

107TH CONGRESS
2D SESSION

S. 2798

To protect employees and retirees from corporate practices that deprive them of their earnings and retirement savings when a business files for bankruptcy under title 11, United States Code.

IN THE SENATE OF THE UNITED STATES

JULY 25, 2002

Mr. DURBIN (for himself and Mr. LEAHY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To protect employees and retirees from corporate practices that deprive them of their earnings and retirement savings when a business files for bankruptcy under title 11, United States Code.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Employee Abuse Prevention Act of 2002”.

6 (b) **TABLE OF CONTENTS.**—The table of contents for
7 this Act is as follows:

Sec. 1. Short title.

TITLE I—PRESERVING CORPORATE ASSETS

- Sec. 101. Federal fraudulent transfer amendments.
 Sec. 102. Transparent characterization of transactions.
 Sec. 103. Trustee as good faith reliance purchaser for value.
 Sec. 104. Limitation on retention bonuses, severance pay, and certain other payments.
 Sec. 105. Limitation on avoidance of certain transfers.
 Sec. 106. Effective date.

TITLE II—ENHANCING THE TREATMENT OF EMPLOYEE CLAIMS

- Sec. 201. Fair treatment of employee benefits.
 Sec. 202. Wage priority and employee benefit cap.
 Sec. 203. Enhanced treatment of claims arising from failure to meet fiduciary obligations toward employees and retirees.
 Sec. 204. Enhanced review of pre-bankruptcy terminations of retiree benefits.
 Sec. 205. Local filing of bankruptcy cases.
 Sec. 206. Effective date.

1 **TITLE I—PRESERVING**
 2 **CORPORATE ASSETS**

3 **SEC. 101. FEDERAL FRAUDULENT TRANSFER AMEND-**
 4 **MENTS.**

5 Section 548 of title 11, United States Code, is
 6 amended—

7 (1) in subsection (a)(1)—

8 (A) by striking “one year” and inserting
 9 “4 years”;

10 (B) in subparagraph (A), by striking “or”
 11 at the end;

12 (C) in subparagraph (B), by striking the
 13 period at the end and inserting “; or”; and

14 (D) by adding at the end the following:

15 “(C) made an excess benefit transfer or in-
 16 curred an excess benefit obligation to an insider,

1 general partner, or other affiliated person of the
2 debtor, if the debtor—

3 “(i) was insolvent on the date on which the
4 transfer was made or the obligation was in-
5 curred; or

6 “(ii) became insolvent as a result of the
7 transfer or obligation.”; and

8 (2) in subsection (d)(2)—

9 (A) in subparagraph (C), by striking
10 “and” at the end;

11 (B) in subparagraph (D), by striking the
12 period at the end and inserting “; and”; and

13 (C) by adding at the end the following:

14 “(E) the terms ‘excess benefit transfer’
15 and ‘excess benefit obligation’ mean—

16 “(i) a transfer or obligation, as appli-
17 cable, to an insider, general partner, or
18 other affiliated person of the debtor in an
19 amount that is not less than 10 times the
20 amount of the mean transfer or obligation
21 of a similar kind given to nonmanagement
22 employees during the calendar year in
23 which the transfer is made or the obliga-
24 tion is incurred; or

1 “(ii) if no such similar transfers were
2 made to, or obligations incurred for the
3 benefit of, such nonmanagement employees
4 during such calendar year, a transfer or
5 obligation that is in an amount that is not
6 less than 25 percent more than the amount
7 of any similar transfer or obligation made
8 to or incurred for the benefit of such in-
9 sider, partner, or other affiliated person of
10 the debtor during the calendar year before
11 the year in which such transfer is made or
12 obligation is incurred.”.

