaugh Iron Works Co. v. Delano Coal Co., Inc., 298 Pa. 182, 186, 148 A. 94, 95 (1929) (Uniform Fraudulent Conveyance Act held to give an "additional optional remedy" and not to "deprive a creditor of the right, as formerly, to work out his remedy at law"); 1 G. Glenn, Fraudulent Conveyances and Preferences 120, 130, 150 (Rev.ed. 1940).

§ 8. Defenses, Liability, and Protection of Transferee

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

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Section 7(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

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

(2) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

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

(d) Notwithstanding voidability of a transfer or an obligation under this [Act], a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to

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

(2) enforcement of any obligation incurred; or

(3) a reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under Section 4(a)(2) or Section 5 if the transfer results from:

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

(2) enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

(f) A transfer is not voidable under Section 5(b):

(1) 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;

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

(3) 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.

COMMENT

(1) Subsection (a) states the rule that applies when the transferee establishes a complete defense to the action for avoidance based on Section 4(a)(1). The subsection is an adaptation of the exception stated in § 9 of the Uniform Fraudulent Conveyance Act. The person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. Chorost v. Grand Rapids Factory Showrooms, Inc., 77 F.Supp. 276, 280 (D.N.J. 1948), *aff'd* 172 F.2d 327, 329 (3d Cir. 1949).

(2) Subsection (b) is derived from § 550(a) of the Bankruptcy Code. The value of the asset transferred is limited to the value of the levyable interest of the transferor, exclusive of any interest encumbered by a valid lien. See § 1(2) *supra*.

The requirement of § 550(b)(1) of the Bankruptcy Code that a transferee be "without knowledge of the voidability of the transfer" in order to be protected has been omitted as inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee. Knowledge of the voidability of a transfer would seem to involve a legal conclusion. Determination of the voidability of the transfer ought not to require the court to inquire into the legal sophistication of the transferee.

(3) Subsection (c) is new. The measure of the recovery of a defrauded creditor against a fraudulent transferee is usually limited to the value of the asset transferred at the time of the transfer. See, *e.g.*, United States v. Fernon, 640 F.2d 609, 611 (5th Cir. 1981); Hamilton Nat'l Bank of Boston v. Halstead, 134 N.Y. 520, 31 N.E. 900 (1892); *cf.* Buffum v. Peter Barceloux Co., 289 U.S. 227 (1932) (transferee's objection to trial court's award of highest value of asset between the date of the transfer and the date of the decree of avoidance rejected because an award measured by value as of time of the transfer plus interest from that date would have been larger). The premise of § 8(c) is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor's recovery. Circumstances may require a departure from that measure of the recovery, however, as the cases decided under the Uniform Fraudulent Conveyance Act and other laws derived from the Statute of 13 Elizabeth illustrate. Thus, if the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by improvements of the asset transferred or discharge of liens on the property, a good faith transferee should be reimbursed for the outlay for such a purpose to the extent the sale proceeds were increased thereby. See Bankruptcy Code § 550(d); Janson v. Schier, 375 A.2d 1159, 1160 (N.H. 1977); Anno., 8 A.L.R. 527 (1920). If the value of the asset has been diminished by severance and disposition of timber or minerals or fixtures, the transferee should be liable for the amount of the resulting reduction.

Damazo v. Wahby, 269 Md. 252, 261, 305 A.2d 138, 142 (1973). If the transferee has collected rents, harvested crops, or derived other income from the use or occupancy of the asset after the transfer, the liability of the transferee should be limited in any event to the net income after deduction of the expense incurred in earning the income. Anno., 60 A.L.R.2d 593 (1958). On the other hand, adjustment for the equities does not warrant an award to the creditor of consequential damages alleged to accrue from mismanagement of the asset after the transfer.

(4) Subsection (d) is an adaption of § 548(c) of the Bankruptcy Code. An insider who receives property or an obligation from an insolvent debtor as security for or in satisfaction of an antecedent debt of the transferor or obligor is not a good faith transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or the obligation was incurred.

(5) Subsection (e)(1) rejects the rule adopted in Darby v. Atkinson (*In re* Farris), 415 F.Supp. 33, 39–41 (W.D. Okla. 1976), that termination of a lease on default in accordance with its terms and applicable law may constitute a fraudulent transfer. Subsection (e)(2) protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement of a secured creditor's rights pursuant to and in compliance with the provisions of Part 5 of Article 9 of the Uniform Commercial Code. *Cf.* Calaiaro v. Pittsburgh Nat'l Bank (*In re* Ewing), 33 B.R. 288, 9 C.B.C.2d 526, CCH B.L.R. ¶ 69,460 (Bk. W.D.Pa. 1983) (sale of pledged stock held subject to avoidance as fraudulent transfer in § 548 of the Bankruptcy Code), *rev'd*, 36 B.R. 476 (W.D.Pa. 1984) (transfer held not voidable because deemed to have occurred more than one year before bankruptcy petition filed). Although a secured creditor may enforce rights in collateral without a sale under § 9–502 or § 9–505 of the Code, the creditor must proceed in good faith (U.C.C. § 9–103) and in a "commercially reasonable" manner. The "commercially reasonable" constraint is explicit in U.C.C. § 9–502(2) and is implicit in § 9–505. See 2 G.Gilmore, Security Interests in Personal Property 1224–27 (1965).

(6) Subsection (f) provides additional defenses against the avoidance of a preferential transfer to an insider under § 5(b).

Paragraph (1) is adapted from § 547(c)(4) of the Bankruptcy Code, which permits a preferred creditor to set off the amount of new value subsequently advanced against the recovery of a voidable preference by a trustee in bankruptcy to the debtor without security. The new value may consist not only of money, goods, or services delivered on unsecured credit but also of the release of a valid lien. See, *e.g.*, *In re* Ira Haupt & Co., 424 F.2d 722, 724 (2d Cir. 1970); Baranow v. Gibraltor Factors Corp. (*In re* Hygrade Envelope Co.), 393 F.2d 60, 65–67 (2d Cir.), *cert. denied*, 393 U.S. 837 (1968); *In re* John Morrow & Co., 134 F. 686, 688 (S.D. Ohio 1901). It does not include an obligation substituted for a prior obligation. If the insider receiving the preference thereafter extends new credit to the debtor but also takes security from the debtor, the injury to the other creditors resulting from the preference remains undiminished by the new credit. On the other hand, if a lien taken to secure the new credit is itself voidable by a judicial lien creditor of the debtor, the new value received by the debtor may appropriately be treated as unsecured and applied to reduce the liability of the insider for the preferential transfer.

Paragraph (2) is derived from § 547(c)(2) of the Bankruptcy Code, which excepts certain payments made in the ordinary course of business or financial affairs from avoidance by the trustee in bankruptcy as preferential transfers. Whether a transfer was in the "ordinary course" requires a consideration of the pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer challenged under § 5(b). See Tait & Williams, Bankruptcy Preference Laws: The Scope of Section 547(c)(2), 99 Banking L.J. 55, 63–66 (1982). The defense provided by paragraph (2) is available, irrespective of whether the debtor or the insider or both are engaged in business, but the prior conduct or practice of both the debtor and the insider-transferee is relevant.

Paragraph (3) is new and reflects a policy judgment that an insider who has previously extended credit to a debtor should not be deterred from extending further credit to the debtor in a good faith effort to save the debtor from a forced liquidation in bankruptcy or otherwise. A similar rationale has sustained the taking of security from an insolvent debtor for an advance to enable the debtor to stave off bankruptcy and extricate itself from financial stringency. Blackman v. Bechtel, 80 F.2d 505, 508–09 (8th Cir. 1935); Olive v. Tyler (*In re* Chelan Land Co.), 257 F. 497, 5 A.L.R. 561 (9th Cir. 1919); *In re* Robin Bros. Bakeries, Inc., 22 F.S. 662, 663–64 (N.D.Ill. 1937); *see* Dean v. Davis, 242 U.S. 438, 444 (1917). The amount of the present value given, the size of the antecedent debt secured, and the likelihood of success for the rehabilitative effort are relevant considerations in determining whether the transfer was in good faith.

§ 9. Extinguishment of [Claim for Relief] [Cause of Action]

A [claim for relief] [cause of action] with respect to a fraudulent transfer or obligation under this [Act] is extinguished unless action is brought:

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

(b) under Section 4(a)(2) or 5(a), within 4 years after the transfer was made or the obligation was incurred; or

(c) under Section 5(b), within one year after the transfer was made or the obligation was incurred.

COMMENT

(1) This section is new. Its purpose is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy. See Restatement of Conflict of Laws 2d § 143 Comments (b) & (c) (1971). The section rejects the rule applied in United States v. Gleneagles Inv. Co., 565 F.S. 556, 583 (M.D.Pa. 1983) (state statute of limitations held not to apply to action by United States based on Uniform Fraudulent Conveyance Act).

(2) Statutes of limitations applicable to the avoidance of fraudulent transfers and obligations vary widely from state to state and are frequently subject to uncertainties in their application. See Hesson, The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations, 32 Cornell L.Q. 222 (1946); Annos., 76 A.L.R. 864 (1932), 128 A.L.R. 1289 (1940), 133 A.L.R. 1311 (1941), 14 A.L.R.2d 598 (1950), and 100 A.L.R.2d 1094 (1965). Together with § 6, this section should mitigate the uncertainty and diversity that have characterized the decisions applying statutes of limitations to actions to fraudulent transfers and obligations. The periods prescribed apply, whether the action under this Act is brought by the creditor defrauded or by a purchaser at a sale on execution levied pursuant to § 7(b) and whether the action is brought against the original transferee or subsequent transferee. The prescription of statutory periods of limitation does not preclude the barring of an avoidance action for laches. See § 10 and the accompanying Comment *infra*.

§ 10. Supplementary Provisions

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.

COMMENT

This section is derived from § 11 of the Uniform Fraudulent Conveyance Act and § 1-103 of the Uniform Commercial Code. The section adds a reference to "laches" in recognition of the particular appropriateness of the application of this equitable doctrine to an untimely action to avoid a fraudulent transfer. See Louis Dreyfus Corp. v. Butler, 496 F.2d 806, 808 (6th Cir. 1974) (action to avoid transfers to debtor's wife when debtor was engaged in speculative business held to be barred by laches or applicable statutes of limitations); Cooch v. Grier, 30 Del.Ch. 255, 265–66, 59 A.2d 282, 287–88 (1948) (action under the Uniform Fraudulent Conveyance Act held barred by laches when the creditor was chargeable with inexcusable delay and the defendant was prejudiced by the delay).

§ 11. Uniformity of Application and Construction

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.

§ 12. Short Title

This [Act] may be cited as the Uniform Fraudulent Transfer Act.

§ 13. Repeal

The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed:

COMMENT

If enacted by this State, the Uniform Fraudulent Conveyance Act should be listed among the statutes repealed.

CONSOLIDATED RECEIVERSHIP STATUTE

Receivership in Michigan, as in many other states, tends to be regulated in a "hit and miss" fashion through a mix of statutes, court rules, and common law decisions. Michigan currently regulates receiverships through: (i) an R.J.A. provision applicable to receiverships generally, but which deals only with limited aspects of the receivership; (ii) a variety of statutes, some fairly detailed, aimed at particular types of receiverships; (iii) court rules dealing with limited aspects of particular types of receiverships; and (iv) common law decisions applicable to receiverships in general.[1] The end result is that for most receiverships, many critical aspects of regulation are left to the discretion of the appointing court, which produces considerable variation from one court to another.

In recent years, several states have responded to similar regulatory hodgepodges by adopting "consolidated" receivership statutes.[2] These statutes provide a general structure for the regulation and use of receiverships. They bring a basic uniformity to the receivership process, while allowing for needed diversity for particular types of receiverships through additional statutory provisions or court rules limited to such receiverships. Our proposal is modeled after such "consolidated"

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[1] Appendix A contains a synopsis of the major provisions on receivers (pp. 91-95), the text of many of the relevant statutes (pp. 96-143), and the text of the relevant Court Rules (pp. 144-148).

[2] These statutes include: Cal.Civ.Proc. Code §§ 564-71; Conn.Gen.Stat. §§52-504 to 52-514; Ga. Code §§9-8-1 to 9-8-14; N.Y.Civ.Prac.L. §§6401-6405 and N.Y.Bus.Corp.L. §§1201-1218; N.C.Gen.Stat. §§1-507 to 1-507.11; Ikla.Stat., Tit. 12, §§1551-1559; S.C. Code §§15-65-10 to 15-65-130; and Tex. Code Civ.Prac. and Remedies §§64.001-64.092.

provisions. It incorporates general principles recognized in Michigan statutes and common law decisions and also adds regulations on important subjects that fall within the gaps of the current regulatory scheme. The proposed statute and commentary follow:

WHEN A RECEIVER CAN BE APPOINTED

Sec. 1. Circuit court judges, in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law.

Commentary

Michigan currently has both a general provision on the appointment of receivers and a series of special provisions dealing with appointment in particular situations. The current general provision is §600.2926 of the Michigan Compiled Laws (see App. A at p. 127). Section one repeats the first sentence of that provision.

Use of the current language has the advantage of bringing with it prior judicial interpretation. As was noted in Petitpren v. Taylor Sch. Dis., 104 Mich. App. 283, 304 N.W.2d 553 (1981), "allowed by law" in §600.2926 refers to both statutes and case law. Petitpren stated:

> This statute does not independently grant the court the authority to appoint receivers but rather confirms that appointment of a receiver is a remedy available to the court in situations where "allowed by law." Although there are several statutes which specifically allow appointment of a receiver, (footnote omitted) the phrase "allowed by law" is not limited to these statutes, since the Supreme Court has recognized that there are cases where the trial court may appoint a receiver in the absence of a statute pursuant to its inherent equitable authority. See, Michigan Minerals, Inc. v. Williams, 306 Mich. 515, 525-26, 11 N.W.2d 224 (1943); Grand Rapids Trust Co. v. Carpenter, 229 Mich. 491, 201 N.W. 448 (1924). (footnote omitted) It thus becomes apparent that, as used in the statute, the phrase "allowed by law" refers to (1) those cases where appointment of a receiver is provided for by statute and (2) those cases where the facts and circumstances render the appointment of a receiver an appropriate exercise of the circuit court's equitable jurisdiction. Accordingly, the fact that no specific statute calls for appointment of a receiver in the instant case did not deprive the trial court of the authority to make such an appointment.

As for specific statutory authorizations, Michigan currently has over forty statutes authorizing the appointment of receivers. See Appendix A. Those statutes can be divided into ten categories: (1) receiverships over real property, (2) receiverships over state authorized bonds where there is default or is otherwise provided for in the bond authorization, (3) receiverships for violations of regulatory statutes, (4) receiverships for family matters, (5) receiverships to aid in enforcement of judgments, (6) receiverships for the dissolution and management of major organizations for delinquency and various other reasons, (7) receiverships for the dissolution of insolvent financial institutions, (8) receiverships for insolvent corporations and corporations that have lost their rights, (9) receiverships for payment to creditors, and (10) receiverships to recover costs of incarcerations from prisoners. See synopsis in Appendix A. These statutes form part of the core.

There are also several rulings of the Michigan Supreme Court authorizing appointment of receivers based upon the circuit court's equitable powers rather than upon any particular statute. In Grand Rapids Trust Co. v. Carpenter, 220 Mich. 491, 201 N.W. 448 (1924), the Michigan Supreme Court did not rely on a statute but cited instead the "inherent power of a court of equity" in ruling that a court has the power to appoint a receiver over a corporation where the term of corporation's existence fixed by statute had expired. In National Bank of Commerce v. Corliss, 217 Mich. 435, 186 N.W. 717 (1922), the Court ruled that a circuit court had the power to appoint a receiver over a creamery company that failed to pay its notes under the court's equity powers. In Ralph v. Shiawassee Circuit Judge, 100 Mich. 164, 58 N.W. 837 (1894), the Court recognized the equitable power to appoint a receiver over a railroad company for nonpayment of bonds and impending cancellation of franchises for mismanagement. In Petitpren, supra, the Court of Appeals reasoned that a circuit court had authority under its equity powers to appoint a receiver over a school district where the schools were in serious need of repair, were facing a large deficit, and were in danger of losing state funding (although it added that appointment was inappropriate where no request for the appointment was made, the allegations which led to the appointment were unrelated to the issue in the case before the circuit court, and no evidentiary hearing took place). Other cases affirming the circuit court's power at equity to appoint receivers include Singer v. Goff, 334 Mich. 163, 54 N.W.2d 290 (1952); Michigan Minerals v. Williams, 306 Mich. 515, 11 N.W.2d 224 (1943); Livingston v. Southern Sur. Co. of N.Y., 262 Mich. 438, 247 N.W. 712 (1933); McDonald v. McDonald, 351 Mich. 568, 88 N.W.2d 398 (1958).

Some states, in their consolidated statutes, set forth the most common statutory and equitable grounds for appointment of receivers. Following this list, they then add a catch-all provision reserving the ability of courts to appoint receivers in all other cases authorized by statute or under the rules of equity. See e.g., Cal.Civ.Pro. Code §564; N.Y. Bus.Corp. Law §1202; N.C. Gen.Stat. §1-502. While there is some value in bringing the various provisions on appointment together, there simply is too much variety in the Michigan statutory provisions to attempt to formulate general

categories that encompass all of such situations. Also, with well developed case law on appointment under the court's inherent equity authority, there is no need to attempt to set forth the conditions for the exercise of that authority.

WHO MAY BE APPOINTED A RECEIVER

Sec. 2. (1) A person appointed a receiver shall meet any special qualifications imposed by statute.

(2) No party or attorney of a party, nor person with a financial interest in the action or attorney of such person, shall be appointed receiver without the written consent of the parties filed with the clerk of the court.

(3) No person related to the third degree, by consanguinity or affinity, to a circuit court judge of the same circuit as the appointment judge shall be appointed receiver.

(4) No more than one receiver may be appointed over the same property.

Commentary

There are several sections of the Michigan Compiled Laws that set forth special qualifications for appointment as a receiver. For example, M.C.L. §487.551 provides that generally only the FDIC may be appointed receiver over a bank for insolvency or failure to submit to inspection or pay deposits. Similarly, only a state official may be appointed receiver over a nursing home when suspension or revocation of its license is certain or has occurred. See, M.C.L. §333.21751. Other provisions clearly state or contemplate that the person appointed receiver would have particular expertise. See, e.g., M.C.L. §600.2926a (to manage cemeteries); M.C.L. §333.57a (to operate hospital facilities); M.C.L. §436.17(3) (to operate a licensed liquor establishment when a licensee dies). Proposed subsection 1 would only provide a cross-reference to the requirements of such statutes.

The Michigan Compiled Laws do not currently contain, either in the general receivership provisions or in the special situation provisions, a prohibition against appointing as receiver a party to an action, an attorney of that party, a person interested in an action, or an attorney of such a

person. Michigan case law, however, does warn against such appointments without approval of all of the parties. The 1880 Michigan Supreme Court case of Merchants' & Manufacturers' Nat'l Bank of Detroit v. Kent Circuit Judge, 43 Mich. 292, 5 N.W. 627 (1880), invalidated the appointment as receiver of the law partner of the solicitor for a complainant seeking appointment of a receiver. The court held:

> We cannot shut our eyes to the fact that the law partner of the solicitor is presumptively as much interested in the proceedings as the solicitor himself, and it would be peculiarly objectionable that he should act in a position requiring impartiality in a case like this, where the parties to the suit are manifestly acting in concert, and adversely to the interests of other person, who cannot watch their proceedings. The practical result would be that the receiver would supervise his own accounts. Garland v. Garland, 2 Ves. 137. The practice in equity does not even permit the receiver to employ a solicitor in the case as his own counsel, lest it might disarm his vigilance in watching the receiver's proceedings. Ryckman v. Parkins, 5 Paige 543; Adams v. Woods, 8 Cal. 306. This rule may, no doubt, be departed from by consent of all parties concerned, but this must mean by consent of all parties concerned in the results of the receivership, and one not a party to the suit may be as much concerned in these as the person who are parties. M. & M. Nat'l Bank, 5 N.W. at 630-31.

Jurisdictions with a consolidated statute, rather than leaving the subject to common law development, often include specific limitations on who can be appointed. The proposed subsection (2) is taken from the Oklahoma and California statutes. See, Okla.Stat.Ann. tit. 12 §1552 ("No party, or attorney, or person interested in an action, shall be appointed receiver therein except by consent of all parties thereto"). See also Cal.Civ.Pro. Code §566(a).

Subsection (3) is also patterned after Cal.Civ.Proc. Code §566(a), which provides: "No party related to any judge of the court by consanguinity or affinity within the third degree, can be appointed receiver." Consider also N.Y. Jud. Law §251-a (forbidding a law clerk or secretary of a supreme court judge from being appointed a receiver).

Subsection (4) of the proposed section forbids the appointment of multiple receivers. Currently, all provisions of the Michigan Compiled Laws refer to appointment of "a receiver," suggesting that multiple receivers may not be appointed. Moreover, Court Rule 2.622(B) provides:

> (3) If several actions or motions under MCR 2.621 [allowing for appointment of receivers to obtain relief supplementary to judgment under M.C.L. §§600.6101-600.6143] are filed by different creditors against the same debtor, only one receiver may be appointed, unless the first appointment was obtained by fraud or collusion, or the receiver is an improper person to execute the trust.

Michigan case law also supports a provision against multiple receivers. The Michigan Supreme Court held in the 1932 case of In re Farber, 260 Mich.

652, 245 N.W. 793, 795 (1932):

> In the case of conflict, priority generally follows the decree of the court which first obtains jurisdiction of the parties and the subject matter. 53 C.J. 50. It does not rest upon a race between courts to final decree. Although different receivers may be appointed in different proceedings, 53 C.J. 76, such conflict should be avoided, especially as between branches of the same court.

The Michigan Supreme Court also stated in McKay v. Van Kleeck, 133 Mich. 27, 94 N.W. 367 (1903):

> "As regards the right of possession when two different receivers have been appointed, in different proceedings, over the same fund or estate, the question of priority or procedure must be determined with reference to the date of appointments, since the courts will not permit both to act, the title of one being necessarily exclusive of that of the other." McKay, 94 N.W. at 370 (quoting High on Receivers, p. 137) (emphasis added).

Other jurisdictions are split on the issue of multiple receivers. The North Carolina statutes specifically forbids multiple receivers, stating, "No more than one receiver of the property of a judgment debtor shall be appointed." N.C.Gen.Stat. §1-363. The reason for this rule is "to prevent a conflict of authority between the courts having a concurrent jurisdiction over the subject." Corbin v. Berry & McGowan, 83 N.C. 24, 26-27 (1880). On the other hand, California and New York specifically provide for more than one receiver. See, Cal.Civ.Pro. Code §565 ("Upon dissolution of any corporation, the Superior Court of the county in which the corporation carries on its business or has its principal place of business ... may appoint one or more persons to be receivers or trustees of the corporation"); N.Y.Bus.Corp. Law §1206(c) ("When more than one receiver is appointed; all provisions in this article in reference to one receiver shall apply to them").

PROCEDURE FOR APPOINTMENT OF RECEIVERS

Sec. 3. (1) A receiver may not be appointed before a complaint is filed.

(2) A receiver may not be appointed without notice to the parties and a hearing on the appointment, except as justified by special circumstances, including each of the following:

(a) the defendant is beyond the jurisdiction of the court;

(b) a bona fide effort has been made to obtain service of

process but that effort has been unsuccessful;

(c) the property that is the subject of the action is in such immediate danger of destruction or removal from the jurisdiction that there is insufficient time to hold a hearing.

(3) Except where the authority to apply for receivership is vested by statute or court rule in particular persons, any party to an action who has asserted a claim to the property may move for the appointment of a receiver as an ancillary remedy.

(4) If the court grants a motion to establish a receivership, the court shall issue an order stating the following:

(a) The name of the person appointed receiver;

(b) The property covered by the receivership;

(c) The duration of the receivership;

(d) The amount of the bond to be posted;

(e) The powers of the receiver.

(5) Circuit court judges may exercise their authority to appoint receivers in vacation, in chambers, and during sessions of the court.

Commentary

The 1880 Michigan Supreme Court case of Merchants' & Manufacturers' Nat'l Bank of Detroit v. Kent Circuit Court Judge, 43 Mich. 292, 5 N.W. 627 (1880), supports the subsection 1 prohibition against appointment of a receiver before a complaint is filed. That case struck down the order of a judge appointing a receiver the day before a foreclosure complaint was filed, with the court holding: "The order appointing a receiver was void, for the reason that it was made when there was no suit pending." This decision was followed in Jones v. Schall, 45 Mich. 379, 8 N.W. 68 (1881). See also M.C.L. §600.2926, which refers to "cases pending."

American State Trust Co. of Detroit v. Rosenthal, 255 Mich. 157, 237 N.W. 534 (1931), stands for the proposition set forth in the first part of

subsection (2) -- in general, a receiver should not be appointed without a hearing. However, as the 1933 case of Livingston v. Southern Sur. Co. of N.Y., 262 Mich. 438, 247 N.W. 712 (1933), also notes, "the right of a court of equity to appoint a receiver ex parte is an inherent part of its equity powers." [Citing Tuller v. Wayne Circuit Judge, 243 Mich. 239, 219 N.W. 939 (1928)]. The remainder of subsection (2) specifies those situations, as developed in the case law, that allow the appointment of a receiver without a hearing.

There are several cases discussing when a receiver may be appointed without notice and a hearing. W.R. Reynolds & Co. v. Gordon, 234 Mich. 189, 207 N.W. 811 (1926), allowed appointment of a receiver without notice to the defendant where the defendant was beyond the jurisdiction of the court and could not be served. Tuller v. Webster, 243 Mich. 239, 219 N.W. 939 (1928), upheld the appointment of a receiver without notice or a hearing where unsuccessful bona fide efforts were made to serve the defendant. The court there also stated:

> "A receiver may be appointed without notice where the defendant is beyond the jurisdiction of the court or cannot be found or where some emergency is shown rendering the appointment, before the giving of notice necessary to prevent imminent and irreparable injury, waste, destruction, or loss, or when notice itself will jeopardize the delivery of the property over which the receivership is to be extended. The situation must be such as to be of such imperious necessity that it requires immediate action, and of a character that no other protection can be accorded to the plaintiff." (quoting Tardy's Smith on Receivers).

Sanford v. Newell, 204 Mich. 911, 169 N.W. 941 (1918), stated that appointment without a hearing is allowed "in rare cases of special emergency, where imminent danger of loss of the corpus of the litigation or irreparable injury is clearly shown." The 1971 Michigan Court of Appeals case of Slay v. Berry, 27 Mich.App. 271, 183 N.W.2d 436 (1971), upheld the appointment of a conservator over a state bank without notice to the defendant where "imminent danger of insolvency requir[ed] prompt action to safeguard the value of the assets." A major difficulty there was that "the probable result of notice of the receivership proceedings would be a 'run' on the bank, thus dashing any hope of consummating a sale [of the bank]." In light of that concern, as well as the fact that "the circuit court provided for a subsequent hearing at which objections to the sale [of assets] could be made," the Court of Appeals upheld the appointment.

The consolidated statutes of several jurisdictions, specifically provide for appointment of a receiver without notice and a hearing in exceptional circumstances. See, e.g., Ga. Code §9-8-3 ("Under extraordinary circumstances, a receiver may be appointed before and without notice to the trustee or other person having charge of the assets. The terms on which a receiver is appointed shall be in the discretion of the court"); S.C. Code §15-65-20 (requiring notice but allowing the court to give less than four days notice of the application if it "appear[s] that delay would work injustice"). See also, Cal.Civ.Pro. Code §566(b)

(contemplating appointment without notice and hearing).

Subsection (3) authorizes any party to the action who has asserted a claim to the property to move for the appointment of the receiver. The 1933 Michigan Supreme Court case of Detroit Fidelity and Sur. Co. v. King, 264 Mich. 91, 249 N.W. 477 (1933), supports the proposition that the movant ordinarily must be a party to an action that exists apart from the request for a receiver. The court there stated that it was "well established that such an appointment can be made only as ancillary to other relief sought in the bill of complaint."

The exception created by the first clause in this subsection is intended to accommodate special provisions of the Michigan Compiled Laws which set forth certain circumstances under which only particular parties may apply for a receivership, sometimes apart from its use as an ancillary remedy. See M.C.L. §500.8085 (action for appointment of receiver over fraternal benefit societies must be brought by attorney general); M.C.L. §450.180 (same for religious organizations); M.C.L. §489.831 (same for savings and loan associations); M.C.L. §487.912a (same for people licensed to sell checks).

Proposed subsection (4) governs details of the order establishing the receivership. Currently the specific contents are not spelled out in court rule or statute. Proposed paragraph (e), identifying the powers of the receiver, is required by M.C.L. §600.2926; that section provides, "In all cases in which a receiver is appointed the court ... shall define the receiver's power and duties where they are not otherwise spelled out by law." As for the requirements of the remaining paragraphs, the specification of the receiver, the property, the duration of the receivership, and the amount of the bond would naturally be included in the order -- as demonstrated by the model appointment order in Callaghan's Mich. Pl. & Pr. §83.13 (2d ed.). Since many current statutory provisions spell out the powers of a receiver in the particular circumstances for appointment, see e.g., M.C.L. §300.1701 (receiver over forest improvement district bonds), the court order on that score may simply refer to the relevant statute in identifying the permissible powers. Section 7 of this proposed statute might also be helpful in this regard.

Proposed subsection (5), providing for appointment in vacation, in chambers, and during sessions of the court, is taken verbatim from M.C.L. §600.2926. That section states in part:

> Circuit court judges in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law. This authority may be exercised in vacation, in chambers, and during sessions of the court. See, Appendix B, p. 37.

As was stated in the 1907 case of Horn v. Pere Marquette R. Co., 151 F. 626 (E.D.Mich. 1907), "[I]n nearly every state the authority of a judge in vacation and at chambers depends upon statute..." A similar provision is found in S.C. Code §15-65-10 ("A receiver may be appointed by a judge of the circuit court, either in or out of court ...").

POSTING OF BOND FOR RECEIVERSHIPS

Sec. 4. (1) A court appointing a receiver shall require the appointee to execute a bond, in an amount set by the court, as security for the receiver's faithful discharge of his or her duties.

(2) A court appointing a government officer acting in his or her official capacity as a receiver shall waive the requirement of posting bond except where such waiver is prohibited by statute.

Commentary

Proposed subsection (1) requires a receiver to post bond as security for the faithful discharge of the duties of receiver. Currently, sections 600.2026 provides for the posting of bond. See M.C.L. §600.2926 ("In all cases in which a receiver is appointed the court shall provide for bond"). See also M.C.L. §600.3510 ("upon giving bond and qualifying, as the court may direct, such permanent receiver ..."). Rule 2.622 of the Michigan Court Rules also requires a receiver to post bond. Rule 2.622(A)(7) states:

> A receiver must give security to cover the property of the debtor that may come into the receiver's hands, and must hold the property for the benefit of all creditors who have commenced, or will commence, similar proceedings during the continuance of the receivership.

Michigan case law has long indicated that the posting of a bond is necessary, absent a special statutory exemption. See, e.g., Smith v. Grant, 53 Mich. 560, 19 N.W. 184, 189 (1884), where the court noted: "The order complained of does not require the receiver to give security. Probably this was an inadvertence. It should be corrected."

Jurisdictions with consolidated statutes commonly include provisions requiring the receiver to post bond. See, e.g., N.Y. Civ.Prac. L. §6403; Ga. Code §9-8-10 (1982); Tex. Code C.P. & R. §64.023; Cal. Civ.Pro. Code §567.

Proposed subsection (2) provides for the waiver of bond where a government official is appointed receiver. This subsection is intended to accommodate statutory provisions such as M.C.L. §487.551. That statute provides that if a receiver is appointed over a bank for its insolvency, its failure to submit to inspection, or its failure pay desposits, and "the federal deposit insurance corporation accepts the appointment as receiver,

it may act as such without bond." Other statutes that refer to appointment of state officials as receivers do not include a provision requiring bond (although they also do not say that there shall not be bond). See e.g., M.C.L. §333.21751 (nursing homes, with director of department ot social services, or director of department of health, appointed as receiver). Since the bond is payable to the state, see People for Use of Wipfler v. Wipfler, 167 Mich. 13, 132 N.W. 444 (1911), there ordinarily is no reason to require the state official to provide a bond.

COMPENSATION AND EXPENSES OF RECEIVERS

Sec. 5. (1) A receiver shall be entitled to reimbursement of reasonable expenses and to reasonable compensation for services rendered in connection with the receivership, as determined by the court.

(2) The court shall not award compensation in excess of any limit set by statute or court rule. In the absence of any other limit set by statute or court rule, a receiver appointed to preserve and collect assets shall not be awarded compensation in excess of five percent of the first twenty thousand dollars in value of the property, two and one-half percent of the next eighty thousand dollars, and one percent of the remainder of the value of the property. Where a receiver is appointed to continue a commercial enterprise, the receiver may not be awarded compensation in excess of that paid to persons in the usual and regular conduct of such business.

(3) Compensation shall be paid out of the property held in receivership except that, where there are no funds in the receiver's hands at the termination of the receivership, the court may direct the party who moved for the appointment of the receiver to pay these sums.

Commentary

That receivers generally have a right to compensation and that the compensation should be taken from the property held in receivership is well supported by Michigan case law. The Michigan Supreme Court wrote in the 1952 case of Fisk v. Fisk, 333 Mich. 513, 53 N.W.2d 356 (1952):

> "Receivers ordinarily have a right to compensation for their services and expenses, and such right is a strong equity, analogous to an obligation founded upon an implied contract, and is not dependent upon the mere arbitrary discretion of the court, if the appointment of the receiver was regular and his conduct has been free from exception. Such right of the receiver to compensation is a charge on the property or fund in receivership." (quoting 45 Am.Jur. §281, p. 218).

Fisk also supports the view that "within reasonable bounds the amount of compensation to be awarded a receiver for services rendered is a matter within the discretion of the trial court."

No attempt is made to define what constitutes a reasonable expense item, but case law suggests various different types of expenses, such as attorneys fees. See Cohen v. Cohen, 125 Mich.App. 206, 335 N.W.2d 661 (1983) ("the receiver's appellate attorney fees where such fees were necessary to the performance of the receiver's duties").

While subsection (1) refers to reasonable compensation, subsection (2) adds further limits. Initially, reference is made to any statutory limits. Although current Michigan statutes do not generally speak to compensation for receivers, there are exceptions. Thus, section 600.2926a states that "compensation for [cemetery] receivers shall not exceed $200.00 per week, which compensation and expenses shall be determined and approved by the appointing court."

Subsection (2) also adds a statutory cap in the ordinary situation where the receiver's function is simply to preserve and collect assets. Other jurisdictions have similar compensation caps based on the amount of funds in the receiver's hands or the receiver's receipts and disbursements. See, e.g., N.C. Gen.Stat. §1-507.9; Ga. Code §9-8-13 to 14; N.Y. Bus.Corp. Law §1217; N.Y. Civ.Prac. L. §800.401; S.C. Code §15-65-100. The caps selected here are taken from the New York statute. The separate treatment of the receiver operating a business follows from the Georgia statute. Those provisions would not apply where the court rules or statutes set other limitations.

The exception in the subsection (3) allows the court to direct the person who sought the appointment of the receivership to pay the compensation as provided for in Rule 2.622(D) of the Michigan Rules of Court. That rule states:

> When there are no funds in the hands of the receiver at the termination of the receivership, the court, on application of the receiver, may set

the receiver's compensation and the fees of the receiver's attorney for the services rendered, and may direct the party who moved for the appointment of the receiver to pay these sums in addition to the necessary expenditures of the receiver. If more than one creditor sought the appointment of a receiver, the court may allocate the costs among them.

MODIFICATION AND TERMINATION OF RECEIVERSHIPS

Sec. 6(1). The court, in its discretion, may modify any receivership or terminate any receivership and return the property held by the receiver to the debtor when it appears to be in the best interest of the debtor, the creditors, and others interested.

(2) The court, in its discretion, may remove a receiver, appointing a replacement consistent with section 2.

Commentary

The language of subsection (1) comes almost verbatim from M.C.L. 600.2926, which states in part: "The court may terminate any receivership and return the property held by the receiver to the debtor whenever it appears to be to the best interest of the debtor, the creditors and others interested." Rule 2.622(A)(9) of the Michigan Rules of Court clarifies that a court order is necessary for termination, stating, "A receiver may only be discharged from the trust on order of the court."

That courts have great discretion in modifying or terminating receiverships is clearly supported by Michigan case law. See e.g., Singer v. Goff, 334 Mich. 163, 54 N.W.2d 291, 292 (1952); In re Newbrough, 254 Mich. 170, 236 N.W. 233 (1931).

Subsection (2) makes clear that the courts inherent authority extends to the individual receiver as well as the receivership. Other jurisdictions have similar provisions. See e.g., Ga. Code §9-8-8(b) (may be removed at the "pleasure" of the court); Conn.Gen.Stat. §52-513; N.Y.Civ.Prac. L. §6405; N.C. Gen.Stat. §§1-504, 1-507.1.

POWERS OF RECEIVERS

Sec. 7. (1) Except where otherwise provided by statute, court rule, or court order, a receiver has the power to:

(a) Take possession of property;

(b) Bring and defend actions in the receiver's own name;

(c) Collect, sue for and compromise debts, demands, rents, and claims owed;

(2) In addition to the powers listed in subsection (1), receivers shall have any other powers specified by statute, court rule or court order and be allowed any exemptions granted by statute, court rule, or court order.

Commentary

Following the pattern of several statutes, subsection lists basic powers common to all receiverships, unless limited by the court or specific statute or court rules.

Paragraph (a) of proposed subsection (1) identifies the power to take possession of property as a responsibility of the receiver. This power and duty is supported by Michigan case law, such as the cases upholding appointment of a receiver pendente lite to take possession of property pending suit. See e.g., National Bank of Commerce v. Corliss, 217 Mich. 435, 186 N.W. 717 (1922). See also, Schram v. Pasco, 302 Mich. 445, 4 N.W.2d 724 (1924). The power of receivers to take possession of property is also authorized by many Michigan statutes. See, M.C.L. §559.208 (authorizing receivers to take possession of condominium units in actions for foreclosure of assessment liens where condominium taxes are not paid); M.C.L. §125.1255(1)(e) (authorizing receivers to enter and take possession of industrial buildings, sites, machinery, and equipment at the request of holders of industrial development bonds where provided for in the bond authorization); M.C.L. §320.1701 (authorizing receivers to enter and take possession of forest improvement projects where provided for in the bond authorization).

Other jurisdictions have a similar provision. See, e.g., Cal.Civ.Pro. Code §568 ("The receiver has, under the control of the Court, power to ... take and keep possession of the property ..."); N.Y. Civ.Prac. L. §6401(b); N.C.Gen.Stat. 1.507.2 (1983).

Proposed paragraph (b) allows receivers to sue in their own name and prosecute and defend actions. This is provided for in Rule 3.611(E) of the Michigan Rules of Court, where the receiver is appointed in an action for voluntary dissolution under M.C.L. §600.3501. Rule 3.611(E) states:

> An action may be brought by the receiver in his or her own name and may be continued by the receiver's successor or co-receiver. An action commenced by or against the corporation before the filing of the complaint for dissolution is not abated by the complaint or by the judgment of dissolution, but may be prosecuted or defended by the receiver. The court in which an action is pending may on motion order substitution of parties or enter another necessary order.

The 1937 Michigan Supreme Court case of Stephenson v. Golden, 279 Mich. 710, 276 N.W. 849 (1937), upheld a suit by a receiver in his own name, quoting with approval language from an Indiana Supreme Court case. Stephenson noted: "In the absence of authority derived from the statute, or from the court ordering his appointment, a receiver has no power to sue in his own name, and that when his authority is derived from the order of the court that fact must appear by suitable averments in the complaint." (quoting Pouder v. Catterson, Receiver, 127 Ind. 434, 26 N.E. 66). Several jurisdictions have provisions that extend this power across-the-board to receivers generally. See Cal.Civ.Pro. Code §568; Okla.Stat. tit. 12, §1554. Paragraph (b) follows that model. Unless the court order says otherwise, the receiver can sue and defend in his own name.

Paragraph (c) provides that receivers have the power to collect, sue for, and compromise debts, demands, rents and claims. Rule 2.622(A)(1) of the Michigan Rules of Court currently grants this power to receivers appointed in supplementary proceedings pursuant to M.C.L. §600.6104(4). Rule 2.622(A)(1) states:

> A receiver of the property of a debtor appointed pursuant to M.C.L. §600.6104(4); MSA 27A.6104(4) has, unless restricted by special order of the court, general power and authority to sue for and collect all the debts, demands, and rents belonging to the debtor, and to compromise and settle those that are unsafe and of doubtful character.

Several statutes in the Michigan Compiled Laws currently authorize receivers to collect rents due the property held under the receivership. See, M.C.L. §600.2927 (authorizing a receiver appointed over mortgaged property to collect the rents and income from the property); M.C.L. 125.535 (authorizing a receiver appointed over real property with housing violations to collect rents and other revenue for the property).

Other jurisdictions have across-the-board provisions, applicable to all receivers, as would be paragraph (c) (subject to limitation by the court). See, e.g., Cal.Civ.Pro. Code §568 ("The receiver has, under the control of the Court, power ... to receive rents, collect debts, to compound for an compromise the same...."); N.Y.Civ.Prac. L. §6401(b); Okla.Stat.Ann. tit. 12, §1554; Tex. Code C.P. & R. §64.031(2), (3).

Several states have general provisions allowing receivers to "make transfers." See e.g., Cal.Civ.Pro. Code §568; Tex. Code C.P. & R. §64.031. Such a provision was not included in light of limitations upon the transfer and real property under the receivership. Rule 2.622(A)(4) states with regard to receivers appointed in supplementary proceedings under M.C.L. §600.6104(4), "A receiver may convert the personal property into money, but may not sell real estate of the debtor without a special order of the court." The 1902 Michigan Supreme Court case of Campau v. Detroit Driving Club, 90 N.W. 49 (Mich. 1902) invalidated a sale of personal and real property by a receiver where the sale was made without the court's permission. The court wrote:

> "When property or money is in custodia legis, the officer holding it is the mere hand of the court. His possession is the possession of the court. To interfere with his possession is to invade the jurisdiction of the court itself; and an officer so situated is bound by the orders and judgments of the court, whose agent he is; and he can make no disposition of it without the consent of his own court, express or implied." Campau, 90 N.W. at 52 (quoting Rood, Garnish. §27).

Subsection (2) is a catchall provision reserving for receivers all other powers and exemptions granted by statute, court rule, or court order. Case law support for this section comes from the 1931 Michigan Supreme Court case of Woodliff v. Frechette, 254 Mich. 328, 236 N.W. 799 (1931). That case held: "As such receiver, he is the arm of the court. He derives his authority as much receiver from the statutes and rules of court, the order appointing him, and specific orders which may from time to time be made by the court of his appointment."

Other jurisdictions have a provisions similar to proposed subsection (2). See e.g., Tex. Code C.P. & R. §64.031(5) ("Subject to the control of the court, a receiver may ... perform other acts in regard to the property as authorized by the court"); Cal.Civ.Pro. Code §568; Conn.Gen.Stat. §52-507(a); N.C.Gen.Stat. 1-507.2(1983); Okla.Stat. tit. 12, §1554. Specific statutory authorizations cover a wide range of activities. These include the special powers of receivers of corporations. M.C.L. §600.3610; the power to carry on a business, M.C.L. §331.8(c) (receiver appointed over hospitals); and the power to make leases, M.C.L. §125.1255(1)(e).

The provision reserving all exemptions granted receivers is intended to accommodate statutes such as M.C.L. §339.2503. That section excludes receivers from the provisions of the Occupational Code governing the licensing requirements for real estate brokers and sales persons. See M.C.L. §339.2503, Appendix A, p. 14.

DUTY TO ACCOUNT

Sec. 8(1). A receiver shall keep written accounts itemizing receipts and expenditures, and describing the property and naming the depository of receivership funds, which shall be open to inspection by any person having an apparent interest in the property. Upon motion of the receiver or of any person having an apparent interest in the property, the court may require the keeping of additional records or direct or limit inspection or require presentation of a receiver's accounts.

(2) As soon as possible after appointment, a receiver shall return to the court an inventory of all property received.

(3) A receiver shall file with the clerk of the court a semi-annual report setting forth a summary of the actions of the receivership for the preceding six months and a description of the present condition and prospects of all property subject to the receivership. This report shall be filed within sixty days after the end of each six month period of an ongoing receivership.

(4) Prior to the termination of a receivership, the receiver shall file with the clerk of the court a final accounting. The final accounting shall include:

(a) the initial inventory as required under subsection (2);

(b) the semi-annual reports as required under subsection (3);

(c) a listing of all court orders relating to the receivership;

(d) a final inventory of all property subject to the

receivership;

(e) a schedule of the distribution of the property as approved by the court;

(f) such other matter as required by the court.

Notification of the filing of the final accounting shall be given to the office of the attorney general and to the sureties on the receiver's bond.

Commentary

This section, requiring various forms of accounting by the receiver, is supported by Michigan case law. The Michigan Supreme Court ruled in the 1937 case of Stephenson v. Golden, 279 Mich. 710, 276 N.W. 849, 871 (1937):

> "A receiver should account to the court which appointed him for all property coming into his hands as receiver." Pontiac Trust Co. v. Newell, 266 Mich. 490, 254 N.W. 178.
>
> "Where property or funds have come into the hands of a receiver as such he is required to account to the court which appointed him for all property or assets which he received by virtue of his appointment." 53 C.J. pp. 366, 367.

The Michigan Supreme Court cases of In re Hudson, 278 Mich. 299, 271 N.W. 576 (1937), and Union Trust Co. v. Marsh, 250 Mich. 561, 231 N.W. 77 (1930), also support the view that a receiver must make a full accounting of assets.

Michigan case law does not, however, specify the manner in which accounts are to be taken and examined. The provisions of subsection (1), requiring the keeping of accounting records, is modeled after N.Y.Civ.Prac. L. §6404. That provision states:

> A temporary receiver shall keep written accounts itemizing receipts and expenditures, and describing the property and naming the depository of receivership funds, which shall be open to inspection by any person having an apparent interest in the property. Upon motion of the receiver or of any person having an apparent interest in the property, the court may require the keeping of particular records or direct or limit inspection or require presentation of a temporary receiver's accounts. Notice of a motion for the presentation of a temporary receiver's accounts shall be served upon the sureties of his undertakings as well as upon each party.

N.Y. Bus.Corp. Law §1206(b)(1) contains a similar provision ("A receiver has the duty ... to keep true books of account of all moneys received and expended by him as receiver, which books shall be open for inspection at reasonable times by creditors or other persons interested therein").

Subsection (2) requiring the filing of an initial inventory is derived from Tex. Code C.P. & R. §64.032. This follows common practice, and other states have similar provisions. See N.C.Gen.Stat. 1-507.3 (inventory within 30 days).

Subsection (3) requiring a semi-annual summary of developments is modeled after Conn.Gen.Stat. §52-508. It would impose a new requirement.

Subsection (4) deals with the final accounting. That subsection is modeled in part on N.Y. Bus.Corp. Law §1216. The final accounting would incorporate all previous reports and add a final accounting an distribution to be approved by the court. Notification would be given to the office of the attorney general, as it bears responsibility to the public interest in this regard, and to the surety as it bears possible financial liability for any misappropriation by the receiver.

APPENDIX A

SYNOPSIS OF PROVISIONS ON RECEIVERS

1. Receiverships for Real Property

a. over nonresidential real property or apartment buildings of more than 4 apartments, where an improvement to the property is not completed as of the date of commencement of an action to enforce a construction lien through foreclosure or in any action to foreclose a mortgage on the property, upon petition by any lien claimant or mortgagee and a finding that a substantial unpaid construction lien exists, or that the mortgage on the real property is in default and that the lien claimant, the mortgagee, or both, are likely to sustain substantial loss if the improvement is not completed -- M.C.L. §§ 570.1122 - .1123

b. over real property to correct housing law violations -- M.C.L. § 125.535

c. to take charge of real property "where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured" -- M.C.L. § 566.20

d. to take possession of real property in an action for foreclosure of assessment lien where condominium taxes are not paid — M.C.L. § 559.208

e. to prevent waste, collect rents and income where taxes or insurance premium on mortgaged property are not paid where provided for in mortgage agreement -- M.C.L. § 600.2927

f. to lease and protect property in suits for partition where it would benefit any part owner -- M.C.L. § 600.3348

g. to operate a licensed liquor establishment when a licensee dies -- M.C.L. § 436.17(3)

2. Receiverships Over State Authorized Bonds

a. to administer and operate on behalf of the township if there is default in payment upon water supply bonds -- M.C.L. §41.348

b. to administer on behalf of the municipality if there is default in payment upon sewage disposal bonds -- M.C.L. § 123.217

c. to administer and operate on behalf of the borrower if there is default in payment upon housing revenue bonds -- M.C.L. § 125.670

d. to administer on behalf of the municipality if there is default in payment upon industrial development revenue bonds -- M.C.L. § 125.1257

e. to administer and operate on behalf of the borrower if there is default in payment upon revenue bonds -- M.C.L. § 141.110

f. to administer and operate on behalf of the hospital authority if there is default in payment upon community hospital bonds -- M.C.L. § 331.8(e)(3)

g. to take, lease and maintain the industrial buildings, site, and machinery at request of holders of industrial development bonds where provided for in bond authorization -- M.C.L. § 125.1255(1)(e)

h. to take, maintain, lease, or sell project funded by economic development revenue bonds where provided for in bond authorization -- M.C.L. § 125.2023(m)

i. to take, lease, and maintain project funded by forest improvement district bonds where provided for in bond authorization -- M.C.L. § 320.1701

j. to operate the hospital facilities upon default in payment upon hospital finance authority bonds where provided for in bond authorization -- M.C.L. § 331.57a

k. to take, lease, and maintain facility at request of holders of building revenue bonds where provided for in board resolution authorizing the obligations -- M.C.L. § 830.418

3. Receiverships for Violations of Regulatory Statutes

a. upon a proper showing for violation of motor vehicle service and repair act -- M.C.L. § 257.1323

b. if defendant is about to remove, conceal, or dispose of assets to the detriment of a class of plaintiffs in an action under the Consumer Protection Act -- M.C.L. § 445.911(4)

c. upon proper showing of a present or future violation of the Franchise Act -- M.C.L. § 445.1535

d. upon proper showing of a present or future violation of the Securities Act -- M.C.L. § 451.808

e. upon determination by department of licensing and regulation that a registrant providing funeral services pursuant to a prepaid funeral contract has insufficient funds in escrow to meet the obligations -- M.C.L. § 328.233

f. to manage cemeteries for violation of Cemetery Act [?] — M.C.L. § 600.2926a, § 456.529

4. Receiverships for Family Matters

a. upon default of payment of judgment for alimony and child support — M.C.L. § 552.27

b. to carry out a judgment in a paternity suit — M.C.L. § 722.719(5)

5. Receiverships to Aid in Enforcement of Judgments

a. to enforce judgments for money in general — M.C.L. § 600.6104

b. to enforce judgments of division of partnership assets — M.C.L. § 449.28

c. in an action by a creditor when execution upon a judgment against a corporation is returned unsatisfied — M.C.L. § 600.3610

6. Receiverships for the Dissolution and Management of Major Organizations

a. state official may be appointed receiver over nursing homes to protect the health and safety of patients when suspension or revocation of license is certain or has occurred — M.C.L. § 333.21751

b. over residential health care facilities to protect health and safety of patients where license has been revoked — M.C.L. § 400.613

c. over business development corporations when undergoing reorganization — M.C.L. § 487.862

d. over corporations when undergoing reorganization where provided for in charter — M.C.L. §§ 450.1204 - .1205

e. over fraternal benefit societies for delinquency but appointment action must be brought by attorney general — M.C.L. § 500.8085

f. over insurance companies for delinquency but receiver must be insurance commissioner — M.C.L. §§ 500.7833 - .7868

g. over religious organizations for fraud, misapplication of funds, illegal acquisition or use of property or propagating vicious principles but appointment action must be brought by attorney general — M.C.L. § 450.180

7. Receiverships for Dissolution of Insolvent Financial Institutions

a. over banks for insolvency or failure to submit to inspection or pay deposits but receiver must be FDIC -- M.C.L. § 487.551

b. over savings and loan associations for insolvency, legal violation, or concealment of books but appointment action must be brought by attorney general -- M.C.L. § 489.831

c. over credit unions for involuntary dissolution but receiver must be a league, national credit union administrator, or person designated by commissioner -- M.C.L. § 490.20

d. over people licensed to sell checks "whenever a licensee has refused or is unable to pay its obligations ... or whenever it appears to the commissioner that a licensee is in an unsafe or unsound condition." Receiver can take possession of books and records and conserve assets and ensure payment of instruments issued by the licensee but attorney general must represent the commissioner at appointment action -- M.C.L. § 487.912a

8. Receiverships for Insolvent Corporations and Corporations That Have Lost Their Rights

a. temporary receiver upon insolvency or court determination that dissolution would be beneficial to stockholders and not injurious to public -- M.C.L. §§ 600.3505 - .3510

b. in an action by a creditor, when necessary to enforce a liability of the directors, trustees or other superintending officers of a corporation that has been involuntarily dissolved -- M.C.L. §§ 600.3515 - .3520

c. appointment of receiver over corporation with expired charter to wind up affairs of corporation -- M.C.L. § 600.3520

d. after judgment against a corporation in quo warranto proceedings -- M.C.L. § 600.4531

9. Receivership for Payment to Creditors

a. assignments for benefit of creditors where available at common law -- M.C.L. §§ 600.5201 - .5305

b. assignments of future wages where debtor is unable to pay debts -- M.C.L. §§ 600.5301 -.5371

10. Receiverships to Recover Costs of Incarceration from Prisoners

a. over property of state prisoners to prevent disposal of property to recover costs of incarceration — M.C.L. § 800.404a

b. over property of county prisoners to prevent disposal of property to recover costs of incarceration — M.C.L. § 801.88

11. Miscellaneous

a. excludes receivers from the provisions of the Occupational Code regulating licensing requirements of real estate brokers and salespersons — M.C.L. § 339.2503

b. makes it a felony to try to bribe a receiver or for a receiver to take a bribe — M.C.L. §§ 750.119 - .120

12. General Receivership Provision

a. provides for appointment as allowed by law, requirement of bond, charge of receiver, and termination — M.C.L. § 600.2926

13. Michigan Rules of Court

a. governs powers and duties of receivers appointed in supplementary proceedings pursuant to M.C.L. § 600.6104(4) - M.C.R. 2.622

b. permits suits by receivers appointed in actions to dissolve corporations pursuant to M.C.L. §§ 600.3501 - .3515 - M.C.R. 3.611

APPENDIX A

STATUTORY PROVISIONS

41.348 Payment of principal and interest on bonds; default, appointment of receiver.

Sec. 18. If there be any default in the payment of the principal of or interest upon any of said bonds, any court having jurisdiction in any proper action may appoint a receiver to administer and operate on behalf of the township, under the direction of said court, any such water supply and sewage disposal system and revenues of which are pledged to the payment of such principal and interest; and by and with the approval of said court, to fix and charge rates and collect revenues sufficient to provide for the payment of any bonds or other obligations outstanding against the revenues of said water supply and sewage disposal system and for the payment of expenses of operating and maintaining the same and to apply the income and revenues of said water supply and sewage disposal system in conformity with this act and the ordinance providing for the issuance of such bonds and in accordance with such orders as the court shall make.

History: Add. 1951, p. 271, Act 201, Imd. Eff. June 14

123.217 Action by trustee and bondholders.

Sec. 17. Action by trustee and bondholders. Any holder of any of such bonds or any of the coupons attached thereto, and the trustee, if any, except to the extent the rights herein given may be restricted by said ordinance or by resolution passed before the issuance of the bonds or by the trust indenture, may, either at law or in equity, by suit, action, mandamus or other proceeding protect and enforce any and all rights granted hereunder or under such ordinance, resolution or trust indenture and may enforce and compel performance of all duties required by this act or by such ordinance, resolution or trust indenture to be performed by the municipality issuing the bonds or any board or officer thereof, including the making and collecting of reasonable and sufficient charges and rates for services rendered by the works. If there be any failure to pay the principal or interest of any of the bonds on the date therein named for such payment, any court having jurisdiction of the action may appoint a receiver to administer the works on behalf of the municipality and the bondholders and/or trustee, except as restricted by said ordinance, resolution or trust indenture, with power to charge and collect rates sufficient to provide for the payment of the expenses of maintenance, operation and repair and also to pay any bonds and interest outstanding and to apply the revenues in conformity with this act and the said ordinance, resolution and/or trust indenture.

History: CL 1948, 123.217

125.535 Receiver; appointment, termination; purpose; powers; expenses.

Sec. 135. (1) When a suit has been brought to enforce this act against the owner the court may appoint a receiver of the premises.

(2) When the court finds that there are adequate grounds for the appointment of a receiver, it shall appoint the municipality or a proper local agency or officer, or any competent person, as receiver. In the discretion of the court no bond need be required. The receivership shall terminate at the discretion of the court.

(3) The purpose of a receivership shall be to repair, renovate and rehabilitate the premises as needed to make the building comply with the provisions of this act, and where ordered by the court, to remove a building. The receiver shall promptly comply with the charge upon him in his official capacity and restore the premises to a safe, decent and sanitary condition, or remove the building.

(4) Subject to the control of the court the receiver shall have full and complete powers necessary to make the building comply with the provisions of this act. He may collect rents, and other revenue, hold them against the claim of prior assignees of such rents, and other revenue, and apply them to the expenses of making the building comply with the provisions of this act. He may manage and let rental units, issue receivership certificates, contract for all construction and rehabilitation as needed to make the building comply with the provisions of this act, and exercise other powers the court deems proper to the effective administration of the receivership.

(5) When expenses of the receivership are not otherwise provided for, the court may enter an order approving the expenses and providing that there shall be a lien on the real property for the payment thereof. The provisions of subsection (7) of section 134 as to the contents and filing of an order are applicable to the order herein provided for.

History: Add 1968, p 492, Act 286, Eff Nov 15

125.670 Receiver; appointment; powers and duties.

Sec. 20. If there shall be any default in the payment of the principal of or interest upon any such bonds authorized pursuant to this act, any court having jurisdiction in any proper action may appoint a receiver to administer and operate the project or combined projects on behalf of the borrower, under the direction of the court and by and with the approval of the court, to fix and charge rents and collect revenues sufficient to provide for the payment of any bonds or other obligations outstanding against the project or combined projects and for the payment of the expense of operating and maintaining the same and to apply the revenues of the project or combined projects in conformity with this act and the ordinance providing for the issuance of such bonds and in accordance with such orders as the court shall make.

History: CL 1948, 125.670.—Am 1970, p 669, Act 249, Imd. Eff Dec. 30

125.1255 Resolution authorizing issuance of bonds; contents.

Sec. 5. (1) Any resolution authorizing the issuance of bonds under this act may contain covenants as to

(a) The use and disposition of the rentals received under the agreement, including the creation and maintenance of reserves.

(b) The issuance of other or additional bonds payable from the income and revenues from the industrial building and site and any industrial machinery and equipment.

(c) The maintenance and repair costs of the industrial building and site and any industrial machinery and equipment, which costs may be assumed by the lessee, person, firm or corporation, in which event no provision need be made for rental payments to meet said costs.

(d) The insurance to be carried thereon and the use and disposition of insurance moneys.

(e) The terms and conditions upon which the holder of the bonds, or any portion thereof or any trustees therefor, shall be entitled to the appointment of a receiver by the circuit court, which court shall have jurisdiction in such proceedings, and which receiver may enter and take possession of the industrial building and site and any industrial machinery and equipment and lease and maintain it, prescribe rentals and collect, receive and apply all income and revenues thereafter arising therefrom in the same manner and to the same extent as the municipality might do.

(2) Any resolution authorizing the issuance of bonds under this act may provide that the principal of and interest on any bonds issued shall be secured by a mortgage or deed of trust covering the industrial building and site and any industrial machinery and equipment for which the bonds are issued and may include any additions, improvements or extensions thereafter made. The mortgage or deed of trust may contain such covenants and agreements to properly safeguard the bonds as may be provided for in the resolution authorizing the bonds but not inconsistent with this act and shall be executed in the manner provided in the resolution. The resolution may provide for the appointment of 1 or more trustees for bondholders, and any such trustee may be an individual or corporation domiciled or located within or without the state and may be given appropriate powers whether with or without the execution of a mortgage or deed of trust covering the industrial building or site or industrial machinery and equipment.

(3) The provisions of this act and any resolution and any mortgage or deed of trust shall continue in effect until the principal of and the interest on the bonds has been fully paid and the duties of the municipality and its governing body and officers under this act and any resolution and any mortgage or deed of trust shall be enforceable by any bondholder by mandamus, foreclosure of the mortgage or deed of trust or other appropriate action in any court of competent jurisdiction.

(4) The resolution authorizing the bond shall provide that the bonds shall contain a recital that they are issued pursuant to this act, which recital shall be conclusive evidence of their validity and of the regularity of their issuance.

(5) Any resolution authorizing the issuance of bonds under this act shall not be effective until publication once in a newspaper of general circulation within the municipality.

History: New 1963, p 72, Act 62, Imd Eff May 8.—Am 1966, p 628, Act 340, Imd Eff Sept 21.—Am 1967, p 67, Act 45, Imd Eff June 14

125.1257 Default; receiver.

Sec. 7. If there is any default in the payment of principal of or interest on any bond issued hereunder, any circuit court having jurisdiction of the action may appoint a receiver to administer the industrial building and site and any industrial machinery and equipment on behalf of the municipality, with power to charge and collect rents sufficient to provide for the payment of any bonds outstanding, and for the payment of operating expenses and to apply the income and revenue in conformity with this act and the resolution made hereunder.

History: New 1963, p 72, Act 62, Imd Eff May 8.—Am 1966, p 629, Act 340, Imd Eff Sept 21

MICHIGAN STRATEGIC FUND ACT

Caption editorially supplied

Cross References

Industrial development, see § 125.1251.

Library References

States ⇐12.
C.J.S. States § 228.
M.I. P. State § 3.

P.A.1984. No. 270, Eff. March 29. 1985

AN ACT relating to the economic development of this state; to create the Michigan strategic fund and to prescribe its powers and duties; to transfer and provide for the acquisition and succession to the rights, properties, obligations, and duties of the job development authority and the Michigan economic development authority to the Michigan strategic fund; to provide for the expenditure of proceeds in certain funds to which the Michigan strategic fund succeeds in ownership; to provide for the issuance of, and terms and conditions for, notes and bonds of the Michigan strategic fund; to exempt the property, income, and operation of the fund and its bonds and notes, and the interest thereon, from certain taxes; to provide for the creation of certain centers within and for the purposes of the Michigan strategic fund; to provide for the creation and funding of certain accounts for certain purposes; to impose certain powers and duties upon certain officials, departments, and authorities of the state; to provide penalties; and to repeal certain acts and parts of acts.

(8) A resolution authorizing notes or bonds may contain any or all of the following covenants which shall be a part of the contract with the holders thereof:

(a) A pledge of all or a part of the fees, charges, and revenues made or received by the fund, or all or a part of the money received in payment of lease rentals, or loans and interest thereon, and other money received or to be received to secure the payment of the notes or bonds or of an issue thereof, subject to agreements with bondholders or noteholders as may then exist.

(b) A pledge of all or a part of the assets of the fund, including leases, or notes or mortgages and obligations securing the same to secure the payment of the notes or bonds or of an issue of notes or bonds, subject to agreements with noteholders or bondholders as may then exist.

(c) A pledge of a loan, grant, or contribution from the federal, state, or local government, or source in aid of a project as provided for in this act.

(d) A pledge of money directly derived from payments from the heritage trust fund created by the heritage trust fund act of 1982, Act No. 327 of the Public Acts of 1982, being sections 318.421 to 318.434 of the Michigan Compiled Laws.

(e) The use and disposition of the revenues and income from leases, or from loans, notes, and mortgages owned by the fund.

(f) The establishment and setting aside of reserves or sinking funds and the regulation and disposition thereof subject to this act.

(g) Limitations on the purpose to which the proceeds of sale of the notes or bonds may be applied and limitations on pledging those proceeds to secure the payment of other bonds or notes.

(h) Authority for and limitations on the issuance of additional notes or bonds for the purposes provided for in the resolution and the terms upon which additional notes or bonds may be issued and secured. Additional bonds pledging money derived from the heritage trust fund as provided in subdivision (d) may only be issued if such issuance meets the requirements of section 204 of the resolution adopted by the Michigan economic development authority authorizing issuance of its bonds dated December 1, 1982 and any requirement of former Act No. 70 of the Public Acts of 1982, provided that the foregoing requirements shall not be applicable if such bonds have been defeased.

(i) The procedure, if any, by which the terms of a contract with noteholders or bondholders may be amended or abrogated, the number of noteholders or bondholders who are required to consent thereto, and the manner in which the consent may be given.

(j) Vest in a trustee, or a secured party, such property, income, revenues, receipts, rights, remedies, powers, and duties in trust or otherwise as the fund may determine necessary or appropriate to adequately secure and protect noteholders and bondholders or to limit or abrogate the rights of the noteholders and bondholders. A trust agreement may be executed by the fund with any trustee who may be located inside or outside this state to accomplish any of the foregoing.

(k) Pay maintenance and repair costs of a project.

(*l*) The insurance to be carried on a project and the use and disposition of insurance money and condemnation awards.

(m) The terms, conditions, and agreements upon which the holder of the bonds, or a portion thereof, shall be entitled to the appointment of a receiver by the circuit court. A receiver who is appointed may enter and take possession of the project and maintain it or lease or sell the same for cash or on an installment sales contract and prescribe rentals and payments therefor and collect, receive, and apply all income and revenues thereafter arising in the same manner and to the same extent as the fund.

(n) Any other matters, of like or different character, which in any way affect the security or protection of the notes or bonds.

141.110 Receiverships for public improvements.

Sec. 10. If there be any default in the payment of the principal of or interest upon any of said bonds, any court having jurisdiction in any proper action may appoint a receiver to administer and operate on behalf of the borrower, under the direction of said court, any public improvement the revenues of which are pledged to the payment of such principal and interest; and by and with the approval of said court, to fix and charge rates and collect revenues sufficient to provide for the payment of any bonds or other obligations outstanding against the revenues of said public improvement and for the payment of the expenses of operating and maintaining the same and to apply the income and revenues of said public improvement in conformity with this act and the ordinance providing for the issuance of such bonds and in accordance with such orders as the court shall make.

History: Am. 1946, 1st Ex. Sess., p. 49, Act 23, Eff. June 7, —C.L. 1948, 141.110

257.1323 Action by attorney general or county prosecutor.

Sec. 23. If it appears that a person has engaged, is engaging, or is about to engage in a method, act, or practice in violation of this act or the rules promulgated hereunder, the attorney general or county prosecutor, may after receiving notice of an alleged violation of this act, with or without prior administrative proceedings having occurred, bring an action in the name of the people of this state to enjoin that method, act, or practice. The action shall be brought in the county where the person resides, or does business. If a person is not established in any one county, the action may be brought in Ingham county. Upon a proper showing, temporary or permanent injunctions may be issued including the appointment of a receiver or conservator. The state is not required to post a bond in a court proceeding. In addition the court may suspend or revoke a registration, certificate, or permit.

History: New 1974, p. 1146, Act 300, Eff. Apr. 1, 1975

320.1701. Bond authorization resolution; provisions

Sec. 701. A resolution authorizing bonds to be issued under the power granted in section 413 [1] may contain provisions, which shall be part of the contract with the holders of the bonds, as to:

(a) The use and disposition of the payments received under the agreement, including the creation and maintenance of reserves.

(b) The issuance of other or additional bonds of equal standing with bonds of a district already issued.

(c) The insurance to be carried on the forest improvement project and the use and disposition of insurance money.

(d) The terms and conditions upon which the holder of the bonds, or a portion of the bonds, or a trustee of the bonds, shall be entitled to the appointment of a receiver by a court which has jurisdiction in those proceedings, who may enter and take possession of the forest improvement project and lease and maintain it, prescribe rentals, and collect, receive, and apply all income and revenues thereafter arising in the same manner and to the same extent as a district may do under this act.

P.A.1980, No. 298, § 701, Imd. Eff. Oct. 21.

[1] Section 320.1413.

328.233 Insufficient funds in escrow; appointment of receiver; liquidation

Text effective July 1, 1987

Sec. 23. If the department determines that a registrant has not complied with the investment and depositing requirements of this act and that insufficient funds are available in escrow accounts to meet the obligations of prepaid funeral contracts, the department may petition the circuit court of the county of the registrant's principal place of business or the county of Ingham for appointment of a receiver. After notice to the registrant and a hearing and upon its concurrence in the findings of the department, the court shall appoint a receiver who shall, under conditions as may be prescribed by the court, take into possession the assets of the registrant for the purpose of liquidation. In the order of liquidation, the court shall make provision for notice to creditors, filing of claims, and all other details necessary for an estate in receivership. Any remaining funds held in escrow pursuant to this act shall be regarded as belonging to contract buyers or contract beneficiaries according to their interests and shall be distributed to these entities pro rata on the basis of the amount of funds paid by the contract buyers and shall not be available to general creditors of the estate.

P A 1986, No. 255 § 23, Eff. July 1, 1987

331.8e Bonds; creation of lien in authorizing resolution; nature and effect of lien; default; receiver.

Sec. 8e. (1) There shall be created in the authorizing resolution a lien, by this act made a statutory lien upon all net revenues, including as a part thereof, the assessments against a member city, township, or village as provided in this act pledged to the payment of the principal of and interest on the bonds, to and in favor of the holders of the bonds and the interest coupons pertaining thereto. This lien shall be a first lien upon the revenues and amounts pledged, except where a prior lien exists, then the new lien shall be subject thereto.

(2) The revenues and amounts so pledged shall be and remain subject to the statutory lien until the payment in full of the principal of and interest upon the bonds. The holder or holders of bonds representing in the aggregate not less than 20% of the entire issue then outstanding may by suit, action, or other proceeding protect and enforce the statutory lien and enforce and compel the performance of all duties of the officials of the hospital authority, including the fixing of sufficient rates, the collection of revenues, the proper segregation of revenues, the proper application thereof, and the imposition and collection of assessments against a member city, township, or village assessed in accordance with this act. However, the statutory lien shall not be construed to give the holders or owners of a bond or coupon authority to compel the sale of any of the hospitals the revenues of which are pledged.

(3) If a payment of principal or interest on the bonds is in default, a court having jurisdiction in any proper action may appoint a receiver to administer and operate on behalf of the hospital authority, under direction of the court, any hospital the revenues of which are pledged to the payment of principal and interest. With the approval of the court the receiver may fix and charge rates and collect revenues sufficient to provide for the payment of bonds or other obligations outstanding against the revenues of the hospital, and for the payment of operating and maintenance expenses, and to apply the income and revenues of the hospital in conformity with this act, the resolution providing for the issuance of the bonds, and in accordance with orders of the court.

History: Add 1973, p 651, Act 161, Imd Eff Dec 14

331.57a Hospital loan from local authority; purpose; requirements; security; appointment of receiver; limitation on loan; repayment; interest.

Sec. 27a. A local authority may lend money to hospitals for the payment of project costs. A hospital loan shall not be made unless the local authority is reasonably satisfied that there will be made available to the hospital from the hospital loan and other sources all the funds necessary to pay the project costs; that the hospital facility and other revenues pledged will produce sufficient revenues to meet the principal and interest on the hospital loan, other costs, expenses, and charges connected with the loan, and other charges or obligations of the hospital which may be prior or equal to the loan promptly as they become due; and the hospital is otherwise soundly financed. The hospital loan may be secured by a mortgage of hospital property, including the hospital facility, and may provide for the appointment of a receiver to operate the hospital facilities in case of default. A hospital loan made pursuant to this section shall not exceed the project costs as determined by the local authority. A loan shall be secured in a manner, be repaid in a period not exceeding 50 years, and bear interest at a rate, as determined by the local authority. The rate may be decreased or increased so that it is not less than the rate paid by the local authority on notes, renewal notes, or bonds issued to fund the loan.

History: Add 1975, p 615, Act 277, Imd Eff July 3

333.21751 Emergency petition to place nursing home under control of receiver; appointment of receiver; use of income and assets; major structural alteration; consultation; termination of receivership; accounting; disposition of surplus funds.

Sec. 21751. (1) When the department has concluded a proceeding under sections 71 to 106 of the administrative procedures act of 1969, as amended, being sections 24.271 to 24.306 of the Michigan Compiled Laws, or when the department has suspended or revoked the license of a nursing home, the department, a patient in the facility, or a patient's representative may file an emergency petition with the circuit court to place the nursing home under the control of a receiver if necessary to protect the health or safety of patients in the nursing home. The court may grant the petition upon a finding that the health or safety of the patients in the nursing home would be seriously threatened if a condition existing at the time the petition was filed is permitted to continue.

(2) The court shall appoint as receiver the director of the department of social services, the director of the department of public health, or another state agency or person designated by the director of public health. The receiver appointed by the court shall use the income and assets of the nursing home to maintain and operate the home and to attempt to correct the conditions which constitute a threat to the patients. A major structural alteration shall not be made to the nursing home, unless the alteration is necessary to bring the nursing home into compliance with licensing requirements.

(3) To assist in the implementation of the mandate of the court, the receiver may request and receive reasonable consultation from the available personnel of the department.

(4) The receivership shall be terminated when the receiver and the court certify that the conditions which prompted the appointment have been corrected, when the license is restored, when a new license is issued, or, in the case of a discontinuance of operation, when the patients are safely placed in other facilities, whichever occurs first.

(5) Upon the termination of the receivership, the receiver shall render a complete accounting to the court and shall dispose of surplus funds as the court directs.

History: Add 1978, p 2010, Act 495, Eff Mar 30, 1979

339.2503. Scope and application of article

Sec. 2503. (1) This article shall not apply to an individual, partnership, association, or corporation, who as owner, sells or offers for sale a detached, single family dwelling, duplex, triplex, or quadruplex, which has never been occupied and which was built by the individual, partnership, association, or corporation while licensed under article 24.[1] This article does not apply to an individual, partnership, association, or corporation, who as owner or lessor or as attorney-in-fact acting under a duly executed and recorded power of attorney from the owner or lessor, or who has been appointed by a court, performs an act as a real estate broker or real estate salesperson with reference to property owned by it, unless performed as a principal vocation not through a licensed real estate broker.

(2) This article shall not include the services rendered by an attorney at law as an attorney at law, nor shall it include a receiver, trustee in bankruptcy, administrator, executor, a person selling or appraising real estate under order of a court, nor a trustee selling under a deed of trust. This exemption of a trustee shall not apply to repeated or successive sales of real estate by the trustee, unless the sale is made through a licensed real estate broker.

P.A 1980, No. 299, § 2503, Imd. Eff. Oct. 21.

[1] Section 339.2401 et seq.

400.613 Revocation of license of residential health care facility; petition for appointment of receiver; order; appointment, compensation, and powers and duties of receiver.

Sec. 13. (1) As a means of protecting the health, safety, and welfare of patients in a residential health care facility, including hospitals, nursing homes, and other institutions reimbursed for resident or patient care by the medical assistance program established by Act No. 280 of the Public Acts of 1939, as amended, if the license of a residential health care facility is revoked for violation of this act, the attorney general may file a petition with the circuit court for the county of Ingham or the circuit court in the county in which the residential health care facility is located for the appointment of a receiver.

(2) The circuit court shall issue an order to show cause why a receiver should not be appointed returnable within 5 days after the filing of the petition.

(3) If the court finds that the facts warrant the granting of the petition, the court shall appoint a receiver to take charge of the residential health care facility. The court may determine fair compensation for the receiver.

(4) A receiver appointed pursuant to this section shall have the powers and duties prescribed by the court not inconsistent with section 2926 of Act No. 236 of the Public Acts of 1961, being section 600.2926 of the Michigan Compiled Laws. The receiver may correct an act prohibited by this act or required under Act No. 280 of the Public Acts of 1939, as amended.

History: New 1977, p 169, Act 72, Imd. Eff. July 27

436.17. Liquor licenses

Issuance; fees, bonds, liability insurance

Sec. 17. (1) The commission may issue licenses, as provided in this act, upon the payment of the fees provided in section 19 [1] and the filing of the bonds required in section 22,[2] or liability insurance as provided in section 22a.[3]

(2) The commission shall issue licenses to manufacturers only when 25% or more of the capital stock is owned by residents of this state, except that these limitations shall not apply to manufacturers of wine or beer or malt beverages or to distillers or rectifiers.

Full-year licenses, expiration, construction as contract; death of licensee, operation pending settlement of estate; receivers or trustees; part-year licenses, resorts; transfer; licenses for sale of beer, wine, or spirits for consumption on premises, approval by local legislative body; names, addresses, and phone numbers; revocation

(3) A full-year license issued by the commission shall expire on April 30 following the date of issuance or the date fixed by the commission. A license issued under this act shall be construed to be a contract between the commission and the licensee and shall be signed by both parties. When a licensee dies, the commission may approve the operation of the establishment by a personal representative or independent personal representative duly appointed by the proper court, pending the settlement of the estate of the deceased licensee. The commission may approve a receiver or trustee appointed by a proper court to operate the licensed establishment of a licensee of the commission. The commission may grant a part-year license for a proportionate part of the license fee specified in section 19. In a resort area the commission shall grant a license for as short a period as 3 months. A license may be transferred with the consent of the commission. A class C or specially designated distributor license obtained other than by transfer shall not be transferred within 3 years after its issuance except if the licensee clearly and convincingly shows that unusual hardship will result if the transfer is not consented to by the commission. Except as provided in section 17b,[4] an application for a license to sell beer and wine or spirits for consumption on the premises, except in a city having a population of 1,000,000 or more, shall be approved by the local legislative body in which the applicant's place of business is located before the license is granted by the commission, except that in the case of an application for renewal of an existing license, if an objection to a renewal has not been filed with the commission by the local legislative body not less than 30 days before the date of expiration of the license, the approval of the local legislative body shall not be required. The commission shall provide the local legislative body and the local chief of police with the name, home and business addresses, and home and business phone numbers to accomplish the local legislative reviews of new and transferred license applications called for in this subsection. Upon request of the local legislative body after due notice and proper hearing by the local legislative body and the commission, the commission shall revoke the license of a licensee granted a license to sell beer, wine, or spirits for consumption on the premises, or the commission shall revoke any permit issued by the commission which is held in conjunction with a license to sell beer, wine, or spirits for consumption on the premises.

445.909 Publication, public inspection and copying, and distribution of rules, final judgments, assurance of discontinuance, and other matters; request; fee.

Sec. 9. (1) The attorney general shall publish, make available for public inspection and copying during business hours, and distribute by subscription upon the request of any person:

(a) Rules promulgated under section 3 (2).

(b) Copies of final judgments rendered under this act provided to the attorney general by clerks of the courts pursuant to section 12 (1).

(c) Any other matter as required by Act No. 306 of the Public Acts of 1969, as amended.

(d) An assurance of discontinuance entered into pursuant to section 6.

(2) The attorney general may charge a reasonable fee to cover the expense of copying or distribution.

History: New 1976, p 1169 Act 331 Eff Apr 1, 1977

445.910 Class action by attorney general for actual damages; order; hearing; receiver; sequestration of assets; cost of notice; limitations.

Sec. 10. (1) The attorney general may bring a class action on behalf of persons residing in or injured in this state for the actual damages caused by any of the following:

(a) A method, act, or practice in trade or commerce defined as unlawful under section 3.

(b) A method, act, or practice in trade or commerce declared to be unlawful under section 3 (1) by a final judgment of the circuit court or an appellate court of this state which is either reported officially or made available for public dissemination pursuant to section 9 by the attorney general not less than 30 days before the method, act, or practice on which the action is based occurs.

(c) A method, act, or practice in trade or commerce declared by a circuit court of appeals or the supreme court of the United States to be an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the federal trade commission act, 15 U.S.C. 45(a)(1), in a decision which affirms or directs the affirmance of a cease and desist order issued by the federal trade commission if the order is final within the meaning of section 5(g) of the federal trade commission act, 15 U.S.C. 45(g), and which is officially reported not less than 30 days before the method, act, or practice on which the action is based occurs. For purposes of this subdivision, a method, act, or practice shall not be deemed to be unfair or deceptive within the meaning of section 5(a)(1) of the federal trade commission act solely because the method, act, or practice is made unlawful by another federal statute that refers to or incorporates section 5(a)(1) of the federal trade commission act.

(2) On motion of the attorney general and without bond in an action under this section the court may make an appropriate order: to reimburse persons who have suffered damages; to carry out a transaction in accordance with the aggrieved persons' reasonable expectations; to strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result; or to grant other appropriate relief. The court after a hearing may appoint a receiver or order sequestration of the defendant's assets if it appears to the satisfaction of the court that the defendant threatens or is about to remove, conceal, or dispose of his assets to the detriment of members of the class.

(3) If at any stage of the proceedings the court requires that notice be sent to the class, the attorney general may petition the court to require the defendant to bear the cost of the notice. In determining whether to impose the cost on the defendant or the state, the court shall consider the probability that the attorney general will succeed on the merits of the action.

(4) If the defendant shows by a preponderance of the evidence that a violation of this act resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, the amount of recovery shall be limited to actual damages.

(5) An action shall not be brought by the attorney general under this section more than 6 years after the occurrence of the method, act, or practice which is the subject of the action nor more than 1 year after the last payment in a transaction involving the method, act, or practice which is the subject of the action, whichever period of time ends on a later date.

History: New 1976, p 1170, Act 331, Eff Apr 1, 1977

445.911 Action by person for declaratory judgment, injunction, or actual damages; class action by person for actual damages; order; hearing; receiver; sequestration of assets; cost of notice; limitations.

Sec. 11. (1) Whether or not he seeks damages or has an adequate remedy at law, a person may bring an action to do either or both of the following:

(a) Obtain a declaratory judgment that a method, act, or practice is unlawful under section 3.

(b) Enjoin in accordance with the principles of equity a person who is engaging or is about to engage in a method, act, or practice which is unlawful under section 3.

(2) Except in a class action, a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages or $250.00, whichever is greater, together with reasonable attorneys' fees.

(3) A person who suffers loss as a result of a violation of this act may bring a class action on behalf of persons residing or injured in this state for the actual damages caused by any of the following:

(a) A method, act, or practice in trade or commerce defined as unlawful under section 3.

(b) A method, act, or practice in trade or commerce declared to be unlawful under section 3(1) by a final judgment of the circuit court or an appellate court of this state which is either reported officially or made available for public dissemination pursuant to section 9 by the attorney general not less than 30 days before the method, act, or practice on which the action is based occurs.

(c) A method, act, or practice in trade or commerce declared by a circuit court of appeals or the supreme court of the United States to be an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the federal trade commission act, 15 U.S.C. 45(a)(1), in a decision which affirms or directs the affirmance of a cease and desist order issued by the federal trade commission if the order is final within the meaning of section 5(g) of the federal trade commission act, 15 U.S.C. 45(g), and which is officially reported not less than 30 days before the method, act, or practice on which the action is based occurs. For purposes of this subdivision, a method, act, or practice shall not be deemed to be unfair or deceptive within the meaning of section 5(a)(1) of the federal trade commission act solely because the method, act, or practice is made unlawful by another federal statute that refers to or incorporates section 5(a)(1) of the federal trade commission act.

(4) On motion of a person and without bond in an action brought under subsection (3) the court may make an appropriate order: to reimburse persons who have suffered damages; to carry out a transaction in accordance with the aggrieved persons' reasonable expectations; to strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result; or to grant other appropriate relief. The court after a hearing may appoint a receiver or order sequestration of the defendant's assets if it appears to the satisfaction of the court that the defendant threatens or is about to remove, conceal, or dispose of his assets to the detriment of members of the class.

(5) If at any stage of proceedings brought under subsection (3) the court requires that notice be sent to the class, a person may petition the court to require the defendant to bear the cost of notice. In determining whether to impose the cost on the defendant or the plaintiff, the court shall consider the probability that the person will succeed on the merits of his action.

(6) If the defendant shows by a preponderance of the evidence that a violation of this act resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, the amount of recovery shall be limited to actual damages.

(7) An action under this section shall not be brought more than 6 years after the occurrence of the method, act, or practice which is the subject of the action nor more than 1 year after the last payment in a transaction involving the method, act, or practice which is the subject of the action, whichever period of time ends at a later date. However, when a person commences an action against another person, the defendant may assert, as a defense or counterclaim, any claim under this act arising out of the transaction on which the action is brought.

History: New 1976, p 1171, Act 331, Eff Apr 1 1977

445.1535. Injunctions; mandamus; receivers; conservators; notice

Sec. 35. (1) Whenever it appears to the department that a person has engaged, is engaged, or is about to engage in an act or practice constituting a violation of a provision of this act or a rule or order hereunder, after notice as required in subsection (2), the department may bring an action in the name of the people in the circuit court to enjoin the acts or practices, to obtain restitution on behalf of the franchisee, or to enforce compliance with this act or a rule or order hereunder. Upon a proper showing a preliminary or permanent injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. The court shall not require the department to post a bond. The court may award costs, including reasonable costs of investigation, to the prevailing party.

(2) Unless waived by the court on good cause shown not less than 10 days before the commencement of an action under this section, the department shall notify the person of the intended action and give the person an opportunity to cease and desist from the alleged unlawful method, act, or practice or to confer with the department in person, by counsel, or by other representative as to the proposed action before the proposed filing date. The notice may be given the person by mail, postage prepaid, to the place of business listed in the notice under section 7a.[1]

(3) In an action under this section to enjoin enforcement of a provision that is void and unenforceable under section 27,[2] if the court finds that such a provision is present, there is a presumption of immediate and irreparable harm to the franchisee. Further showing shall not be required for a grant of a preliminary injunction.

P.A.1974, No. 269, § 35, Eff. Oct. 15. Amended by P.A.1984, No. 92, § 1, Eff. June 29.

449.28 Partner's interest; subject to charging order.

Sec. 28. (Partner's interest subject to charging order).

(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require;

(2) The interest charged may be redeemed at any time before foreclosure or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by any 1 or more of the partners, or

(b) With partnership property, by any 1 or more of the partners with the consent of all the partners whose interests are not so charged or sold;

(3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

History: CL 1929, 9866.—CL 1948, 449.28

450.180 Ecclesiastical corporations; articles, execution, contents; receivership; unclaimed property, state.

Sec. 180. Same; execution and contents of articles; receivership; unclaimed property to escheat to state. Excepting as herein otherwise provided, such articles shall be executed, acknowledged, filed and disposed of in the same manner and with like effect as is prescribed in section 5 of this act. Such articles may contain, among other things, specified in section 179 of this act, any provisions the incorporators may determine upon respecting the church polity or government, and the blank spaces provided for shall be filled in by words appropriate to the particular denomination or corporation being so incorporated. Such society shall not, however, by its articles, by-laws or system of discipline, permit or encourage the teaching of immoral practices or conduct or anything that is contrary to public policy; that violates the sanctity of the marital relations; that will prohibit any member of such society from appealing to the courts of the United States or the courts of this state for the enforcement of personal or property rights; that the by-laws and rules of discipline shall not be subject to civil law or decree; that encourages violating or disregarding any law of the United States or of this state. No provision shall be made in such by-laws or articles permitting such corporation to receive, accept, acquire or endeavor to secure property through fraud, misrepresentation or undue influence under the guise of religious teaching or discipline; that will permit any individual as such and not as an official of said society to acquire and hold the property thereof in his own name, or which permits any official to dictate and construe the rules of discipline or by-laws of such society without the approval of the directing board thereof, or require that such by-laws and rules be approved by him before becoming effective. Whenever proceedings in the nature of quo warranto have been or may hereafter be brought against any association or corporation organized or doing business in this state as a religious or ecclesiastical body, and when it shall appear in the information that such association or corporation has exceeded its powers, misused its franchises and privileges, committed any fraud or deception, has been guilty of any misapplication of funds or property, has secured property or donations through fraud or misrepresentation, has acquired or used property illegally, has been guilty of propagating or teaching immoral or vicious principles or doctrines or has otherwise violated the laws of this state or the United States, the attorney general may, in such proceedings, or in separate proceedings, apply to the same or any other circuit court for a receiver for the property and effects of such association or corporation, and in all such cases the court shall appoint a receiver in like manner and with like effect and powers as in insolvency proceedings as provided for in the judicature act of 1915 and any amendments thereto. All persons having any interest in the property of such association or corporation or who have conveyed, donated or contributed substantially to the funds or property of such association or corporation, may intervene in such proceedings for the purpose of obtaining restitution of such property or their just share thereof, and shall be entitled to prove their claims thereunder according to the rules and practice of the court. Any property, goods or money of such association or corporation, or held in trust by or for it, and not claimed or distributed to the creditors or other claimants whose claims have been duly proved in the proceedings herein authorized, shall escheat to the people of this state and upon the winding up of the receivership shall be conveyed to the state board of escheats, and shall be disposed of by such board as now provided by law for other escheated property.

History: CL 1948, 450.180

450.1204 Articles of incorporation; provision as to compromise, arrangement, or plan of reorganization.

Sec. 204. The articles of incorporation may contain the following provision or the substance thereof: When a compromise or arrangement or a plan of reorganization of this corporation is proposed between this corporation and its creditors or any class of them or between this corporation and its shareholders or any class of them, a court of equity jurisdiction within the state, on application of this corporation or of a creditor or shareholder thereof, or on application of a receiver appointed for the corporation, may order a meeting of the creditors or class of creditors or of the shareholders or class of shareholders to be affected by the proposed compromise or arrangement or reorganization, to be summoned in such manner as the court directs. If a majority in number representing ¾ in value of the creditors or class of creditors, or of the shareholders or class of shareholders to be affected by the proposed compromise or arrangement or a reorganization, agree to a compromise or arrangement or a reorganization of this corporation as a consequence of the compromise or arrangement, the compromise or arrangement and the reorganization, if sanctioned by the court to which the application has been made, shall be binding on all the creditors or class of creditors, or on all the shareholders or class of shareholders and also on this corporation.

History: New 1972, p 796, Act 284, Eff Jan 1, 1973

450.1205 Articles of incorporation; effect of provision as to compromise, arrangement, or plan of reorganization.

Sec. 205. (1) When the provision of section 204 is included in the original articles of incorporation of a corporation, all persons who become creditors or shareholders thereof are deemed to have become creditors or shareholders subject in all respects to that provision, and it shall be binding upon them.

(2) When that provision is inserted in the articles of a corporation, by an amendment of the articles, all persons who become creditors or shareholders of the corporation after the amendment becomes effective are deemed to have become creditors or shareholders subject in all respects to that provision, and it shall be binding upon them.

(3) The circuit court may administer and enforce the provision and restrain, pendente lite, actions and proceedings against the corporation with respect to which the court so restraining has begun the administration or enforcement of the provision, and appoint a temporary receiver for the corporation and grant the receiver such powers as are deemed proper.

History: New 1972, p 796, Act 284, Eff Jan 1, 1973

451.808 Cease and desist order; injunction, restraining order, order requiring accounting or disgorgement, or writ of mandamus; appointment of receiver or conservator; bond not required; hearing; decision; order denying or revoking exemption; remedies; commencement of action or proceeding.

Sec. 408. (a) Whenever it appears to the administrator that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this act or any rule or order hereunder, it may in its discretion issue a cease and desist order or bring an action in a circuit court to enjoin the acts or practices and to enforce compliance with this act or any rule or order hereunder. Upon a proper showing a permanent or temporary injunction, restraining order, order requiring an accounting or disgorgement or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. The court may not require the administrator to post a bond.

(b) A person who has been ordered to cease and desist may file with the administrator within 15 days after service on him or her of the order a written request for a hearing. The administrator within 15 days after the filing shall issue a notice of hearing and set a date for the hearing. If a hearing is not requested by the person or is not ordered by the administrator within 15 days, the order will stand as entered. The administrator shall hold the hearing in accordance with Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws, and shall have all the powers granted thereunder. The administrator shall issue a decision sustaining, modifying, or dismissing the original order.

(c) The administrator, if it finds such action to be in the public interest and that any person has violated or is about to violate any provision of this act or any rule or order hereunder, may by order deny or revoke any exemption specified in section 402(a)(1), (6), (7), (8), (9), or (10) or section 402(b) with respect to a specific security, issuer or transaction, or a person's right to sell exempt securities or engage in exempt transactions in the future without compliance with the registration provisions of this act. The order shall list the individual exemptions revoked and the rationale for the revocation. An order may not be entered without appropriate prior notice to all interested parties, opportunity for hearing, and written findings of fact and conclusions of law, except that the administrator may by order summarily deny or revoke any of the specific exemptions pending final determination of a proceeding under this subsection. Upon the entry of a summary order the administrator shall promptly notify all interested parties that the order has been entered and the reasons therefor and that within 15 days after receipt of a written request the matter will be set down for hearing. If a hearing is not requested within 15 days and none is ordered by the administrator, the order will remain in effect until it is modified or vacated by the administrator. If a hearing is requested or ordered, the administrator, after notice of an opportunity for hearing to all interested persons, may modify or vacate the order or extend it until final determination. An order under this subsection may operate retroactively. A person does not violate section 301 or 403 by reason of any offer or sale effected after the entry of an order under this subsection if that person sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the order.

(d) None of the remedies provided for in this act are mutually exclusive and the administrator in its discretion may use as many remedies as it deems necessary. The administrator in seeking a remedy shall consider the present actions and the possibility of future violations by the parties against whom proceedings are contemplated, together with actions taken to mitigate harm to the public.

(e) The administrator shall not commence any action or proceeding under this act more than 6 years after the violation.

History: New 1964, p 434, Act 265, Eff Jan 1, 1965 — Am 1978, p 1972, Act 481, Eff Mar 30, 1979

456.529. Commissioner; hearings; subpoenas; violations of act, rule, or order; denial of application, suspension or revocation of permit or registration

Sec. 9. (1) The commissioner may hold hearings, administer oaths, take testimony under oath, and request in writing the appearance and testimony of witnesses, including the production of books and records. Upon the refusal of a witness to appear, testify, or submit books and records after a written request, the commissioner or a party to a contested case may apply to the circuit court for Ingham county for a subpoena or a subpoena duces tecum. The court shall issue a subpoena when reasonable grounds are shown.

(2) When it appears to the commissioner that a person or registrant has violated this act or a rule * * * promulgated or order issued under this act, the commissioner may do 1 or more of the following:

(a) Issue a cease and desist order.

(b) Accept an assurance of discontinuance.

(c) Bring an action in the circuit court for the county in which the person resides or in the circuit court for the county of Ingham, to enforce compliance with this act or a rule * * * promulgated or order issued under this act. Upon a proper showing, a permanent or temporary injunction or a restraining order may be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. The court shall not require the commissioner to post a bond.

(3) In addition to an action taken under this section, the commissioner may deny an application or may suspend or revoke a permit or registration * * * after a hearing as set forth in this act.

P.A.1968, No. 251, § 9, Eff. Sept. 15. Amended by P.A.1978, No. 102, § 1, Imd. Eff. April 6; P.A.1982, No. 132, § 1, Imd. Eff. April 20.

487.551 Receivership; grounds for appointment; dissolution; federal deposit insurance corporation as receiver, bond.

Sec. 251. Whenever a bank has refused to pay its deposits or obligations in accordance with the terms under which such deposits or obligations were incurred or whenever any bank becomes insolvent, or whenever any bank shall refuse to submit its books, papers and records for inspection by the commissioner or whenever it appears to the commissioner that the bank is in an unsafe or unsound condition, the commissioner shall either appoint a conservator under the provisions of section 261 or, with the attorney general representing him, shall apply to the circuit court for the county in which the bank is located for the appointment of a receiver for the bank. In any proceeding for the appointment of a receiver the commissioner shall request that the court appoint the federal deposit insurance corporation as the receiver if the deposits in the bank are insured to any extent by the corporation. The court may act upon the application forthwith and without notice to any person but if at any time it appears to the court that none of the claimed reasons for receivership did in fact exist, the receivership shall be dissolved and the proceedings terminated. If the federal deposit insurance corporation accepts the appointment as receiver, it may act as such without bond.

History: New 1969, p. 720, Act 319, Imd. Eff. Aug. 20

487.552 Receiver; powers and duties.

Sec. 252. Subject to the approval of the appointing court, a receiver shall:

(a) Take possession of the books, records and assets of every description of the bank and collect all debts, dues and claims belonging to it.

(b) Sue and defend, compromise and settle all claims involving the bank.

(c) Sell any and all real and personal property.

(d) Exercise any and all fiduciary functions of the bank as of the date of the commencement of the receivership.

(e) Pay all expenses of the receivership, which expenses shall be a first charge upon the assets of the bank and shall be fully paid before any final distribution or payment of dividends to creditors or shareholders.

(f) Pay ratably any and all debts of such bank, except that debts not exceeding $50.00 in amount may be paid in full but the holders thereof shall not be entitled to interest thereon.

(g) Repay, ratably, any amount which may have been paid in by any shareholder by reason of assessments made upon the stock of the bank by order of the commissioner in accordance with the provisions of this act.

(h) Pay, ratably, to the shareholders of the bank in proportion to the number of shares held and owned by each the balance of the net assets of the bank after payment or provision for payments as provided in subdivisions (e), (f) and (g).

(i) Borrow such sum of money as may be necessary or expedient in aiding the liquidation of the bank and in connection therewith to secure such borrowings by the pledge, hypothecation or mortgage of the assets of the bank.

(j) Exercise such other powers and duties as may be provided by the appointing court pursuant to the laws of this state applicable to the appointment of receivers by circuit court judges.

History: New 1969, p 721, Act 319, Imd Eff Aug 20

487.553 Receiver; reports to commissioner.

Sec. 253. The receiver from time to time shall report to the commissioner with respect to all of his acts and proceedings in connection with the receivership.

History: New 1969, p 721, Act 319, Imd Eff Aug 20

487.554 Receiver; bank liquidation, act provides exclusive procedures.

Sec. 254. The full and exclusive procedures for the liquidation of a bank subject to the provisions of this act shall be the procedures prescribed in this act and no receiver or other liquidating agent shall be appointed for such purpose or for any bank or its assets and property except as expressly provided in this act.

History: New 1969, p 721, Act 319, Imd Eff Aug 20

487.557 Receivership; federal deposit insurance corporation; subrogation.

Sec. 257. Whenever any bank has been closed and placed in receivership, and the federal deposit insurance corporation pays or makes available for payment the insured deposit liabilities of the closed bank, the corporation, whether or not it has become receiver thereof, is subrogated to all of the rights of the owners of the deposits against the closed bank in the same manner and to the same extent as subrogation of the corporation is provided for in the federal reserve act, as amended, in the case of the closing of a national banking association. The rights of depositors and other creditors of the closed bank shall be determined in accordance with the applicable provisions of the laws of this state.

History: New 1969, p 721, Act 319, Imd Eff Aug 20

487.561 Conservator; appointment, bond; expenses.

Sec. 261. (1) If any of the grounds set forth in section 251 authorizing the appointment of a receiver exist or whenever the commissioner deems it necessary in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the commissioner may appoint a conservator for the bank and require of him such bond and security as the commissioner deems proper.

(2) The commissioner may appoint as conservator 1 of the bank examiners of the bureau or some other competent and disinterested person. The bureau shall be reimbursed out of the assets of the conservatorship for all sums expended by it in connection with the conservatorship as expenses or otherwise, which funds shall be paid into the revolving fund provided for in section 267. Any conservator by such appointment shall become a member of the bureau. All expenses of any conservatorship shall be paid out of the assets of the bank, upon the approval of the commissioner. The expenses shall be a first charge upon the assets and shall be fully paid before any final distribution or payment of dividends to creditors or shareholders.

History: New 1969, p. 722, Act 319, Imd. Eff. Aug. 20

487.562 Conservator; powers and duties.

Sec. 262. The conservator, under the direction of the commissioner, shall take possession of the books, records and assets of every description of the bank, and take such action as may be necessary to conserve the assets of the bank pending further disposition of its business as provided by law. The conservator shall have all the rights, powers and privileges of receivers of banks appointed pursuant to this act and shall be subject to the obligations and penalties, not inconsistent with the provisions of this act with respect to conservators, to which receivers are subject. During the time that the conservator remains in possession of the bank, the rights of all parties with respect thereto, subject to the other provisions of this act with respect to conservators, shall be the same as if a receiver had been appointed. The conservator may execute the discharge of any real estate mortgage held as part of the assets of the bank.

History: New 1969, p. 722, Act 319, Imd. Eff. Aug. 20

487.563 Conservator; deposits and withdrawals, ratable basis; new deposits and assets.

Sec. 263. While a bank is in the hands of the conservator appointed by the commissioner, he may require the conservator to set aside and make available for withdrawal by depositors and payment to other creditors, on a ratable basis, such amounts as in the opinion of the commissioner may be used safely for this purpose. The commissioner may permit the conservator to receive deposits. Deposits received while the bank is in the hands of the conservator shall not be subject to any limitation as to payment or withdrawal. Such deposits and any new assets acquired on account of the deposits shall be segregated and shall be held especially for the new deposits and shall not be used to liquidate any indebtedness of such bank existing at the time that a conservator was appointed for it or any subsequent indebtedness incurred for the purpose of liquidating any indebtedness of the bank existing at the time the conservator was appointed. Deposits received while the bank is in the hands of the conservator shall be kept on hand in cash, invested in the direct obligations of the United States or deposited in banks designated by the commissioner.

History: New 1969, p. 722, Act 319, Imd. Eff. Aug. 20

487.564 Conservator; borrowing power.

Sec. 264. With the prior approval of the commissioner, the conservator of any bank may borrow such sums of money as are necessary or expedient in aiding the operation, reorganization or liquidation of the bank, including the payment of liquidating dividends, and may secure the loans by the pledge, hypothecation or mortgage of the assets of the bank.

History: New 1969, p. 722, Act 319, Imd. Eff. Aug. 20

487.565 Conservatorship; termination; resumption of business.

Sec. 265. If the commissioner is satisfied that it may be done safely and that it would be in the public interest, he may terminate the conservatorship and permit the bank to resume the transaction of its business subject to such terms, conditions, restrictions and limitations as he may prescribe.

History: New 1969, p 722, Act 319, Imd Eff Aug 20

487.566 Conservatorship; return of bank to directors; effect on segregation of deposits; notice.

Sec. 266. After 15 days from the date upon which the affairs of a bank shall have been turned back to its board of directors by the conservator, either with or without being reorganized, the provisions of section 263 with respect to the segregation of deposits received while it is in the hands of the conservator and with respect to the use of such deposits to liquidate the indebtedness of the bank shall no longer be effective. Before the conservator turns back the affairs of the bank to its board of directors, he shall publish a notice in form approved by the commissioner, stating the date on which the affairs of the bank will be returned to its board of directors and that the provisions of section 263 will not be effective after 15 days from such date. On the date of the publication of the notice, the conservator shall immediately send to every person who deposited money in the bank after the appointment of a conservator therefor, a copy of the notice by mail, postage prepaid, addressed to the last known address of the person as shown by the records of the bank. The conservator shall send similar notice in like manner to every person making deposit in the bank under section 263 after the date of the newspaper publication and before the time when the affairs of the bank are returned to its directors.

History: New 1969, p 723, Act 319, Imd Eff Aug 20

487.567 Receiver and conservator; rules prescribed by commissioner; revolving fund to reimburse bureau.

Sec. 267. (1) The commissioner is authorized and empowered to prescribe such rules as he deems necessary in order to carry out the provisions of this chapter as to receivers and conservators.

(2) All compensation and expenses allowed to reimburse the bureau when a bank examiner acts as receiver or conservator and all expenses for state supervision of receiverships and conservatorships under the provisions of this act shall be turned over to the state treasurer and shall be credited to a revolving fund, hereby created, to be held for the bureau, which fund shall be disbursed on proper vouchers approved by the commissioner to reimburse the bureau in connection with the provisions of this act with respect to receivers and conservators of banks.

History: New 1969, p 723, Act 319, Imd Eff Aug 20

487.568 Reorganization of bank; consent; definition; effect on depositors, creditors and shareholders.

Sec. 268. (1) In any reorganization of any bank under a plan of a kind which requires the consent of depositors and other creditors or of shareholders or of both depositors and other creditors and shareholders, the reorganization shall become effective when both the following occur:

(a) The commissioner is satisfied that the plan of reorganization is fair and equitable as to all depositors, other creditors and shareholders and is in the public interest and has approved the plan subject to such conditions, restrictions and limitations as he may prescribe.

(b) After reasonable notice of the reorganization as determined by the commissioner, depositors and other creditors of such bank representing at least 75% in amount of its total deposits and other liabilities as shown by the books of the bank or shareholders owning at least ⅔ of its outstanding capital stock as shown by the books of the bank or both depositors and other creditors representing at least 75% in amount of the total deposits and other liabilities and shareholders owning at least ⅔ of its outstanding capital stock as shown by the books of the bank, shall have consented in writing to the plan of reorganization. Claims of depositors or other creditors which will be satisfied in full under the provisions of the plan of reorganization shall not be included among the total deposits and other liabilities of the bank in determining the 75% thereof. The term "reorganization" as used in this section may be construed to include the establishment of a new bank in conformity with any plan of reorganization.

(2) When the reorganization becomes effective, all books, records and assets of the bank shall be disposed of in accordance with the provisions of the plan and the affairs of the bank shall be conducted by its board of directors in the manner provided by the plan and under the conditions, restrictions and limitations which may have been prescribed by the commissioner. In any reorganization which has been approved and become effective, all depositors and other creditors and shareholders of the bank, whether or not they have consented to the plan or reorganization, shall be fully and in all respects subject to and bound by its provisions and claims of all depositors and other creditors shall be treated as if they had consented to the plan of reorganization. The state or any department, agency or political subdivision thereof holding a claim against the bank is authorized to participate in a plan or reorganization as any other creditor and shall be subject to and bound by its provisions as any other creditor.

History: New 1969 p 723 Act 319, Imd Eff Aug 20

487.862 Holders of capital stock; rights denied.

Sec. 12. (1) The holders of capital stock of the corporation shall not, as such, have any preemptive or preferential right to purchase or subscribe for any part of the unissued or new issue of capital stock of such corporation, whether now or hereafter authorized or issued, or to purchase or subscribe for any bonds or other obligations, whether or not convertible into stock of such corporation, now or hereafter authorized or issued.

Reorganization; meeting of creditors, members, stockholders.

(2) Whenever a compromise or arrangement or any plan of reorganization of such corporation is proposed between such corporation and its creditors, members or stockholders, the circuit court of Ingham county, on application of the corporation or of any creditor, member or stockholder thereof, or on the application of any receiver appointed for the corporation, may order a meeting of the creditors, members or stockholders as may be affected by the proposed compromise or arrangement or plan of reorganization, which shall be called in such manner as the court directs. If, at such meeting, the compromise or arrangement or plan of reorganization is agreed to by or on behalf of the creditors holding ⅔ in amount of the claims against the corporation, and by or on behalf of the stockholders holding the majority of capital stock, and by or on behalf of the members holding ⅔ in amount of the outstanding notes or other interest-bearing obligations of the corporation and if the agreement is further evidenced by the written acceptance of the creditors, stockholders and members, duly filed in the court, the compromise or arrangement or plan of reorganization, if approved by the court as just and equitable, shall be binding on all creditors, stockholders or members who are affected thereby, and also on the corporation. All persons who become creditors, stockholders or members of the corporation shall be deemed to have become creditors, stockholders or members subject in all respects to this section, and the same shall be absolutely binding upon them. For the purposes of this subsection only, members shall not be deemed to be creditors and shall act under this subsection as a separate class.

History: New 1963, p. 165, Act 117, Eff. Sept. 6

487.912a. Conservator or receiver for licensee

Sec. 12a. (1) Whenever a licensee has refused or is unable to pay its obligations generally as they become due or whenever it appears to the commissioner that a licensee is in an unsafe or unsound condition, the commissioner may appoint a conservator or, with the attorney general representing the commissioner, may apply to the circuit court for the county in which the licensee is located for the appointment of a receiver for the licensee. The commissioner may require of the conservator such bond and security as the commissioner considers proper.

(2) The receiver, subject to the approval of the appointing court, shall take possession of the books, records, and assets of the licensee and shall take such action with respect to employees, agents, or representatives of the licensee or any other action as may be necessary to conserve the assets of the licensee or ensure payment of instruments issued by the licensee pending further disposition of its business as provided by law. The conservator or receiver shall sue and defend, compromise, and settle all claims involving the licensee and exercise such powers and duties as may be necessary and consistent with the laws of this state applicable to the appointment of receivers.

(3) The commissioner may appoint as conservator 1 of the employees of the bureau or some other competent and disinterested person. The bureau shall be reimbursed out of the assets of the conservatorship for all sums expended by it in connection with the conservatorship as expenses or otherwise. All expenses of the conservatorship shall be paid out of the assets of the licensee, upon the approval of the commissioner. The expenses shall be a first charge upon the assets and shall be fully paid before any final distribution is made.

(4) The conservator or receiver from time to time but in no event less frequently than once each calendar quarter shall report to the commissioner with respect to all acts and proceedings in connection with the conservatorship or receivership.

(5) If satisfied that it may be done safely and that it would be in the public interest, the commissioner may terminate the conservatorship or receivership and permit the licensee to resume the transaction of its business subject to such terms, conditions, restrictions, and limitations as the commissioner may prescribe.

P.A.1960, No. 136, § 12a, added by P.A.1986, No. 275, § 1, Imd. Eff. Dec. 19, 1986.

489.831 Receiver; appointment; dissolution of association.

Sec. 431. If irregularities complained of in an order of the supervisory authority, as provided in section 425 are not corrected or if any irregularities complained of in a report of a conservator are not corrected, or whenever from the report of the examiner it appears to the supervisory authority that the association (a) is impaired or insolvent, (b) is pursuing a course which threatens to result in imparity or insolvency, (c) is in violation of any valid and applicable law or regulation, or lawful order of the supervisory authority, or (d) is concealing any of its assets, books or records and that it will be for the best interest of the members and creditors that the association should liquidate and be dissolved, he shall communicate such fact, together with a copy of the examiner's report to the attorney general, who shall institute the necessary proceedings to enjoin the association from doing any further business, for the appointment of a receiver therefor and for the dissolution of the association.

History: New 1964, p. 179, Act 156, Eff. Jan. 1, 1965

489.832 Receiver; appointment; expenses; possession of records.

Sec. 432. The supervisory authority, with the attorney general representing him, shall apply to the circuit court for the county in which the association is located, or to the circuit court for the county of Ingham, for the appointment of a receiver for the association. The court may appoint as receiver 1 of the examiners of the supervisory authority or some other competent and disinterested person who shall have the recommendation of the supervisory authority. The supervisory authority shall be reimbursed out of the assets of the receivership for all sums expended by him in connection with the receivership as expenses, compensation of his examiners, or otherwise. All expenses of any receivership, including those incurred by the supervisory authority in connection therewith, shall be paid out of the assets of the association upon the approval of the supervisory authority and upon order of the appointing court. The expenses shall be a first charge upon the assets and shall be fully paid before any final distribution or payment of liquidating dividends to creditors and members. The supervisory authority, pending action on its application to the court, if he deems it necessary, forthwith may take possession of the books, records and assets of every description of the association and hold the same, and the books, records and assets shall not be subject to any levy, attachment, execution or other process available to creditors of the association. The receiver shall make a report to the supervisory authority of all of his acts and proceedings.

History: New 1964 p 180, Act 156 Eff Jan 1, 1965

490.20 Dissolution and reorganization

Voluntary dissolution

Sec. 20. (1) The process of voluntary dissolution shall be as follows:

(a) The majority of the entire membership of the credit union, by ballot or written consent, may agree to a dissolution of the credit union.

(b) Thereupon they shall file with the commissioner a statement of their consent to dissolution, attested by a majority of the officers and including the names and addresses of the officers and directors.

(c) The commissioner shall determine whether the credit union is solvent. If solvency is determined, he or she shall issue in duplicate a certificate to the effect that the provisions of this section relating to voluntary dissolution have been complied with.

(d) The certificate shall be filed with the county clerk of the county in which the credit union is located, whereupon the credit union shall be considered dissolved and shall cease to carry on business except for the purpose of liquidation.

(e) The credit union shall continue in existence for the purpose of discharging its debts, collecting and distributing its assets, and doing all other acts required in order to wind up its business, and may sue and be sued for the purpose of enforcing those debts and obligations until its affairs are fully adjusted and wound up for a period of 3 years.

Involuntary dissolution

(2) The process for involuntary dissolution shall be as follows:

(a) If the commissioner shall determine that the credit union is insolvent, the commissioner may take immediate possession of the assets of the credit union.

(b) Upon taking possession of the assets of the credit union, the commissioner may appoint a receiver for the credit union, which receiver may be a league, the national credit union administration, or a person designated by the commissioner, and the commissioner may prescribe the amount of bond and such other terms and conditions with which the receiver shall comply before entering upon his or her office.

(c) Upon qualifying the receiver shall take possession of the assets and proceed to liquidate the credit union, to collect all assets and distribute and pay all obligations, and distribute the remaining assets to the shareholders in accordance with their respective interests. The receiver, whether the commissioner or a receiver appointed by him or her, shall have full power and authority to sue and be sued, for the purpose of enforcing the debts and obligations due the credit union and do all things and perform all acts necessary to wind up the affairs of the credit union. The commissioner shall have power to issue such rules as he or she shall deem proper for the purpose of winding up the affairs of a credit union in involuntary dissolution.

(d) Upon commencement of the liquidation, a certificate shall be filed by the commissioner with the county clerk of the county in which the credit union is located indicating the commencement of liquidation, and upon the completion of the liquidation and dissolution of the credit union, the commissioner shall file with the county clerk of the county in which the credit union is located a certificate indicating that the liquidation and dissolution is complete and that the credit union has ceased to do business.

(e) A credit union shall be deemed insolvent when the total of share capital and deposit accounts is * * * more than the value of the assets of the credit union as determined by an appraisal of assets made by the commissioner or other person authorized or directed by him or her to make such an appraisal.

(f) The powers of the commissioner under this section shall also apply to section 6.[1]

Reorganization

(3) The commissioner may permit a credit union in either voluntary or involuntary dissolution because of insolvency to reorganize its affairs and continue in business, if a majority of the members of the credit union approve a scale-down of their share balances in an amount sufficient to offset the deficit in assets as determined by the commissioner, under such rules as the commissioner may establish not inconsistent with or contrary to law.

Amended by P.A.1986, No. 278, § 1, Imd. Eff. Dec. 19

[1] Section 490.6.

500.7833 Receiver; notice of appointment, property description; guaranty association act.

Sec. 7833. When a receiver is appointed in this state for any authorized insurer, the receiver shall promptly give notice of his appointment and a brief description of the contents of the property and casualty guaranty association act, if applicable, by first class mail, to: (i) all persons known or reasonably expected to have or be interested in claims against the insurer, at the last known address within this state; (ii) all insureds of the insurer, at the last known address within this state; and (iii) the governors of the property and casualty guaranty association. The receiver may also require that agents of the insurer give prompt written notice of the same information, by first class mail, to their insureds at the last known address within this state. The receiver shall also promptly publish such notice in a newspaper of general circulation in the county where the insurer had its principal office in this state not less than once per week, for 4 weeks, and by publication elsewhere in this state as the court shall direct.

History: Add 1969, p 514, Act 277, Imd Eff Aug 11

500.7836 Uniform insurers liquidation act; short title.

Sec. 7836. Sections 7836 through 7868 constitute, and may be cited as, the "uniform insurers liquidation act."

History: New 1956, p 646, Act 218, Eff Jan 1, 1957

500.7837 Uniform insurers liquidation; definitions.

Sec. 7837. For the purposes of this act:

(1) "Insurer" means any person, firm, corporation, association, or aggregation of persons doing an insurance business and subject to the insurance supervisory authority of, or to liquidation, rehabilitation, reorganization, or conservation by, the insurance commissioner of this state, or the equivalent insurance supervisory official of another state.

(2) "Delinquency proceeding" means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving such insurer.

(3) "State" means any state of the United States, and also the District of Columbia, Alaska, Hawaii, and Puerto Rico.

(4) "Foreign country" means territory not in any state.

(5) "Domiciliary state" means the state in which an insurer is incorporated or organized, or, in the case of an insurer incorporated or organized in a foreign country, the state in which such insurer, having become authorized to do business in such state, has designated as its domiciliary state and/or state of entry into the United States.

(6) "Ancillary state" means any state other than a domiciliary state.

(7) "Reciprocal state" means any state other than this state in which in substance and effect the provisions of this act are in force, including the provisions requiring that the insurance commissioner or equivalent insurance supervisory official be the receiver of a delinquent insurer.

(8) "General assets" means all property, real, personal, or otherwise, not specifically mortgaged, pledged, deposited, or otherwise encumbered for the security or benefit of specified persons or a limited class or classes of persons, and as to such specifically encumbered property the term includes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets held in trust and assets held on deposit for the security or benefit of all policyholders, or all policyholders and creditors in the United States, shall be deemed general assets.

(9) "Preferred claim" means any claim with respect to which the law of a state or of the United States accords priority of payment from the general assets of the insurer.

(10) "Special deposit claim" means any claim secured by a deposit made pursuant to statute for the security or benefit of a limited class or classes of persons, but not including any general assets.

(11) "Secured claim" means any claim secured by mortgage, trust, deed, pledge, deposit as security, escrow, or otherwise, but not including special deposit claims or claims against general assets. The term also includes claims which more than 4 months prior to the commencement of delinquency proceedings in the state of the insurer's domicile have become liens upon specific assets by reason of judicial process.

(12) "Receiver" means receiver, liquidator, rehabilitator, or conservator as the context may require.

History: New 1956, p 646, Act 218, Eff Jan 1, 1957

500.7838 Uniform insurers liquidation; domiciliary receivers, powers.

Sec. 7838. (1) Whenever under the laws of this state a receiver is to be appointed in delinquency proceedings for an insurer domiciled in this state, the court shall appoint the insurance commissioner as such receiver. The court shall direct the receiver forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court.

(2) The domiciliary receiver and his successors in office shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all of the books and records of the insurer wherever located, as of the date of entry of the order directing possession to be taken, and he shall have the right to recover the same and reduce the same to possession; except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are hereinafter prescribed for ancillary receivers appointed in this state as to assets located in this state. The filing or recording of the order directing possession to be taken, or a certified copy thereof, in the office where instruments affecting title to property are required to be filed or recorded shall impart the same notice as would be imparted by a deed, bill of sale, or other evidence of title duly filed or recorded. The domiciliary receiver shall be responsible on his official bond for the proper administration of all assets coming into his possession or control. The court may at any time require an additional bond from him or his deputies if deemed desirable for the protection of the assets.

(3) Upon taking possession of the assets of a delinquent insurer the domiciliary receiver shall, subject to the direction of the court, immediately proceed to conduct the business of the insurer or to take such steps as are authorized by the laws of this state for the purpose of liquidating, rehabilitating, reorganizing, or conserving the affairs of the insurer. In connection with delinquency proceedings he may appoint 1 or more special deputy commissioners to act for him, and may employ such counsel, clerks, and assistants as he deems necessary. The compensation of the special deputies, counsel, clerks, or assistants and all expenses of taking possession of the delinquent insurer and of conducting the delinquency proceedings shall be fixed by the receiver, subject to the approval of the court, and shall be paid out of the funds or assets of the insurer. Within the limits of the duties imposed upon them, special deputies shall possess all the powers given to, and in the exercise of those powers, shall be subject to all of the duties imposed upon the receiver with respect to delinquency proceedings.

History: New 1956, p 647, Act 218, Eff Jan 1, 1957

500.7840 Uniform insurers liquidation; ancillary receiver powers.

Sec. 7840. (1) Whenever under the laws of this state an ancillary receiver is to be appointed in delinquency proceedings for an insurer not domiciled in this state, the court shall appoint the insurance commissioner as ancillary receiver. The commissioner shall file a petition requesting the appointment (a) if he finds that there are sufficient assets of such insurer located in this state to justify the appointment of an ancillary receiver, or (b) if 10 or more persons resident in this state having claims against such insurer file a petition with the commissioner requesting the appointment of such ancillary receiver.

(2) The domiciliary receiver of an insurer domiciled in a reciprocal state, shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all of the books and records of the insurer located in this state, and he shall have the immediate right to recover balances due from local agents and to obtain possession of any books and records of the insurer found in this state. He shall also be entitled to recover the other assets of the insurer located in this state except that upon the appointment of an ancillary receiver in this state, the ancillary receiver shall during the ancillary receivership proceedings have the sole right to recover such other assets. The ancillary receiver shall, as soon as practicable, liquidate from their respective securities those special deposit claims and secured claims which are proved and allowed in the ancillary proceedings in this state, and shall pay the necessary expenses of the proceedings. All remaining assets he shall promptly transfer to the domiciliary receiver. Subject to the foregoing provisions the ancillary receiver and his deputies shall have the same powers and be subject to the same duties with respect to the administration of such assets, as a receiver of an insurer domiciled in this state.

History: New 1956, p 648, Act 218 Eff Jan 1, 1957

500.7842 Uniform insurers liquidation; claims of nonresidents against domestic insurers, filing, proof.

Sec. 7842. (1) In a delinquency proceeding begun in this state against an insurer domiciled in this state, claimants residing in reciprocal states may file claims either with the ancillary receivers, if any in their respective states, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(2) Controverted claims belonging to claimants residing in reciprocal states may either (a) be proved in this state as provided by law, or (b), if ancillary proceedings have been commenced in such reciprocal states, may be proved in those proceedings. In the event a claimant elects to prove his claim in ancillary proceedings, if notice of the claim and opportunity to appear and be heard is afforded the domiciliary receiver of this state as provided in section 7844 with respect to ancillary proceedings in this state, the final allowance of such claim by the courts in the ancillary state shall be accepted in this state as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within the ancillary state.

History: New 1956, p 648, Act 218, Eff Jan 1, 1957

500.7844 Uniform insurers liquidation; claims of residents against foreign insurers, filing, proof.

Sec. 7844. (1) In a delinquency proceeding in a reciprocal state against an insurer domiciled in that state, claimants against such insurer who reside within this state may file claims either with the ancillary receiver, if any, appointed in this state, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceeding.

(2) Controverted claims belonging to claimants residing in this state may either (a) be proved in the domiciliary state as provided by the law of that state, or (b), if ancillary proceedings have been commenced in this state, be proved in those proceedings. In the event that any such claimant elects to prove his claim in this state, he shall file his claim with the ancillary receiver in the manner provided by the law of this state for the proving of claims against insurers domiciled in this state, and he shall give notice in writing to the receiver in the domiciliary state, either by registered mail or by personal service at least 40 days prior to the date set for hearing. The notice shall contain a concise statement of the amount of the claim, the facts on which the claim is based, and the priorities asserted, if any. If the domiciliary receiver, within 30 days after the giving of such notice, shall give notice in writing to the ancillary receiver and to the claimant, either by registered mail or by personal service, of his intention to contest such claim, he shall be entitled to appear or to be represented in any proceeding in this state involving the adjudication of the claim. The final allowance of the claim by the courts of this state shall be accepted as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within this state.

History: New 1956, p 648, Act 218, Eff Jan 1, 1957

500.7846 Uniform insurers liquidation; preferred claims, priority.

Sec. 7846. (1) In a delinquency proceeding against an insurer domiciled in this state, claims owing to residents of ancillary states shall be preferred claims if like claims are preferred under the laws of this state. All such claims whether owing to residents or nonresidents shall be given equal priority of payment from general assets regardless of where such assets are located.

(2) In a delinquency proceeding against an insurer domiciled in a reciprocal state claims owing to residents of this state shall be preferred if like claims are preferred by the laws of that state.

History: New 1956, p 649, Act 218, Eff Jan 1, 1957

500.7848 Uniform insurers liquidation; special deposit claims, priority.

Sec. 7848. The owners of special deposit claims against an insurer for which a receiver is appointed in this or any other state shall be given priority against their several special deposits in accordance with the provisions of the statutes governing the creation and maintenance of such deposits. If there is a deficiency in any such deposit so that the claims secured thereby are not fully discharged therefrom, the claimants may share in the general assets, but such sharing shall be deferred until general creditors, and also claimants against other special deposits who have received smaller percentages from their respective special deposits, have been paid percentages of their claims equal to the percentage paid from the special deposit.

History: New 1956, p 649, Act 218, Eff Jan 1, 1957

500.7850 Uniform insurers liquidation; secured claims, priority.

Sec. 7850. The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his security and file his claim as a general creditor, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this act, or if it has been adjudicated by a court of competent jurisdiction in proceedings in which the domiciliary receiver has had notice and opportunity to be heard, such amount shall be conclusive; otherwise, the amount shall be determined in the delinquency proceedings in the domiciliary state.

History: New 1956, p 649, Act 218, Eff Jan 1, 1957

500.7854 Uniform insurers liquidation; attachment, garnishment or execution prohibited.

Sec. 7854. During the pendency of delinquency proceedings in this or any reciprocal state no action or proceeding in the nature of an attachment, garnishment, or execution shall be commenced or maintained in the courts of this state against the delinquent insurer or its assets. Any lien obtained by any such action or proceeding within 4 months prior to the commencement of any such delinquency proceeding or at any time thereafter shall be void as against any rights arising in such delinquency proceeding.

History: New 1956, p 649, Act 218, Eff Jan 1, 1957

500.7858 Uniform insurers liquidation; action by domiciliary receiver of reciprocal state.

Sec. 7858. The domiciliary receiver of an insurer domiciled in a reciprocal state may sue in this state to recover any assets of such insurer to which he may be entitled under the laws of this state.

History: New 1956, p 649, Act 218, Eff Jan 1, 1957

500.7868 Construction of act.

Sec. 7868. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.

History: New 1956, p 650, Act 218, Eff Jan 1, 1957

500.8085 Injunction, dissolution, receiver; applied for by attorney general only.

Sec. 8085. No application for injunction against or proceedings for the dissolution of or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in this state, unless the same is made by the attorney general.

History: New 1956, p. 665, Act 218, Eff. Jan. 1, 1957

552.27 Alimony or allowance for support; lien; foreclosure.

Sec. 27. In all cases where alimony or allowance for the support and education of minor children shall be awarded to either party, the amount thereof shall constitute a lien upon such of the real and personal estate of the adverse party as the court by its judgment shall direct, and in default of payment of the amount so awarded the court may order the sale of the property against which such lien is adjudged in the same manner and upon like notice as in suits for the foreclosure of mortgage liens; or the court may award execution for the collection of the judgment, or the court may sequester the real and personal estate of either party and may appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate to be applied to the payment thereof or the court in lieu of a money allowance may award such a division between the husband and wife of the real and personal estate of either party or of the husband and wife by joint ownership or right as he shall deem to be equitable and just.

History: CL 1857, 3248,—Am. 1865, p. 529, Act 255, Eff. June 22,—CL 1871, 4759,—Am. 1877, p. 32, Act 44, Eff. Aug. 21,—How. 6247,—Am. 1897, p. 252, Act 197, Eff. Aug. 30,—CL 1897, 8640,—CL 1915, 11416,—CL 1929, 12747,—CL 1948, 552.27,—Am. 1970, p. 544, Act 182, Imd. Eff. Aug. 3.

559.208 Assessment lien; priority; foreclosure; bid; actions; receiver.

Sec. 108. (1) Sums assessed to a co-owner by the association of co-owners which are unpaid constitute a lien upon the unit or units in the project owned by the co-owner at the time of the assessment before other liens except tax liens on the condominium unit in favor of any state or federal taxing authority and sums unpaid on a first mortgage of record except that past due assessments which are evidenced by a notice of lien, recorded as set forth in subsection (3), have priority over a first mortgage recorded subsequent to the recording of the notice of lien. The lien upon each condominium unit owned by the co-owner shall be in the amount assessed against the condominium unit, plus a proportionate share of the total of all other unpaid assessments attributable to condominium units no longer owned by the co-owner but which became due while the co-owner had title to the condominium units. The lien may be foreclosed by an action or by advertisement by the association of co-owners in the name of the condominium project on behalf of the other co-owners.

(2) A foreclosure shall be in the same manner as a foreclosure under the laws relating to foreclosure of real estate mortgages by advertisement or judicial action.

(3) A foreclosure proceeding may not be commenced without recordation and service of notice of lien in accordance with the following:

(a) Notice of lien shall set forth:

(i) The legal description of the condominium unit or condominium units to which the lien attaches.

(ii) The name of the co-owner of record thereof.

(iii) The amounts due the association of co-owners at the date of the notice, exclusive of interest, costs, attorney fees and future assessments.

(b) The notice of lien shall be in recordable form, executed by an authorized representative of the association of co-owners and may contain other information as the association of co-owners may deem appropriate.

(c) The notice of lien shall be recorded in the office of register of deeds in the county in which the condominium project is located and shall be served upon the delinquent co-owner by first class mail, postage prepaid, addressed to the last known address of the co-owner at least 10 days in advance of commencement of the foreclosure proceeding.

(4) The association of co-owners, acting on behalf of all co-owners, unless prohibited by the master deed or bylaws, may bid in at the foreclosure sale, and acquire, hold, lease, mortgage, or convey the condominium unit.

(5) An action to recover money judgments for unpaid assessments may be maintained without foreclosing or waiving the lien.

(6) An action for money damages and foreclosure may be combined in 1 action.

(7) A receiver may be appointed in an action for foreclosure of the assessment lien and may be empowered to take possession of the condominium unit, if not occupied by the co-owner and to lease the condominium unit and collect and apply the rental therefrom.

History: New 1978, p 169, Act 59 Eff July 1

566.20 Rights of creditors whose claims have not matured.

Sec. 10. Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured, he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,

(a) Restrain the defendant from disposing of his property,

(b) Appoint a receiver to take charge of the property,

(c) Set aside the conveyance or annul the obligation, or

(d) Make any order which the circumstances of the case may require.

History: CL 1929, 13401.—CL 1948, 566.20

570.1122. Appointment of receiver; powers

Sec. 122. (1) If the improvement to the real property is not completed as of the date of commencement of an action in which enforcement of a construction lien through foreclosure is sought or in any action to foreclose a mortgage on the real property on which the incomplete improvement exists, any lien claimant or mortgagee may petition the court for the appointment of a receiver. The petition shall be heard as a motion. A receiver may be appointed by the court upon finding that a substantial unpaid construction lien exists, or that the mortgage on the real property is in default and that the lien claimant, the mortgagee, or both, are likely to sustain substantial loss if the improvement is not completed.

(2) When making an appointment of a receiver under this section, the court shall give consideration to the nominations of the mortgagee and the lien claimant. Any receiver appointed under this section shall be deemed a fiduciary for the benefit of all persons having or claiming interests in the real property, and shall exercise his or her office accordingly.

(3) A receiver shall not be appointed under this section for any residential structure, nor for any apartment building containing 4 or less apartments.

(4) The receiver shall be entitled to possession of the real property upon his or her appointment. Unless otherwise limited by the court, and subject to his or her fiduciary responsibility as provided in this act, the receiver shall have all powers generally exercised by a receiver in a court of equity, including the right to be compensated for his or her services and those of his or her agents and attorneys.

P.A.1980, No. 497, § 122, Eff. Jan. 1, 1982. Amended by P.A.1981, No. 191, § 1.

570.1123. Receivers; petitions for authority to complete improvements or sell real property; purchase of real property at foreclosure sale; rights conveyed

Sec. 123. (1) The receiver may petition the court for authority to complete construction of improvements to the real property in full or in part, to borrow money to complete the construction, and to grant security, by way of mortgage or otherwise, for the borrowings. The priority of the security shall be determined by the court. A petition for authority to complete construction of improvements shall not be granted unless the court finds that the value added to the real property which will result from the construction is likely to exceed the cost of the additional construction, including all estimated overhead and administrative costs, together with interest on any funds that are to be borrowed for the construction. The receiver also may be authorized by the court to borrow funds for other purposes, including such purposes as preserving and operating the real property.

(2) The receiver may petition the court for authority to sell the real property interest under foreclosure for cash or on other terms as may be ordered by the court. The sale may be by private or public sale and shall be held in the manner directed by the court. A sale under this subsection shall become final upon the entry of an order of confirmation by the court, unless the court allows a period for redemption. The redemption period, if allowed, shall not exceed 4 months.

(3) Any lien claimant or mortgagee may purchase the real property at a sale on foreclosure or a sale by the receiver, and may apply on the purchase price any sums which would be payable to him or her from the proceeds of the sale.

(4) Pursuant to section 119(3)[1] and subject to section 121(1),[2] a sale by the receiver, upon becoming final, shall vest in the grantee named in the deed all the right, title, and interest in the real property which the owner, co-owner, lessee, or co-lessee whose interest is being foreclosed had at the date of the execution of the contract for the improvement or at any time thereafter.

P.A.1980, No. 497, § 123, Eff. Jan. 1, 1982. Amended by P.A.1981, No. 191, § 1.

[1] Section 570.1119(3).
[2] Section 570.1121(1).

600.2926 Jurisdiction to appoint receivers; termination.

Sec. 2926. Circuit court judges in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law. This authority may be exercised in vacation, in chambers, and during sessions of the court. In all cases in which a receiver is appointed the court shall provide for bond and shall define the receiver's power and duties where they are not otherwise spelled out by law. Subject to limitations in the law or imposed by the court, the receiver shall be charged with all of the estate, real and personal debts of the debtor as trustee for the benefit of the debtor, creditors and others interested.

The court may terminate any receivership and return the property held by the receiver to the debtor whenever it appears to be to the best interest of the debtor, the creditors and others interested.

History: New 1961, p. 524, Act 236, Eff. Jan 1, 1963
Cited in other sections: Section 600 2926 is cited in § 400 613

600.2926a Cemetery receivers; appointment; qualifications; term; accounting; compensation and expenses.

Sec. 2926a. Circuit court judges in the exercise of their equitable powers in matters relating to cemeteries operating under the provisions of Act No. 87 of the Public Acts of 1855, as amended, being sections 456.1 to 456.36 of the Compiled Laws of 1948, and Act No. 12 of the Public Acts of 1869, as amended, being sections 456.101 to 456.119 of the Compiled Laws of 1948, may appoint receivers. Such appointments shall be limited to persons who have had at least 5 years' experience in cemetery management. Such appointments shall be limited to 1 year with reappointment permissible. Any person appointed under this section shall be required to make an accounting to the court at least once each 90 days. Compensation for such receivers shall not exceed $200.00 per week, which compensation and expenses shall be determined and approved by the appointing court.

History: Add. 1967, p. 242, Act 180, Eff. Nov. 2

600.2927 Mortgaged property; nonpayment of taxes or insurance as waste.

Sec. 2927. (1) The parties to any mortgage, trust mortgage, or deed of trust of real property, or any extension thereof, may, by agreement therein contained to that effect, provide that the failure of the mortgagor or grantor, as the case may be, to pay any taxes assessed against such property or installments thereof, in the event said taxes are being paid under the provisions of Act No. 126 of the Public Acts of 1933, as amended, or any insurance premium upon policies covering any property located upon such premises constitutes waste.

Receiver to prevent waste; collection of rents and income.

(2) If such mortgagor or grantor in such instrument fails to pay such taxes or insurance premiums upon property subject to the terms of a mortgage, trust mortgage, or deed of trust containing such agreement the circuit court having jurisdiction of such property may, in its discretion upon complaint or motion filed by such mortgagee, grantee, assignee thereof or trustee under such instrument and upon such notice as the court may require, appoint a receiver of the property for the purpose of preventing such waste. Subject to the order of the court, the receiver may collect the rents and income from such property and shall exercise such control over such property as to such court may seem proper.

Same; homestead; property under $7,500 value.

(3) No receiver may be appointed under the provisions of this section for any dwelling house or farm occupied by any owner thereof as his home or farm. No receiver may be appointed under the provisions of this section for any store or other business property having an assessed valuation of $7,500.00 or less.

History: New 1961, p. 524, Act 236, Eff. Jan. 1, 1963

600.3348 Receiver; appointment; protection from waste, trespass, or injury.

Sec. 3348. Whenever it appears that to do so would benefit any part owner of the premises of which partition is sought, the court may appoint a receiver having such authority as is necessary to lease the premises; or protect them from waste, trespass, or injury; or for any other purpose.

History: New 1961, p. 545, Act 236, Eff. Jan. 1, 1963

600.3501 Voluntary dissolution of corporations; actions equitable in nature.

Sec. 3501. (1) Whenever the directors, trustees, or other officers who have the management of the affairs of any corporation, or the majority of them, discover that the stock, property, and effects of the corporation are so far reduced by losses or otherwise that the corporation will not be able to pay all just demands to which it is liable, or to afford a reasonable security to those who deal with it, or whenever the directors, trustees, or officers, or a majority of them, for any reason, deem it beneficial to the stockholders to dissolve the corporation, they may institute a civil action in the circuit court for the county in which the corporation is located, for a judgment dissolving the corporation. Such actions are equitable in nature.

Parties defendant; stockholders and creditors.

(2) All stockholders and creditors shall be made parties defendant. Hearing of the matter may be referred to a circuit court commissioner.

History: New 1961, p 550, Act 236, Eff Jan 1, 1963

600.3505 Voluntary dissolution of corporations; dissolution, receiver, temporary receiver.

Sec. 3505. If it appears to the court that the corporation is insolvent or that dissolution thereof would be beneficial to the stockholders and not injurious to the public, the court may dissolve the corporation and appoint a receiver of its estate and effects. Pending the hearing, the court may appoint a temporary receiver and prescribe his powers and duties.

History: New 1961, p 550, Act 236, Eff Jan 1, 1963

600.3510 Receiver; bond, powers, duties; administration of estate.

Sec. 3510. (1) Upon giving bond and qualifying, as the court may direct, such permanent receiver is vested with all the estate, real and personal, of such corporation and is trustee thereof for the benefit of its creditors and stockholders, and has all the powers, authority and remedies of an assignee for the benefit of creditors under RJA chapter 52, and also the power to continue the business of such corporation for such period as the court permits; and so far as they may be applicable, is subject to all the duties and obligations of such an assignee, except where other provisions are herein made.

Common law assignments.

(2) The provisions of law regulating common law assignments with reference to sales of property, notice to creditors to prove claims, the proving, contesting and allowing of claims, the making of set-offs, the powers of the court in chancery or judge thereof, the making and filing of accounts, the closing of the estate, the distribution of dividends and the compensation of the receiver, apply and shall be followed except that,

(a) stockholders as well as creditors shall be given notice of claims filed and may with like effect request that any claim be contested;

(b) stockholders shall be given notice of such other matters and in such manner as the court may require;

(c) in distributing dividends any surplus remaining after payment of expenses and after creditors are paid in full shall be distributed among the stockholders according to their respective rights as determined by the court.

History: New 1961, p 550 Act 236, Eff Jan 1, 1963

600.3515 Sales, transfers and levies subsequent to application for dissolution; validity.

Sec. 3515. All sales, assignments, transfers, mortgages and conveyances of any part of the assets of such corporation made after the filing of such application for dissolution, in payment of or as security for any existing or prior debt, and all judgments confessed by such corporation after that time, and all subsequent levies or garnishments are absolutely void as against the receiver who may be thereafter appointed.

History: New 1961, p 550 Act 236, Eff Jan 1 1963

600.3520 Corporations with expired charters; manner of winding up.

Sec. 3520. (1) Any corporation which is organized under the general acts or any special act of the legislature authorizing its organization for the purpose of carrying on the business of mining, smelting, or manufacturing, whose term of existence as fixed by its articles or the special act under which it is organized has expired and whose further term allowed by the laws of this state for winding up its business has also expired or will expire (no other valid proceeding to wind up its corporate affairs having been completed), may be wound up and its assets disposed of and distributed pursuant to this section and the rules of court upon the application of any stockholder or any creditor whose demand is in full force.

Parties plaintiff; actions equitable in nature.

(2) Any stockholder, whether his title to the stock is legal, equitable, absolute or in trust, in such corporation, or any creditor of such corporation whose demand is in full force and is not barred by any statute of limitations, may bring an action in the circuit court of any county of this state in which any of the real or personal property of such corporation is situated, for the purpose of winding up the affairs of such corporation and disposing of and distributing its property among the persons entitled thereto. Such actions are equitable in nature.

Reorganization or extension of renewal; de facto corporations.

(3) Nothing in this section shall be construed to prevent the reorganization or the extension of the renewal of the corporate term by corporations authorized by law to do so or to affect or impair the organization rights of property of any de facto corporation actively carrying on its proper business.

Receiver; appointment.

(4) The circuit court, or the judge thereof, may at any time, on proper application of plaintiff, and notice to the proper parties, appoint a receiver of the property of the corporation.

Same; powers and duties; conveyances.

(5) Such receiver shall be vested with all the estate, real and personal, of such corporation, and shall, under the direction of the court, proceed to wind up the affairs of such corporation, sell and convey and distribute its assets among its creditors and stockholders, in the same manner as near as may be, as is provided by law in the case of voluntary dissolution of corporations. A conveyance by a receiver in accordance with a court order shall convey all of the interest of the corporation.

History: New 1961, p 551, Act 236, Eff Jan 1, 1963

600.3610 Sequestration of corporate property.

Sec. 3610. (1) Whenever a judgment is obtained against any corporation, incorporated under the laws of this state, and an execution issued upon the judgment is returned unsatisfied, in part or in whole, upon the petition of the person who obtained the judgment, or his representative, the circuit court may sequester the stock, property, things in action, and effects of the corporation, and may appoint a receiver of the corporation.

Distribution of assets upon final judgment.

(2) Upon a final judgment, the court shall cause a just and fair distribution of the property of the corporation, and of the proceeds thereof, to be made among the creditors of such corporation, in proportion to their debts respectively, who shall be paid in the same order as provided in the case of a voluntary dissolution of a corporation

History: New 1961, p 552, Act 236, Eff Jan 1, 1963

600.3615 Insolvency for one year; corporate rights deemed surrendered.

Sec. 3615. Whenever any incorporated company has remained insolvent for 1 whole year, or for 1 year has neglected or refused to pay and discharge its notes, or other evidence of debt, it is deemed to have surrendered the rights, privileges, and franchises granted by any act of incorporation, or acquired under the laws of this state, and shall be adjudged to be dissolved.

History: New 1961, p. 553, Act 236, Eff. Jan. 1, 1963

600.3620 Creditor's bill against directors or stockholders; jurisdiction of circuit court.

Sec. 3620. (1) Whenever any creditor of a corporation seeks to charge the directors, trustees or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may bring an action in the circuit courts to enforce such liability.

Same; accounts; receivers.

(2) The court shall proceed thereon as in other cases, and when necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint 1 or more receivers, who shall possess all the powers conferred, and are subject to all the obligations imposed on receivers in case of the voluntary dissolution of a corporation.

Same; determination of liability in case of corporate insolvency.

(3) But if, on the coming in of the answer, or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditor, the court may proceed without appointing any receiver, to ascertain the respective liabilities of such directors and stockholders, and enforce the same, by its orders and judgments, as in other cases.

Distribution of property upon final judgment.

(4) Upon a final judgment being made upon any such application to restrain a corporation, or upon any such complaint filed against directors or stockholders, the court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among its creditors, in the order and in the proportions prescribed in the case of a voluntary dissolution of a corporation.

History: New 1961, p. 553, Act 236, Eff. Jan. 1, 1963

600.4531 Judgment against corporation; restraint; receiver; accounting; distribution of assets; duty of attorney general.

Sec. 4531. Whenever any such judgment is rendered, any court having equity jurisdiction has the same powers to restrain the corporation against which it is rendered; to appoint a receiver of its property and effects; and to take an account and make distribution thereof among its creditors, as in the case of the voluntary dissolution of a corporation, and the attorney general shall, immediately after the rendering of any such judgment, institute proceedings for that purpose.

History: New 1961, p. 566, Act 236, Eff. Jan. 1, 1963

600.5201 Common law assignments for the benefit of creditors; requirements for validity.

Sec. 5201. (1) All assignments commonly called common law assignments for the benefit of creditors are void unless the same are without preferences as between such creditors and are of all the property of the assignor not exempt from execution, and the instrument of assignment (or a duplicate thereof), a list of creditors of the assignor, and a bond for the faithful performance of the trust by the assignee are filed in the office of the clerk of the circuit court where said assignor resides, or if he is not a resident of the state, then of the county where the assigned property is principally located, within 10 days after the making thereof.

Bond of assignee, filing, approval.

(2) No such assignment is effectual to convey the title to the property to the assignee until such bond is filed with and approved by said clerk.

Subsequent attachment or execution on assigned property.

(3) No attachment or execution levied upon any assigned property of such assignor after such assignment and before the expiration of the time provided herein for filing such bond, is valid, and does not create any lien upon such property.

Acknowledgment; inventory, contents; list of creditors, contents.

(4) Such assignment shall be acknowledged before some officer authorized to take acknowledgments. Such inventory shall be a detailed statement as near as may be of the general description, value and location of all the property and rights assigned, and in cases of persons engaged in business, specifying the original cost of any goods, wares, merchandise, fixtures and furniture. Such list of creditors shall, as far as the assignor can state the same, contain the name and post office address of each creditor, the amount due as near as may be over and above all defenses, the actual consideration for the debt, when contracted, and all securities and the value thereof held by each creditor. Such inventory and list of creditors shall be sworn by the assignor to be full, true and correct to the best of his knowledge, information and belief.

Bond of assignee, sureties.

(5) Such bond shall be to the assignor for the joint and several use and benefit of himself and each, any and all of the creditors of such assignor in a penal sum at least double the value of the assigned property as shown by such inventory, and conditioned for the prompt and faithful administration of the trust by the assignee and shall be signed by the assignee and sufficient surety or sureties, who shall, under oath endorsed on said bond, testify that they are worth in the aggregate over and above all exemptions, incumbrances and debts, the penal sum of said bond.

History: New 1961, p. 571, Act 236, Eff. Jan. 1, 1963.

600.5205 Property conveyed; general powers of assignee.

Sec. 5205. Such assignment shall be deemed to convey to the assignee all property of the assignor not exempt from execution, and all rights legal or equitable of said assignor. The assignee shall also be trustee of the estate of the debtor for the benefit of his creditors and may recover all property or rights or equities in property which might be recovered by any creditor. When more than 1 assignee is appointed, the debts and property of the assignor may be collected and received by 1 of them and when there are more than 2 assignees, every power and authority of the whole may be exercised by any 2 of them. The survivor or survivors of any assignees shall have all their powers and rights and all property in the hands of any assignee at the time of his death, removal or incapacity, shall be delivered to the remaining assignee or assignees if there be any, or to the successor of the one so dying, removed or incapacitated, who may demand and sue for the same.

History: New 1961, p. 572, Act 236, Eff. Jan. 1, 1963.

600.5211 Specific powers of assignee.

Sec. 5211. Among other things the assignee has the power to:

(1) Sue in his own name as such assignee and recover all the estate, debts and things in action belonging to or due to such assignor in the manner and with like effect as he might or could have done if an assignment had not been made, but no suit seeking equitable relief shall be brought by the assignee involving less than $500.00 without the consent of the court.

(2) Take into his hands all the estate of such assignor whether delivered to him or afterwards discovered, and all books, vouchers and papers relating to the same;

(3) From time to time sell the assets at public auction or at private sale, as herein provided;

(4) Redeem all mortgages and conditional contracts or other incumbrances and pledges of personal property; or sell such property subject to such incumbrances, contracts or pledges;

(5) Settle all matters and accounts between such assignor and his debtors and creditors and examine, on oath to be administered by him, any person touching such matters and accounts;

(6) Compound with any person indebted to such assignor, under order of said court or judge;

(7) Prosecute or defend suits pending in favor of or against the assignor.

History: New 1961, p. 572, Act 236, Eff. Jan. 1, 1963

600.5215 Appraisal of property; sale, notice.

Sec. 5215. As soon as practicable after receiving said assignment, the assignees shall cause an appraisement of such property to be made by 2 disinterested competent persons under oath, and filed with the clerk of the court. Within 10 days after completion of the appraisal, the assignee shall apply to the circuit court or the judge thereof for the exercise of its equitable power to direct the disposition of the assets. Such application shall be by petition, showing what, in the opinion of the assignee, is the most advantageous method of effecting such disposition. Notice of such application of not less than 10 days shall be given by mail to all creditors known to the assignee, and proof thereof filed with the clerk prior to such hearing. The assigned property and assets shall be sold at public or at private sale, in 1 parcel or separately, as said court or judge may direct. At least 14 days' notice of the time and place of any public sale shall be given by publishing the same in a newspaper printed and circulated in the county where the sale shall be made, if there be one, and if not then in such paper as the court shall direct, once in each week for at least 2 successive weeks prior to said sale and by mailing a copy of the same to all creditors. All sales of personal property shall be for cash, but on sales of real property credit may be given for not exceeding 1 year and for not more than ¾ of the purchase money, which shall be secured by mortgage on the property sold.

History: New 1961, p. 572, Act 236, Eff. Jan. 1, 1963

600.5221 Proof of claims; notice, filing; list of creditors.

Sec. 5221. Within 10 days after receiving such trust, the assignee shall give notice to all creditors personally or by mail (accompanied by blank proof of claim) requiring them to prove their claims within 90 days thereafter by a proof of claim to be filed with the assignee, or in default thereof, that the assignee will proceed to distribute the estate as soon as practicable without reference to claims not proved when dividends are paid. It shall not be obligatory upon the assignee to receive proofs of claim after the expiration of said 90 day period except upon order of the court, and the court shall not allow any claim by any creditor so notified to be received after the expiration of 1 year from the date on which the assignment is filed. Within 10 days after the expiration of said 90 day period the assignee shall serve personally or by mail upon each of the creditors a complete list of all creditors who have filed proof of claim giving in each instance the name, post office address and amount claimed. After the expiration of 20 days from the time when said notice is given, the assignee shall file all proofs of claim with the clerk of the court accompanied by any notices of contest which he may decide to make.

History: New 1961, p. 573, Act 236, Eff. Jan. 1, 1963

600.5225 Proof of claims; contents, verification.

Sec. 5225. Each proof of claim must be sworn to and must state the actual amount unpaid and owing, the actual consideration thereof, when the same was contracted, when the same has become or will become due, whether any or what securities are held therefor, whether any and what payments have been made thereon, that the sum claimed is justly owing from the assignor to the claimant, and that the claimant has not, nor has any other person for his use, received any security or satisfaction whatever other than that set forth in such proof. When the claim is founded upon an account an itemized statement thereof shall be given and when the claim is founded upon any note or similar instrument, a copy thereof shall be attached and the production of the original may be required by the assignee.

History: New 1961, p 573, Act 236, Eff Jan 1, 1963

600.5231 Contest of claims; procedure, costs; filing fee.

Sec. 5231. The assignee may contest any claim. Any creditor desirous of having a claim contested may by writing request the assignee to do so and the service of any such request shall operate to stay the payment of any dividend upon such claim until the further order of the court; or any creditor may petition the court for an order requiring the assignee to contest any claim. The contest of any claim shall be instituted by serving, personally or by mail, a notice upon the claimant stating that such claim will be contested and for what reasons. Upon said proof of claim and proof of such service being filed with the clerk of said court, he shall enter such contest as cause in the name of such creditor against such assignor. The circuit court of such county shall proceed with the trial of said cause in the same manner as in other suits at law and shall have power to cause further pleadings to be filed and to allow new or amended ones as may be deemed necessary. The costs or any part thereof may be awarded to either party as the court may deem just and right under the circumstances. Whenever costs are awarded to the creditor, they shall be taxed and shall be paid by the assignee out of the assets if he has sufficient for that purpose. On the filing of the assignment referred to in section 5201, the assignor shall pay to the clerk of the court filing fee of $5.00. For all subsequent proceedings, fees shall be due and payable in accordance with the provisions of the statute relating generally to trials in circuit court.

History: New 1961, p 573, Act 236, Eff Jan 1, 1963.—Am 1963, p 419, Act 240, Eff Sept 6

600.5235 Set-off of mutual debts and credits.

Sec. 5235. In all cases of mutual debts or mutual credits between the estate of an assignor and a creditor, the account shall be stated and 1 debt shall be set off against the other and the balance only shall be allowed or paid. A set-off or counter claim shall not be allowed in favor of any debtor of the assignor which is not provable against his estate, or which was purchased by or transferred to such debtor after the filing of the assignment or prior to the filing thereof with a view to such use and with knowledge or notice that such assignor was insolvent.

History: New 1961, p 574, Act 236, Eff Jan 1, 1963

600.5241 Circuit courts; jurisdiction.

Sec. 5241. Circuit courts have original jurisdiction to hear and determine matters concerning assignments, commonly called common law assignments for the benefit of creditors, according to the following provisions.

Supervisory powers.

(1) The circuit court of the county where the assignor resides, or if the assignor is not a resident of the state then the circuit court of the county where the assigned property is principally located, has supervisory power over all matters, questions, and disputes arising under all those assignments commonly called common law assignments for the benefit of creditors, except as otherwise provided.

Specific powers.

(2) Upon the application of the assignee or of any other interested person the proper circuit court may make all necessary and proper orders for:

(a) the management and disposition of the assigned property;

(b) the allowance of claims;

(c) the re-examination of claims;

(d) the distribution of the assets and avails;

(e) the recovery of all property claimed by third persons;

(f) the prevention of any fraudulent transfer or change in the property or effects of the assignor or the allowance or payment of any unjust or fraudulent claims;

(g) the furnishing from time to time of new bonds or sureties who shall qualify under the court rules, and

(h) the removal of any assignee for cause and the appointment of a successor to any assignee who dies, resigns, or is removed.

Examination; assignor and others.

(3) On the application of the assignee or any creditor the judge of this court may require the assignor or any other person to appear before him on reasonable notice and submit to examination under oath upon all matters relating to:

(a) the disposal of the property of the assignor;

(b) the assignor's trade and dealings with others and his accounts concerning his trade and dealings with others;

(c) all debts due or claimed from the assignor;

(d) any and all other matters concerning the assignor's property and estate or the concealment and embezzlement of his property and estate, and

(e) the due settlement of the estate according to law.

At the request of any party to the proceedings the examination may be reduced to writing and filed with the clerk of the county.

Same; assignee, orders.

(4) At any time before the final settlement of the accounts of the assignee the judge of the proper circuit court may require the attendance of and examine the assignee as to all matters appertaining to the estate of the assignor or the administration of the trust, and upon the examination he may make any order which he deems proper in regard to costs.

Circuit court commissioner.

(5) No power conferred upon the judge by the above subsections (1) through (4) shall be exercised by a circuit court commissioner except under a special reference made by the court.

History: New 1961, p 574, Act 236, Eff Jan 1 1963

600.5245 Assignee; accounts, reports, completion of duties; extension of time, notice.

Sec. 5245. The assignee shall keep a regular account of all money received by him, to which account every creditor or other interested person shall be at liberty at all reasonable times to have access. Within 3 months after receiving such trust, the assignee shall file a report in said clerk's office of the condition of said estate, containing a statement of all property whatsoever received by him and the disposition made thereof, and of all moneys received, disbursed and on hand, and shall quarterly thereafter make like report covering all matters since the preceding report. It shall be the duty of the assignee to close his trust if practicable within 1 year from the date the assignment is filed, but such court or judge shall have power upon cause shown to extend the time allowed for that purpose, for such further periods as may be reasonably necessary, but in case of application for any such extension, notice thereof by mail or otherwise as said court or judge may direct shall be given to the creditors who shall have the right to appear and be heard with reference thereto.

History: New 1961, p 575, Act 236, Eff Jan 1 1963

600.5251 Payment of claims; order, method, time.

Sec. 5251. (1) Funds available for distribution shall be applied to the payment of the following items and in the following order:

(a) All taxes legally due and owing by the assignor to the United States, state, county or municipality;

(b) The cost of administration;

(c) All labor debts entitled to preference under the laws of this state;

(d) All other debts which under the laws of the United States or of this state are entitled to priority;

(e) All other claims preferred and allowed;

(f) Any remaining surplus to be paid to the assignor, his representatives or assigns.

(2) In case the funds shall be insufficient to pay any class in full, then the same shall be distributed pro rata among such class. No dividend on general claims shall be paid until 20 days after the second notice required by section 5221 has been given and proof of service thereof filed with the clerk. If at the time any dividend is made, any suit or claim be pending in which a demand against such assignor may be established, the assignee shall retain in his hands the proportion which would belong to such demand if established, and the necessary costs and expenses of such suit or proceeding to be applied according to the event thereof or to be distributed in a subsequent dividend. Any creditor, who shall have neglected to make proof of his claim before any dividend but who shall make proof before a subsequent dividend, shall receive the sum or sums he would have been entitled to on any former dividend or dividends before any further distribution be made to other creditors. It shall be the duty of the assignee to endeavor to make payment of all dividends to the persons entitled thereto. If any dividend that shall have been declared shall remain unpaid to the person entitled thereto until the estate is otherwise ready to be closed, the assignee shall consider it relinquished and shall distribute it among the other creditors unless otherwise ordered by the court.

History: New 1961, p 575, Act 236, Eff Jan 1, 1963

600.5255 Compensation of assignee; application, notice to creditors.

Sec. 5255. The assignee shall receive for his services, such compensation as may be allowed by the court. In the event of an estate being administered by more than 1 assignee or by successive assignees, the court shall apportion the compensation between them according to the services actually rendered so that there shall not be paid to the assignees for the administering of any estate a greater amount than 1 assignee would be entitled to. The court may in its discretion withhold all compensation from any assignee who has been removed for cause. Ten days' notice by mail shall be given to the creditors of all applications for the allowance to the assignee of compensation and expenses, stating the amount of compensation and the items of expenses for which allowance is asked.

History: New 1961, p 575, Act 236, Eff Jan 1, 1963

600.5261 Civil action for enforcement of trust; grounds; appointment of receiver or assignee; summary examination; powers, duties, and compensation of receiver.

Sec. 5261. In case there is any fraud in the matter of the assignment, or if the assignee fails to file it, or to qualify or to comply with any of the provisions of this chapter, or to promptly and faithfully execute the trust, any person interested therein may bring a civil action in the proper county for the enforcement of the trust. The court in its discretion may appoint a receiver or assignee therein and may order the summary examination of any party or witness at any stage of the cause or other proceedings under this chapter, relative to the matters of the trust, and enforce attendance and the giving of testimony. A receiver shall have the same rights, powers, duties, and compensation and be subject to all the obligations and liabilities of an assignee.

History: New 1961, p 576, Act 236, Eff Jan 1, 1963 —Am 1974, p 1123, Act 297, Eff Apr 1, 1975

600.5265 Nature of proceedings.

Sec. 5265. Proceedings under this chapter, except the contest of claims under section 5231, are equitable in nature.

History: New 1961, p 576, Act 236, Eff Jan 1, 1963

600.5301 Assignment of future wages; notice to creditor and employer; exception.

Sec. 5301. Any person employed by any person, firm, corporation, a local government or agency, or the state, or an agency thereof, who is or may be working for wages or for a salary for others, including those paid on a commission basis or who are paid through any combination thereof, who has debts which he is unable to pay, may file a full and complete list of his creditors with the clerk of the district or municipal court where he lives or where he is employed. Upon making an assignment of all his future wages to the clerk of the court to continue during the pendency of the proceedings as hereinafter set forth, he may have a notice served upon each creditor. The notice shall set forth the fact that the proceedings are pending and contain a full list of his creditors and the amount alleged to be due to each creditor and shall prescribe a time within which the creditor shall file a sworn proof of claim with the clerk of the court, which time shall not be less than 10 days nor more than 20 days from the date of service of the notice upon the creditor and shall be signed by the clerk of the court. The notice shall act as an immediate stay of proceedings by every creditor so served as against the wages, salary, or commission so assigned. The clerk of the court shall thereupon also notify the employer of the pendency of the court proceedings in suitable form as prescribed by the court. The notice shall constitute a notification to the employer to pay any and all moneys due or to become due to the employee from thenceforth, to the clerk of the court, unless and until served with a notice to the contrary. The provisions of this chapter shall not apply to any city having a common pleas court.

History: New 1961, p 576, Act 236, Eff Jan 1, 1963.—Am 1969, p 769, Act 341, Eff Jan 1, 1970.—Am 1974, p 1123, Act 297, Eff Apr 1, 1975

600.5305 List of creditors; contents of petition.

Sec. 5305. The list of creditors above mentioned shall be in the form of a petition under oath and under the pains and penalties of perjury, and shall set forth whether the petitioner is a married man or not and the name, age and relationship of each person depending upon him for support and shall give the name and address of each and every creditor of the petitioner, the amount of the indebtedness, the nature of the claim, and shall contain a statement in addition to the above as to whether or not the claim is disputed by either party as to amount, and in case said claim is disputed it shall give the amount claimed by the creditor and the amount claimed by the debtor.

History: New 1961, p 576, Act 236, Eff Jan 1, 1963

600.5311 Exemptions.

Sec. 5311. After the filing of such petition and assignment of wages, the court shall make an order directing the clerk to pay the petitioner his legal exemptions, which shall be as follows:

(1) If the petitioner is a householder having a family, 60% but not less than $15.00 per week for which such wages, salary or commission are due, and in addition $2.00 per week for each person other than husband or wife under 18 years of age or incapable of self support because mentally or physically defective and legally dependent upon him for support.

(2) If the petitioner is not a householder having a family, he shall be entitled to 40% but not less than $10.00 per week.

History: New 1961, p 577, Act 236, Eff Jan 1, 1963.—Am 1972, p 49, Act 21, Imd Eff Feb 19

600.5315 Exemptions by agreement; support of children.

Sec. 5315. If all creditors sign a written agreement so to do, the debtor may be paid more than the amounts herein provided for. If the petitioner is required by an order of a court of competent jurisdiction to pay money for the support and maintenance of children, then upon the filing with the court of a certified copy of the order, there shall be exempted such further sum as may be required to comply with the order, which the clerk shall forward to the person or official named in the order to receive the same.

History: New 1961, p 577, Act 236, Eff. Jan. 1, 1963

600.5321 Distribution of balance.

Sec. 5321. The court shall further direct the clerk to pay the remainder of any moneys in his possession, over and above the exemptions of the petitioner, to the creditors, to be divided equally among all creditors listed, but the clerk shall not be obliged to make such distribution oftener than once in 60 days and then only if there is at least $100.00 to be distributed, but when making a distribution to creditors may pay claims or unpaid balances of $5.00 or less in full and divide the balance of the money equally among the balance of the creditors. Any money not called for by any creditor, or checks returned undelivered and remaining in the clerk's office for 6 months after the proceedings are dismissed, may be paid by the clerk to the petitioner.

History: New 1961, p. 577, Act 236, Eff Jan. 1, 1963

600.5325 Clerk as agent of listed creditors; title to funds.

Sec. 5325. The clerk of the court shall be the agent of each creditor listed, as to funds paid into court to which such creditors are entitled under the provisions of this chapter, and upon payment of any such funds to the clerk of the court the title thereto shall immediately pass to the creditors entitled thereto by the provisions of this chapter and their heirs and assigns, and shall become part of the estate of such creditors. This provision shall not apply to moneys not called for by any creditor or checks returned not delivered and remaining in the clerk's office for 6 months after a petition is dismissed.

History: New 1961, p. 577, Act 236, Eff Jan 1, 1963

600.5331 Fixing amount of claim; disputed claim; costs; intervention.

Sec. 5331. (1) The judge shall fix the amount of each claim, regardless of whether or not it exceeds the jurisdiction of the court in civil actions, for the purpose of participating in the funds only. The fixing of these amounts shall not be construed to be a judgment, but a creditor may at any time during the pendency of the proceeding or afterwards, take any legal action he may desire against the debtor and any means to collect any judgment secured, excepting to garnish the assigned wages. In the case of a judgment creditor who is such when the petition is filed, the amount fixed shall be the amount of the judgment with costs and legal interest, less any payments thereon. When a creditor reduces his claim to judgment during the pendency of the proceedings, the amount of his claim for participating in the funds shall thereupon be fixed at the amount of the judgment and costs, but in such case payments previously made to creditors shall not be affected.

(2) The judge, debtor, or any creditor may dispute the claim of any creditor, at any time during the pendency of the proceedings. Upon the determination of the judge to dispute a claim, or upon the filing of a written notice of intention by the debtor or creditor to do so, the judge shall cause notice of hearing to be served on the debtor, the creditor whose claim is disputed, and the objector, and have a hearing thereon, and may issue subpoenas to compel the attendance of witnesses as in civil actions therein.

(3) Any costs incurred by the hearing may be taxed against either the debtor, the objector, or the creditor whose claim is disputed, as the judge may deem just, and may be deducted from any funds in the custody of the court which would otherwise be paid to the person against whom taxed, and paid to the person in whose favor they are taxed.

(4) Any person claiming to be a creditor of any person taking advantage of this chapter who has not been listed may intervene and prove his claim the same as though his claim had been listed.

History: New 1961, p 577, Act 236, Eff Jan 1, 1963.—Am 1974, p 1124, Act 297, Eff Apr 1, 1975

600.5335 Payment of wages by employer.

Sec. 5335. Payment by any employer to the clerk of the court in pursuance of notice from the court to him or it of the filing of a petition by an employee, shall be payment to the employee the same as if received by said employee personally. Any employer who pays any wages, salary or commission to any employee after receiving notice of said assignment, shall be liable for any sums so paid on garnishment proceedings taken by any creditor.

History: New 1961, p 578, Act 236, Eff Jan 1, 1963

600.5341 Garnishment; effect.

Sec. 5341. No creditor so named in this proceeding shall have any right to garnishee the petitioner therein, and it shall be the duty of the employer in any case when served with a notice of garnishment against said employee, nevertheless to pay said wages to the clerk of the court aforesaid together with notice that such wages have been garnisheed together with any other pertinent facts pertaining to the case. When and in case any creditor not listed shall garnishee any wages so assigned, he shall have the right to have his cost expended in said garnishment added to the amount due him by proof to the court that said garnishment was instituted in good faith and without knowledge of said assignment proceedings.

History: New 1961, p 578, Act 236, Eff Jan 1, 1963

600.5345 Duration of assignment proceedings.

Sec. 5345. Such proceedings shall be continued indefinitely until all debts of said petitioner are paid or they may be dismissed by the court after notice to interested parties upon the petition of the debtor or upon the court's own motion or upon the petition of any creditor who can show by evidence that the debtor is attempting to deceive the court or to be unfair or is in collusion with any person, persons, firm, firms, corporation or corporations, in connection with the receivership.

History: New 1961, p 578, Act 236, Eff Jan 1, 1963

600.5351 Secured creditors.

Sec. 5351. Nothing in this chapter shall be construed to deprive the creditor holding security from pursuing his rights under the instrument giving him such security, and no creditor shall be deprived of any remedy given him by the laws of the state except they shall not have the right to garnishee or obtain any interest in the wages, salary or commission of any person claiming the advantages of this chapter.

History: New 1961, p 578, Act 236, Eff Jan 1, 1963

600.5355 Notices; manner of giving; change of employment.

Sec. 5355. All notices provided for in this chapter may be given by registered mail with return receipt demanded, and if the return receipt is not received the court may order the same served as process is served in said court, and the cost thereof shall be paid by the petitioner. When and if the petitioner changes his employer he shall notify the clerk of the court and execute a new assignment of his wages and the clerk shall notify the new employer.

History: New 1961, p 579, Act 236, Eff Jan 1, 1963

600.5361 Debts incurred after filing petition; not included.

Sec. 5361. The petitioner shall not have the right to file or list any indebtedness incurred after the filing of the petition.

History: New 1961 p 579, Act 236 Eff Jan 1, 1963

600.5365 Statute of limitations tolled during pendency of proceedings.

Sec. 5365. The statute of limitations shall not run against any debt or liability of a petitioner during the pendency of the proceedings herein provided for, whether such indebtedness or liability existed at the time of the filing of the petition or was incurred afterwards.

History: New 1961, p 579, Act 236 Eff Jan 1, 1963

600.5371 Court fees upon petition; defrayment of incidental expenses.

Sec. 5371. Upon the filing of the petition and assignment of wages as herein provided, said petitioner shall pay to the clerk of said court the sum of 50 cents as a filing fee and the further sum of 50 cents for each creditor named in the petition and each year thereafter the sum of 50 cents for each creditor listed and not paid in full. In the event of any contest between the debtor and any creditor or 1 creditor and another creditor, the moving party in such contest shall before having same determined pay to the clerk of the court the sum of 50 cents as a hearing fee for such service and the court shall have the right to direct the clerk to retain from the exemptions of petitioners such sums as may be necessary to defray the actual costs for providing notices, stamps, clerical help in the clerk's office, and other incidental expenses of paying for the administration of this chapter, and charge the same to the petitioners. The clerk shall deduct from the exemptions of petitioners the fee of 50 cents per creditor above provided for second and subsequent years, unless the petitioner shall pay same when due. All fees herein provided for shall be for the use of the city.

History: New 1961 p 579, Act 236 Eff Jan 1, 1963

600.5375 Repealed. 1969, p. 388, Act 209, Eff. Jan. 1, 1970.

Compiler's note: The repealed section pertained to receivership for wage earners, cities to which applicable

600.6104 Powers of judge after rendition of judgment for money.

Sec. 6104. After judgment for money has been rendered in an action in any court of this state, the judge may, on motion in that action or in a subsequent proceeding:

(1) Compel a discovery of any property or things in action belonging to a judgment debtor, and of any property, money, or things in action due to him, or held in trust for him;

(2) Prevent the transfer of any property, money, or things in action, or the payment or delivery thereof to the judgment debtor;

(3) Order the satisfaction of the judgment out of property, money, or other things in action, liquidated or unliquidated, not exempt from execution;

(4) Appoint a receiver of any property the judgment debtor has or may thereafter acquire; and

(5) Make any order as within his discretion seems appropriate in regard to carrying out the full intent and purpose of these provisions to subject any nonexempt assets of any judgment debtor to the satisfaction of any judgment against the judgment debtor.

The court may permit the proceedings under this chapter to be taken although execution may not issue and other proceedings may not be taken for the enforcement of the judgment. It is not necessary that execution be returned unsatisfied before proceedings under this chapter are commenced.

History: New 1961 p 619, Act 236 Eff Jan 1, 1963 — Am 1974 p 1133, Act 297 Eff Apr 1, 1975

722.719. Bond, conditions, sureties, default contempt; lien on real estate; receivers

Sec. 9. (1) The person so adjudged to be the father of the child may be required to give bond with 1 or more sufficient sureties to the satisfaction of the court, to perform the order * * * of the court, and to indemnify the county * * * which * * * is chargeable with the confinement expenses and with the maintenance of the child. The bond shall be filed with the friend of the court or the clerk of the court. If on the trial he is adjudged not to be the father of the child, the court shall dismiss the complaint; and the judgment of the court is final.

* * * (2) If default is made in the payment of an installment or any part of the installment, mentioned in the bond * * * filed under subsection (1), the judge of the court in which the bond is filed, at the request of the mother, guardian, or any other person interested in the support of the child, shall issue a citation to the principal and sureties in the bond requiring them to appear on a day specified in the citation, and show cause * * * why execution shall not issue against them for the amount of the installment due and unpaid on the bond. The citation shall be served by the sheriff of any county in which the principal or sureties reside or may be found. If the amount due on the installment is not paid on or before the time mentioned for showing cause, the judge shall render judgment in favor of the complainant against the principal and sureties who have been served with the citation, for the amount unpaid on the installment due on the bond * * *. Execution shall issue from the court against the goods and chattels of the person or persons against whom the judgment is rendered for the amount of the judgment and costs to the sheriff of any county in the state where the parties to the judgment, or either of them, reside or have property subject to the execution.

(3) The judge, in case of default in the payment, when due, of any installment or any part of the installment or in the condition of the bond, may adjudge the reputed father guilty of contempt of court * * * as provided in sections 31 to 39 of the support and visitation enforcement act.[1] The commitment of the reputed father pursuant to sections 31 to 39 of the support and visitation enforcement act shall not operate to stay or defeat the obtaining of judgment and the collection of the judgment by execution. The rendition and the enforcement of decree or judgment shall not be construed to bar or hinder the taking of similar proceedings for subsequent defaults.

(4) If the judge deems it necessary in order to secure the payment or enforcement of the judgment, the same shall be made a lien upon such of the real estate of the defendant as the court directs, and a certified copy of the judgment shall be made by the clerk of the court, and filed and recorded in the office of the register of deeds of the county in which the real estate is located * * *. Upon the recording of the judgment, the judgment shall be a lien on that real estate. Execution and other process may also issue for the enforcement of the judgment as in case of other judgments in the court, and the provisions of this section, as far as applicable.

(5) In order to make effective the purpose and intention of the bonds, the court * * * may appoint a receiver of the real and personal property belonging to the judgment debtors with * * * powers not exceeding those customarily exercised by receivers * * *

Amended by P.A.1982, No. 296, § 1, Eff. July 1, 1983.

[1] Sections 552.631 to 552.639.

750.119 Jurors, appraisers, etc.; bribery.

Sec. 119. Bribery of jurors, etc.—Any person who shall corrupt or attempt to corrupt any appraiser, receiver, trustee, administrator, executor, commissioner, auditor, juror, arbitrator or referee, by giving, offering or promising any gift or gratuity whatever, with intent to bias the opinion or influence the decision of such appraiser, receiver, trustee, administrator, executor, commissioner, auditor, juror, arbitrator or referee in relation to any matter which may be pending in a court, or before an inquest, or for the decision of which said appraiser, receiver, trustee, administrator, executor, commissioner, auditor, juror, arbitrator or referee shall have been appointed or chosen, shall be guilty of a felony.

History: C.L.1948, 750.119

Former law: See section 9 of Ch. 156 of R.S. 1846, being C.L. 1857, § 5828, C.L. 1871, § 7061, How. § 9243, C.L. 1897, § 11313, C.L. 1915, § 14980, and C.L. 1929, § 16571.

750.120 Jurors, appraisers, etc.; accepting bribe.

Sec. 120. Juror, etc., accepting bribe—Any person summoned as a juror or chosen or appointed as an appraiser, receiver, trustee, administrator, executor, commissioner, auditor, arbitrator or referee who shall corruptly take anything to give his verdict, award, or report, or who shall corruptly receive any gift or gratuity whatever, from a party to any suit, cause, or proceeding, for the trial or decision of which such juror shall have been summoned, or for the hearing or determination of which such appraiser, receiver, trustee, administrator, executor, commissioner, auditor, arbitrator, or referee shall have been chosen or appointed, shall be guilty of a felony.

History: C.L.1948, 750.120

Former law: See section 10 of Ch. 156 of R.S. 1846, being C.L. 1857, § 5829, C.L. 1871, § 7062, How. § 9244, C.L. 1897, § 11314, C.L. 1915, § 14981, C.L. 1929, § 16572, and Act 120 of 1873.

800.404a. Remedies to restrain disposition of prisoner's estate; receiver; execution against homestead

Sec. 4a. (1) Except as provided in subsection (3), in seeking to secure reimbursement under this act, the attorney general may use any remedy, interim order, or enforcement procedure allowed by law or court rule including an ex parte restraining order to restrain the prisoner or any other person or legal entity in possession or having custody of the estate of the prisoner from disposing of certain property pending a hearing on an order to show cause why the particular property should not be applied to reimburse the state as provided for under this act.

(2) To protect and maintain assets pending resolution of an action under this act, the court, upon request, may appoint a receiver.

(3) The attorney general or a prosecuting attorney shall not enforce any judgment obtained under this act by means of execution against the homestead of the prisoner.

Amended by P.A.1984, No. 282, § 1, Imd. Eff. Dec. 20.

801.88. Venue; restraining orders; appointment of receiver

Sec. 8. (1) Consistent with section 7,[1] the county may file the civil action in the circuit court. If the defendant is still a prisoner in the county jail, venue is proper in the county in which the jail is located.

(2) If necessary to protect the county's right to obtain reimbursement under this act against the disposition of known property, the county, in accordance with rules of the supreme court of this state, may seek issuance of an ex parte restraining order to restrain the defendant from disposing of the property pending a hearing on an order to show cause why the particular property should not be applied to reimbursement of the county for the maintenance and support of the defendant as a prisoner.

(3) To protect and maintain the property pending resolution of the matter, the court, upon request, may appoint a receiver.

P.A.1984, No. 118, § 8, Imd. Eff. June 1.

[1] Section 801.87.

CHAPTER 830

STATE BUILDING PROGRAMS

STATE BUILDING AUTHORITY

P.A.1964, No. 183, Imd. Eff. May 19

AN ACT creating the state building authority with power to acquire, construct, furnish, equip, own, improve, enlarge, operate, mortgage, and maintain buildings, necessary parking structures or lots and facilities, and sites therefor, for the use of the state or any of its agencies; to act as a developer or co-owner of buildings, necessary parking structures or lots, and facilities, and sites therefor as a condominium project for the use of the state or any of its agencies; to authorize the execution of leases pertaining to such properties and facilities by the building authority with the state or any of its agencies; to authorize the payment of true rentals by the state; to provide for the issuance of revenue obligations by the building authority to be paid from the true rentals to be paid by the state and other resources and security provided for and pledged by the building authority; to authorize the creation of funds; to authorize the conveyance of lands by the state or any of its agencies for the purposes herein authorized; to authorize the appointment of a trustee for bondholders and to permit remedies for the benefit of bondholders: and to provide for other matters in relation thereto. Amended by P.A.1983, No. 156, § 1, Imd. Eff. July 24.

830.418. Revenue bonds: issuance, terms, payment, negotiable, exemption from taxation, approval, sale, additional bonds, total amount

Sec. 8. (1) The building authority, by resolution or resolutions of its board, may provide for the issuance of revenue obligations, which may include revenue bonds, revenue notes, or other evidences of revenue indebtedness, refunding revenue bonds, notes, or other refunding evidences of indebtedness, the obligations for which shall not become a general obligation of the state or a charge against the state, but all revenue obligations and the interest on the revenue obligations and the call premiums for the revenue obligations shall be payable solely from true rental, except to the extent paid from the proceeds of sale of revenue obligations and any additional security provided for and pledged, or from other funds as provided in this act, and each revenue obligation shall have such a statement printed on the face of the revenue obligation. If the resolution of the building authority provides for interest coupons to be attached to any revenue obligation, each interest coupon shall have a statement printed on the coupon that the coupon is not a general obligation of the state or the building authority but is payable solely from certain revenues as specified in the revenue obligation. Revenue obligations may be issued for the purpose of paying part or all of the costs of the facilities or for the purpose of refunding or advance refunding, in whole or in part, outstanding revenue obligations issued pursuant to this act whether the obligations to be refunded or advance refunded have matured or are redeemable or shall * * * mature or become redeemable after being refunded. The cost of the facilities may include an allowance for legal, engineering, architectural, and consulting services, interest on revenue obligations becoming due before the collection of the first true rental available for the payment of those revenue obligations; a reserve for the payment of principal, interest, and redemption premiums on the revenue obligations of the authority; and other necessary incidental expenses * * * including, but not limited to, placement fees and fees or charges for insurance, letters of credit, lines of credit, remarketing agreements, or commitments to purchase obligations issued pursuant to this act or any other fees or charges for any other security provided to assure timely payment of the obligations.

* * *

(10) The board in the resolution, or resolutions, authorizing the obligations may provide for the terms and conditions upon which the holders of the obligations, or any portion of the obligations or any trustee for the obligations, shall be entitled to the appointment of a receiver. The receiver may enter and take possession of the facility, may lease and maintain the facility, may prescribe rentals and collect, receive, and apply income and revenues thereafter arising from the facility in the same manner and to the same extent that the authority is so authorized. The resolution or resolutions may provide for the appointment of a trustee for the holders of the obligations, may give to the trustee the appropriate rights, duties, remedies, and powers, with or without the execution of a deed of trust or mortgage, necessary and appropriate to secure the obligations, and may provide that the principal of and interest on * * * any obligations issued under this act shall be secured by a mortgage, security interest, or deed of trust covering the facility, which mortgage, security interest, or deed of trust may contain such covenants, agreements, and remedies as will properly safeguard the obligations as may be provided for in the resolution or resolutions authorizing the obligations, including the right to sell the facility upon foreclosure sale, not inconsistent with this act.

COURT RULES

RULE 2.622 RECEIVERS IN SUPPLEMENTARY PROCEEDINGS

(A) Powers and Duties.

(1) A receiver of the property of a debtor appointed pursuant to MCL 600.6104(4); MSA 27A.6104(4) has, unless restricted by special order of the court, general power and authority to sue for and collect all the debts, demands, and rents belonging to the debtor, and to compromise and settle those that are unsafe and of doubtful character.

(2) A receiver may sue in the name of the debtor when it is necessary or proper to do so, and may apply for an order directing the tenants of real estate belonging to the debtor, or of which the debtor is entitled to the rents, to pay their rents to the receiver.

(3) A receiver may make leases as may be necessary, for terms not exceeding one year.

(4) A receiver may convert the personal property into money, but may not sell real estate of the debtor without a special order of the court.

(5) A receiver is not allowed the costs of a suit brought by the receiver against an insolvent person from whom the receiver is unable to collect the costs, unless the suit is brought by order of the court or by consent of all persons interested in the funds in the receiver's hands.

(6) A receiver may sell doubtful debts and doubtful claims to personal property at public auction, giving at least 7 days' notice of the time and place of the sale.

(7) A receiver must give security to cover the property of the debtor that may come into the receiver's hands, and must hold the property for the benefit of all creditors who have commenced, or will commence, similar proceedings during the continuance of the receivership.

(8) A receiver may not pay the funds in his or her hands to the parties or to another person without an order of the court.

(9) A receiver may only be discharged from the trust on order of the court.

(B) Notice When Other Action or Proceeding Pending; Appointment.

(1) The court shall ascertain, if practicable, by the oath of the judgment debtor or otherwise, whether another action or motion under MCR 2.621 is pending against the judgment debtor.

(2) If another action or motion under MCR 2.621 is pending and a receiver has not been appointed in that proceeding, notice of the application for the appointment of a receiver and of all subsequent proceedings respecting the receivership must be given, as directed by the court, to the judgment creditor prosecuting the other action or motion.

(3) If several actions or motions under MCR 2.621 are filed by different creditors against the same debtor, only one receiver may be appointed, unless the first appointment was obtained by fraud or collusion, or the receiver is an improper person to execute the trust.

(4) If another proceeding is commenced after the appointment of a receiver, the same person may be appointed receiver in the subsequent proceeding, and must give further security as the court directs. The receiver must keep a separate account of the property of the debtor acquired since the commencement of the first proceeding, and of the property acquired under the appointment in the later proceeding.

(C) Claim of Adverse Interest in Property.

(1) If a person brought before the court by the judgment creditor under MCR 2.621 claims an interest in the property adverse to the judgment debtor, and a receiver has been appointed, the interest may be recovered only in an action by the receiver.

(2) The court may by order forbid a transfer or other disposition of the interest until the receiver has sufficient opportunity to commence the action.

(3) The receiver may bring an action only at the request of the judgment creditor and at the judgment creditor's expense in case of failure. The receiver may require reasonable security against all costs before commencing the action.

(D) Expenses in Certain Cases. When there are no funds in the hands of the receiver at the termination of the receivership, the court, on application of the receiver, may set the receiver's compensation and the fees of the receiver's attorney for the services rendered, and may direct the party who moved for the appointment of the receiver to pay these sums in addition to the necessary expenditures of the receiver. If more than one creditor sought the appointment of a receiver, the court may allocate the costs among them.

RULE 3.611 VOLUNTARY DISSOLUTION OF CORPORATIONS

(A) Scope; Rules Applicable. This rule governs actions to dissolve corporations brought under MCL 600.3501; MSA 27A.3501. The general rules of procedure apply to these actions, except as provided in this rule and in MCL 600.3501–600.3515; MSA 27A.3501–27A.3515.

(B) Contents of Complaint; Statements Attached. A complaint seeking voluntary dissolution of a corporation must state why the plaintiff desires a dissolution of the corporation, and there must be attached:

(1) an inventory of all the corporation's property;

(2) a statement of all encumbrances on the corporation's property;

(3) an account of the corporation's capital stock, specifying the names of the stockholders, their addresses, if known, the number of shares belonging to each, the amount paid in on the shares, and the amount still due on them;

(4) an account of all the corporation's creditors and the contracts entered into by the corporation that may not have been fully satisfied and canceled, specifying:

(a) the address of each creditor and of every known person with whom the contracts were made, if known, and if not known, that fact to be stated;

(b) the amount owing to each creditor;

(c) the nature of each debt, demand, or obligation; and

(d) the basis of and consideration for each debt, demand, or obligation; and

(5) the affidavit of the plaintiff that the facts stated in the complaint, accounts, inventories, and statements are complete and true, so far as the plaintiff knows or has the means of knowing.

(C) Notice of Action. Process may be served as in other actions, or, on the filing of the complaint, the court may order all persons interested in the corporation to show cause why the corporation should not be dissolved, at a time and place to be specified in the order, but at least 28 days after the date of the order. Notice of the contents of the order must be served by mail on all creditors and stockholders at least 28 days before the hearing date, and must be published once each week for 3 successive weeks in a newspaper designated by the court.

(D) Hearing. At a hearing ordered under subrule (C), the court shall hear the allegations and proofs of the parties and take testimony relating to the property, debts, credits, engagements, and condition of the corporation. After the hearing, the court may dismiss the action, order the corporation dissolved, appoint a receiver, schedule further proceedings, or enter another appropriate order.

(E) Suits by Receiver. An action may be brought by the receiver in his or her own name and may be continued by the receiver's successor or co-receiver. An action commenced by or against the corporation before the filing of the complaint for dissolution is not abated by the complaint or by the judgment of dissolution, but may be prosecuted or defended by the receiver. The court in which an action is pending may on motion order substitution of parties or enter another necessary order.

RULE 3.612 WINDING UP OF CORPORATION WHOSE TERM OR CHARTER HAS EXPIRED

(A) Scope; Rules Applicable. This rule applies to actions under MCL 600.3520; MSA 27A.3520. The general rules of procedure apply to these actions, except as provided in this rule and in MCL 600.3520; MSA 27A.3520.

(B) Contents of Complaint. The complaint must include:

(1) the nature of the plaintiff's interest in the corporation or its property, the date of organization of the corporation, the title and the date of approval of the special act under which the corporation is organized, if appropriate, and the term of corporate existence;

(2) whether any of the corporation's stockholders are unknown to the plaintiff;

(3) that the complaint is filed on behalf of the plaintiff and all other persons interested in the property of the corporation as stockholders, creditors, or otherwise who may choose to join as parties plaintiff and share the expense of the action;

(4) an incorporation by reference of the statements required by subrule (C);

(5) other appropriate allegations; and

(6) a demand for appropriate relief, which may include that the affairs of the corporation be wound up and its assets disposed of and distributed and that a receiver of its property be appointed.

(C) Statements Attached to Complaint. The complaint must have attached:

(1) a copy of the corporation's articles of incorporation, if they are on file with the Department of Commerce, and, if the corporation is organized by special act, a copy of the act;

(2) a statement of the corporation's assets, so far as known to the plaintiff;

(3) a statement of the amount of capital stock and of the amount paid in, as far as known, from the last report of the corporation on file with the Department of Commerce or, if none has been filed, from the articles of incorporation on file with the Department of Commerce, or the special legislative act organizing the corporation;

(4) if the corporation's stock records are accessible to the plaintiff, a list of the stockholders' names and addresses and the number of shares held by each, insofar as shown in the records;

(5) a statement of all encumbrances on the corporation's property, and all claims against the corporation, and the names and addresses of the encumbrancers and claimants, so far as known to the plaintiff; and

(6) a statement of the corporation's debts, the names and addresses of the creditors, and the nature of the consideration for each debt, so far as known to the plaintiff.

(D) Parties Defendant. The corporation must be made a defendant. All persons claiming encumbrances on the property may be made defendants. It is not necessary to make a stockholder or creditor of the corporation a defendant.

(E) Process and Order for Appearance; Publication.

(1) Process must be issued and served as in other civil actions or, on the filing of the complaint, the court may order the appearance and answer of the corporation, its stockholders, and creditors at least 28 days after the date of the order.

(2) The order for appearance must be published in the manner prescribed in MCR 2.106.

(3) When proof of the publication is filed and the time specified in the order for the appearance of the corporation, stockholders, and creditors has expired, an order may be entered taking the complaint as confessed by those who have not appeared.

(F) Appearance by Defendants.

(1) Within the time the order for appearance sets, the following persons may appear and defend the suit as the corporation might have:

(a) a stockholder in the corporation while it existed and who still retains rights in its property by owning stock;

(b) an assignee, purchaser, heir, devisee, or personal representative of a stockholder; or

(c) a creditor of the corporation, whose claim is not barred by the statute of limitations.

(2) All persons so appearing must defend in the name of the corporation.

(3) If a person other than the corporation has been named as a defendant in the complaint, that person must be served with process as in other civil actions.

(G) Subsequent Proceedings. So far as applicable, the procedures established in MCR 3.611 govern hearings and later proceedings in an action under this rule.

(H) Continuation of Proceeding for Benefit of Stockholder or Creditor. If the plaintiff fails to establish that he or she is a stockholder or creditor of the corporation, the action may be continued by another stockholder or creditor who has appeared in the action.

AMENDMENTS TO DELETE REFERENCES TO ABOLISHED COURTS

Over the last several years, the Commission has proposed a series of statutory amendments that would eliminate references to abolished courts (in particular, the Justice of the Peace) that are scattered through the Compiled Laws. In the course of preparing these and similar "housekeeping" measures, it became apparent that the amendment process would be greatly facilitated if a single enactment could be used to achieve basically the same substantive amendment in a serious of different statutes. The constitutionality of such an enactment is explored in our 1987 Report at page 83. Relying on our discussion there, we have drafted, with the assistance of the Legislative Service Bureau, a series of bills that would eliminate references to abolished courts though similar amendments in more than legislative act. We have also prepared various bills that would eliminate references to abolished courts in single legislative acts. In most instances, the bills contain changes in only a few lines of a quite lengthy enactment. Accordingly, we do not here set forth the bills in full. Instead, we present a brief description of the legislation to be amended and the nature of the change that would eliminate the reference to the abolished courts. Stylistic changes (e.g., elimination of gender references) are also included in the bills.

Amendments of Multiple Acts

1. Amendments of M.C.L. §46.28 (P.A. 156 of 1851), M.C.L. §239.3 (P.A. 283 of 1909), M.C.L. §§247.172, 247.174, 247.177 (P.A. 368 of 1925),

and M.C.L. §247.466 (P.A. 59 of 1915).

These acts deal with highways and the proposed amendments replace references to the justice of the peace in provisions authorizing civil actions relating to highways. M.C.L. §46.28 refers to complaints brought by one aggrieved by the action of the Board of "Supervisors" (amended to reflect current title of "Commissioners") in laying out, altering, or discontinuing a road. It currently provides that such person file a complaint before any justice of the peace of the township in which the land is located and it then adds specific directions for the selection of a jury by that court. The proposed amendment provides that the complaint be filed with "the district or municipal court of the judicial district or municipality" where the land is located. Throughout most of the state, the district court is the court that now exercises the jurisdiction formerly exercised by the justice of the peace. The reference to municipal courts is needed, however, because several municipalities have chosen the option under M.C.L. §600.9928 to retain their municipal courts in lieu of becoming part of the district court system. Since district courts and municipal courts have their own jury selection procedures, the provisions in M.C.L. §46.28 relating to jury selection are deleted.

M.C.L. §239.3 relates to actions brought by the "highway department" (amended to reflect current title of "state transportation department") to remove previously constructed culvert or cattle-passes on highways that have fallen into disrepair. The proposed amendment provides that the action shall be brought in the "district or municipal court" in lieu of the current reference to "any justice of the peace of such township."

M.C.L. §§247.172, 247.174, and 247.177 relate to actions brought to

remove obstructions and encroachments on public highways by the state highway commissioner or state highway commission (amended to substitute "state transportation department"). The current language states that the action shall be brought before "any justice of the peace of the township, or of an adjoining township in the same county" and it is replaced by reference to the "district or municipal court" of the locality.

M.C.L. §247.466 provides for judicial review (upon certiorari) of proceedings before the county commissioners or "state highway commissioner" (replaced by "state transportation department") with reference to highway improvements. Review by the "district or municipal court" is substituted for review by the "justice of the peace."

2. Amendment of M.C.L. §§85.17, 105.7 (P.A. 215 of 1895), and M.C.L. §201.52 (P.A. 76 of 1917).

Those two Acts provide for the selection and replacement of officials in units of local government (cities of 4th class and townships). Each contains provisions on filling vacancies in the office of justice of the peace. Those provisions are deleted.

3. Amendment of M.C.L. §289.37 (P.A. 211 of 1893), and M.C.L. §290.56 (P.A. 110 of 1909).

Each of these Acts deal with agriculture regulation (dairy products and linseed oil) and provide for seizure and subsequent judicial actions as to products that are adulterated or being kept or sold in violation of law. The language directing that the judicial action be brought before a "justice of the peace" having jurisdiction in the location where the item was seized is replaced by a reference to the "district or municipal court" having such jurisdiction.

4. Amendment of M.C.L. §§426.5, 426.6, 426.11, and 426.12 (P.A. 229 of 1887), M.C.L. §426.53 (P.A. 263 of 1861), M.C.L. §570.188 (Ch. 126 of the Revised Statutes of 1846), M.C.L. §570.335 (P.A. 116 of 1911), and M.C.L. §§570.357 and 570.362 (P.A. 160 of 1897).

Each of these Acts deals with liens. They encompass liens on logs, lumber, telephone poles, etc.; on floating logs and timber, on hay, grain, seed, etc.; and on horses and other animals (for the cost of shoeing). Each currently provides for action upon the lien before the justice of the peace. Two of the Acts also authorize that the actions to be brought in the circuit court, although the other three do not. The proposed amendments initially would substitute the "district or the municipal court" for the current references to the justice of the peace. Secondly, consistent with the R.J.A., the actions under all five of the Acts are to be brought in the circuit court where the dollar value is above general jurisdictional minimum for circuit court jurisdiction. Current language setting forth a specific jurisdictional dividing line ($300.00 in M.C.L. §426.53) is deleted. The reference is made generally to the action meeting the requirements for circuit court jurisdiction so that a statutory change is not needed each time the jurisdictional minimum in the R.J.A. is amended.

5. Amendment of M.C.L. §436.203 (P.A. 68 of 1913), and M.C.L. §§466.10 and 467.10 (P.A. 198 of 1873).

This proposal is discussed in 1987 Annual Report at page 79. The sections involved relate to arrests by railroad conductors for disturbances on trains and the presentation of the arrested person before the justice of the peace.

6. Amendment of M.C.L. §§750.139, 750.215, 750.248, 750.308, 750.371, 750.524, 750.537, and 750.238 (P.A. 328 of 1931), and M.C.L. §§752.526, 752.527, 752.528, and 752.530 (Ch. 158 of the Revised Statutes of 1846).

These provisions are part of the penal code itself and the supplemental chapter of the penal code. Section 750.139 refers to the justice of the peace in describing cases involving children under 16. Section 750.215 refers to the justice of the peace in describing the offense of pretending to be a public official. Section 750.248 refers to the justice of the peace in describing the offense of altering records of various officials. Section 750.308 refers to the justice of the peace in describing courts issuing warrants for search of premises used in gambling. Section 750.371 refers to justices of the peace in prescribing the punishment for second violations of M.C.L. §750.370 (false accusation of crime). M.C.L. §750.524 refers to the justice of the peace in listing officials who have an obligation to take certain steps to suppress a riot. M.C.L. §§750.537 and 750.538 refer to the justice of the peace in listing officials who shall sign a certificate characterizing as unstolen copper or silver the source of which is unknown to the seller. In each of these provisions, the amendment would simply delete the reference to the justice of the peace.

M.C.L. §§752.526, 752.527, 753.528 and 752.530 relate to the offense of disturbing a religious meeting, a misdemeanor. Provisions relating to the initial presentment, trial, and sentencing refer to actions of the "justice of the peace" or any "mayor, recorder, alderman or other magistrate of any city or township." These are replaced by references to the appropriate "district or municipal court."

Amendments of Single Acts

7. Amendment of M.C.L. §24.35 (P.A. 44 of 1899).

This amendment would delete a provision designating the justice of the peace to perform certain recording duties of the township clerk upon vacancy in that office.

8. Amendment of M.C.L. §247.70 (P.A. 359 of 1941).

This amendment substitutes "district or municipal court" for the current reference to the justice court as the court in which to bring an action for violation of local regulations relating to noxious weeks. For an earlier version of this proposal, see 1986 Annual Report at page 128.

9. Amendment of M.C.L. §318.66 (P.A. 355 of 1927).

This amendment, relating to the presentation of persons charged with violations of park rules on Mackinac Island, substitutes a reference to the appropriate "district court" for the current reference to the justice of the peace. An earlier version is to be found in our 1986 Annual Report at page 138.

10. Amendment of M.C.L. §§402.18 and 402.19 (P.A. 146 of 1925).

The amendment substitutes references to the appropriate "district or municipal court" for the current references to the justice of the peace in a provision relating to the bringing of a poor person into a county with the intent to have the county support that person. For an earlier version, see 1986 Annual Report at page 139.

11. Amendment of M.C.L. §408.403 (P.A. 137 of 1885).

This amendment substitutes a reference to the appropriate "district or municipal court" for the current reference to the justice of the peace in a

provision relating to the filing of a misdemeanor complaint for violation of legislation governing permissible hours of employment.

12. Amendment of M.C.L. §426.160 (P.A. 238 of 1879).

This amendment substitutes a reference to the appropriate "district or municipal court" for the current reference to the justice of the peace in a provision relating to remedies available where floating logs, etc. become lodged on land.

13. Amendment of M.C.L. §§433.53, 433.54, and 433.56 (P.A. 248 of 1879).

This amendment substitutes a reference to the appropriate "district or municipal court" for the current reference to the justice of the peace in provisions governing actions brought in connection with the seizure and sale of animals found running at large in cities or villages having a population exceeding 7,000.

14. Amendment of M.C.L. §450.691 (Ch. 53 of the Revised Statutes of 1846).

This amendment substitutes a reference to the appropriate "district or municipal court" for the current reference to the justice of the peace in a provision authorizing a court to order the calling of a meeting of proprietors of a library for the purpose of forming a library corporation.

15. Amendment of M.C.L. §455.62 (P.A. 39 of 1889).

This amendment substitutes a reference to the appropriate "district or municipal court" for the current reference to the justice of the peace in a provision dealing with the initial presentment of persons arrested on the lands of associations organized for specified purposes (e.g., religious).

16. Amendment of M.C.L. §455.216 (P.A. 137 of 1929).

This amendment substitutes the appropriate "district or municipal court" for the current reference to the justice of the peace in a provision governing the presentment of persons arrested in a community governed by a summer resort owners' corporation.

17. Amendment of M.C.L. §456.6 (P.A. 87 of 1855).

This amendment substitutes the appropriate "district or municipal court" for the current reference to the justice of the peace in a provision authorizing a court to order the calling of a meeting for the purpose of incorporating a burial ground.

18. Amendment of M.C.L. §471.36 (P.A. 244 of 1881).

This amendment substitutes a reference to the appropriate "district or municipal court" for the current reference to the justice of the peace as the court in which to bring suit for penalties incurred under an act regulating corporations involved in railroad construction.

19. Amendment of M.C.L. §§500.2033, 500.6858, 500.6859, and 500.6850 (P.A. 218 of 1956).

This proposal would delete references to the justice of the peace in various provisions of the insurance code. These provisions deal with the waiver of immunity in testifying, and the issuance of subpoenas in connection with certain types of litigation.

20. Amendment of M.C.L. §552.9a (Ch. 84 of the Revised Statutes of 1846).

This amendment deletes a reference to the justice of the peace in a provision relating to oaths as to service of process outside the state in divorce cases.

21. Amendment of M.C.L. §§565.16, 565.17, 565.19, 565.20, 565.21,

565.22, and 565.23 (Ch. 65 of the Revised Statutes of 1846).

This proposal deletes references to the justice of the peace in a series of provisions governing an action brought to prove the due execution of a deed by a grantor who refuses to acknowledge the dead. In light of M.C.L. §600.2932, the amendment provides that such actions should be brought before the circuit court (rather than the district or municipal court).

22. Amendment of M.C.L. §565.351 (P.A. 237 of 1879).

This amendment deletes the reference to the justice of the peace in describing officials before whom one may acknowledge the execution of a land contract.

23. Amendment of M.C.L. §752.822 and 752.823 (P.A. 105 of 1951).

This amendment substitutes the appropriate "district or municipal court" for the current reference to the justice of the peace in provisions governing actions brought to enforce this Act, which regulates the erection of posters, signs, and placards on public or privately owned lands.

24. Amendment of M.C.L. §780.401 (P.A. 85 of 1935).

This amendment deletes the phrase "whether cognizable by a justice of the peace or otherwise" in a provision, applicable to any prosecution for a criminal offense, that overrides the common law presumption that a married woman acting in the presence of her spouse is acting under coercion.

25. Amendment of M.C.L. §§801.209, and 801.212 (P.A. 78 of 1917).

This proposal deletes references to the justice of the peace and "police court" in describing the authority of courts to utilize a sentence to a "work farm" in connection with certain misdemeanor sentences.

BIOGRAPHIES OF COMMISSION MEMBERS

RICHARD D. McLELLAN

Mr. McLellan is Chairman of the Michigan Law Revision Commission, a position he has filled since 1986, the year following his appointment as a public member of the Commission.

Mr. McLellan is a partner in, and a member of the Executive Committee of, the 300-lawyer firm of Dykema Gossett, which has offices in Michigan, Florida and Washington, D.C. He serves as the head of his firm's Government Policy and Practice Group and is responsible for coordinating the firm's international practice.

He is a graduate of the Michigan State University Honors College and the University of Michigan Law School.

Prior to entering private practice, Mr. McLellan served as an Administrative Assistant to former Governor William G. Milliken. He is a former member of the National Advisory Food and Drug Committee in the United States Department of Health, Education and Welfare.

Mr. McLellan is also the Treasurer and a member of the Executive Committee of the Michigan State Chamber of Commerce and is the President of the Library of Michigan Foundation.

His legal practice includes primarily the representation of business interests in matters pertaining to state government.

McLellan is a member of the Board of Directors of Manufacturers Life Insurance Company of Michigan, a subsidiary of the Manufacturers Life Insurance Company of Canada.

ANTHONY DEREZINSKI

Mr. Derezinski is Vice-Chairman of the Michigan Law Revision Commission, a position he has filled since May 1986 following his appointment as a public member of the Commission in January of that year.

Mr. Derezinski is counsel to the law firm of Gardner, Carton and Douglas, in its Southfield, Michigan office. The firm, consisting of 200 lawyers, also has offices in Chicago, Washington, D.C., Denver, Colorado, and Libertyville, Illinois.

He is a graduate of Muskegon Catholic Central High School, Marquette University, University of Michigan Law School (Juris Doctor degree), and Harvard Law School (Master of Laws degree). He is married and has one child.

Mr. Derezinski is a Democrat and served as State Senator from 1975 to 1978. He is currently a member of the Board of Regents of Eastern Michigan University.

He served as a Lieutenant in the Judge Advocate General's Corps in the United States Navy from 1968 to 1971 and as a military judge in the Republic of Vietnam. He is a member of the Veterans of Foreign Wars, Derezinski Post No. 7729, the American Academy of Hospital Attorneys, the International Association of Defense Counsel, and the National Health Lawyers' Association.

DAVID LEBENBOM

Mr. Lebenbom is a public member of the Michigan Law Revision Commission and has served since his appointment in 1967, the second year of the Commission's existence.

Mr. Lebenbom is engaged in the private practice of law as David Lebenbom, P.C.

He is a graduate of Detroit Central High School, Wayne State University (where he graduated with distinction), and Columbia Law School. He is married and has four children.

Mr. Lebenbom is a Democrat and served as Chairman of the Wayne County Democratic Committee from 1961 to 1968.

He is a veteran of World War II with a Battle Star. He is a member of Congregation B'nai Moshe and Congregation Shaarey Zedek, the former President of the Jewish Community Council, and the current Vice President of the National Jewish Community Political Advisory Board.

Mr. Lebenbom is the Chair of the Columbia Law School Michigan Alumni Association.

RICHARD C. VAN DUSEN

Mr. Van Dusen is a public member of the Michigan Law Revision Commission and has served since his appointment in September 1977.

Mr. Van Dusen is Senior Partner in the law firm of Dickinson, Wright, Moon, Van Dusen and Freeman.

He is a graduate of Deerfield Academy, the University of Minnesota, and Harvard Law School. He is married and has three children.

Mr. Van Dusen is a Republican and served as a State Representative in 1955 and 1956, a delegate to the 1961-62 Michigan Constitutional Convention, and Under Secretary of the United States Department of Housing and Urban Development from 1969 to 1972. From 1969 through 1980, he was a member of the Council of the Administrative Conference of the United States. He has served on the Wayne State University Board of Governors from 1979 to the present.

He served in the United States Naval Reserve from 1943 to 1946.

RUDY J. NICHOLS

Mr. Nichols is a legislative member of the Michigan Law Revision Commission and has served on the Commission since February 1987.

Mr. Nichols is a Republican State Senator representing the 8th Senatorial District. He was first elected to the Senate in January 1984, following his service as a State Representative representing the 20th House District from January 1983 to January 1984. Among his committee assignments, he is currently serving as Chair of the Senate Committee on Judiciary.

He is a graduate of Michigan State University and the Detroit College of Law. He is married and has two children.

Mr. Nichols is a member of the Waterford Republican Club, the Oakland County Republican Party, and the Waterford Optimist Club. He has been a leader in the Jaycees and was selected as one of the five Outstanding Young Men of Michigan in 1981.

VIRGIL C. SMITH, JR.

Mr. Smith is a legislative member of the Michigan Law Revision Commission and has served on the Commission since May 1988.

Mr. Smith is a Democratic State Senator representing the 2nd Senatorial District. He was first elected to the Michigan House in November 1976 and served in that body until his election to the Senate in March 1988. He presently serves on the Senate Finance Committee and the Senate Local Government and Veterans Committee.

He is a graduate of Detroit Pershing High School, Michigan State University (Bachelor of Arts Degree in Political Science), and Wayne State University Law School. Mr. Smith is married and has two children.

Mr. Smith was a supervisory attorney for the Inkster office of Wayne County Legal Services and was Senior Assistant Corporation Counsel for the City of Detroit Law Department before his election to the Legislature.

W. PERRY BULLARD

Mr. Bullard is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 1981.

Mr. Bullard is a Democratic State Representative representing the 53rd House District. He was first elected to the State House in November, 1972. Among his committee assignments, he has served as Chair of the House Committee on Civil Rights and Chair of the House Committee on Labor. He is currently Chair of the House Committee on Judiciary.

He is a graduate of Harvard University and the University of Michigan Law School. He is single and has one child.

Mr. Bullard was in the United States Navy from 1964 to 1968, receiving several air medals. He is a member of the Michigan Commission on Criminal Justice, Educational Fund for Individual Rights Advisory Committee, and the American Civil Liberties Committee and is the Vice Chairman of the National Conference of State Legislatures State-Federal Assembly Energy Committee.

He was named the Police Officers Association of Michigan's Legislator of the Year in 1979 and the Outstanding Legislator of the Year in 1980 by the American Association of University Professors.

Mr. Bullard is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.

DAVID M. HONIGMAN

Mr. Honigman is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 1987.

Mr. Honigman is a Republican State Representative representing the 24th House District. He was first elected to the State House in November 1984. Among his committee assignments, he has served on the House Committee on Judiciary.

He is a graduate of Yale University (with honors) and the University of Michigan Law School. He is married.

Mr. Honigman serves on the Board of Trustees of the Michigan Cancer Foundation and the Alumni Board of Detroit County Day School. He is a member of the Michigan Regional Advisory Board of the Anti-Defamation League of B'nai Brith. He was named one of the Outstanding Young Men in America in 1985.

Mr. Honigman is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.

ELLIOTT JOHN SMITH

Mr. Smith is an ex officio member of the Michigan Law Revision Commission due to his position as the Director of the Legislative Service Bureau, a position he has filled since January 1980.

Mr. Smith has worked with Michigan legislators since 1972 in various capacities, including his work as a Research Analyst for Senator Stanley Rozycki, Administrative Assistant to Senator Anthony Derezinski, and Executive Assistant to Senate Majority Leader William Faust before being named to his current position.

He is a graduate of Michigan State University. He is married and has two children.

JEROLD ISRAEL

Mr. Israel is the Executive Secretary to the Michigan Law Revision Commission, a position he has filled since October 1973.

Mr. Israel joined the University of Michigan law faculty in 1961 and has taught courses in constitutional law, civil procedure, criminal law, and criminal procedure. He is currently the Alene and Allan F. Smith Professor of Law at the University of Michigan Law School.

He is a graduate of Case-Western Reserve University and Yale Law School. Following his graduation from Yale, he served as a law clerk to Justice Potter Stewart of the United States Supreme Court. He is married and has three children.

Mr. Israel was co-reporter for the Michigan State Bar Association's Proposed Michigan Criminal Code and for the National Conference of Commissioners on Uniform State Laws' Uniform Rules of Criminal Procedure. He has served as a member of Michigan Supreme Court committees and gubernatorial commissions and as a consultant to other states revising their court rules and statutes.

He has co-authored several publications concerning criminal justice administration, including two law school casebooks and a three-volume treatise.

GARY GULLIVER

Mr. Gulliver acts as the liaison between the Michigan Law Revision Commission and the Legislative Service Bureau, a responsibility he has had since May 1984.

Mr. Gulliver is currently the Director of Legal Research with the Legislative Service Bureau. He is a graduate of Albion College (with honors) and Wayne State University Law School. He has two children.

Mr. Gulliver is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.