13 **SEC. 102. TRANSPARENT CHARACTERIZATION OF TRANS-**
14 **ACTIONS.**

15 Section 105 of title 11, United States Code, is
16 amended by adding at the end the following:

17 “(e)(1) Notwithstanding any otherwise applica-
18 ble provision of law, the court may recharacterize as
19 a secured loan, a sale, lease, or transaction if the
20 material characteristics of the sale, lease, or trans-
21 action are substantially similar to the characteristics
22 of a secured loan.

23 “(2) Nothing in paragraph (1) shall be con-
24 strued to modify, impair, or supersede any other au-

1 thority the court has to recharacterize a sale, lease,
2 or transaction.”.

3 **SEC. 103. TRUSTEE AS GOOD FAITH RELIANCE PURCHASER**
4 **FOR VALUE.**

5 (a) TRUSTEE AS LIEN CREDITOR.—Section 544(a) of
6 title 11, United States Code, is amended—

7 (1) by inserting “, the debtor,” after “knowl-
8 edge of the trustee”;

9 (2) by inserting “, property of the estate,” after
10 “property of the debtor”;

11 (3) in paragraph (2), by striking “or” at the
12 end;

13 (4) in paragraph (3), by striking the period at
14 the end and inserting “; or”; and

15 (5) by adding at the end the following:

16 “(4) a good faith purchaser of property that—

17 “(A) gave value for such property as of the
18 time of the commencement of the case;

19 “(B) gave such value in reliance on incor-
20 rect information contained in any public reg-
21 istry of security interests or liens; and

22 “(C) either—

23 “(i) took possession of the property,
24 whether or not such creditor actually could
25 take possession of the property; or

1 “(ii) satisfied any applicable non-
2 bankruptcy law such that no creditor on a
3 simple contract could have obtained a prior
4 judicial lien on such property whether or
5 not such a creditor exists.”.

6 (b) PREFERENCES.—Section 547(e)(1)(B) of title 11,
7 United States Code, is amended by striking “creditor on
8 a simple contract cannot acquire a judicial lien” and in-
9 serting “good faith purchaser for value of such fixture or
10 property that reasonably relied on available information
11 cannot acquire an interest”.

12 **SEC. 104. LIMITATION ON RETENTION BONUSES, SEVER-**
13 **ANCE PAY, AND CERTAIN OTHER PAYMENTS.**

14 Section 503 of title 11, United States Code, is
15 amended by adding at the end the following:

16 “(c)(1) Notwithstanding subsection (b), there shall
17 neither be allowed, nor paid—

18 “(A) a transfer made to, or an obligation in-
19 curred for the benefit of, an insider of the debtor for
20 the purpose of inducing such person to remain with
21 the debtor’s business, absent a finding by the court
22 based on evidence in the record that—

23 “(i) the transfer or obligation is essential
24 to retention of the person because the individual

1 has a bona fide job offer from another business
2 at the same or greater rate of compensation;

3 “(ii) the services provided by the person
4 are essential to the survival of the business; and

5 “(iii) either—

6 “(I) the amount of the transfer made
7 to, or obligation incurred for the benefit of,
8 the person is not greater than an amount
9 equal to 10 times the amount of the mean
10 transfer or obligation of a similar kind
11 given to nonmanagement employees for
12 any purpose during the calendar year in
13 which the transfer is made or the obliga-
14 tion is incurred; or

15 “(II) if no such similar transfers were
16 made to, or obligations were incurred for
17 the benefit of, such nonmanagement em-
18 ployees during such calendar year, the
19 amount of the transfer or obligation is not
20 greater than an amount equal to 25 per-
21 cent of the amount of any similar transfer
22 or obligation made to or incurred for the
23 benefit of such insider for any purpose
24 during the calendar year before the year in

1 which such transfer is made or obligation
2 is incurred;

3 “(B) a severance payment to an insider of the
4 debtor, unless—

5 “(i) the payment is part of a program that
6 is generally applicable to all full-time employees;
7 and

8 “(ii) the amount of the payment is not
9 greater than 10 times the amount of the mean
10 severance pay given to nonmanagement employ-
11 ees during the calendar year in which the pay-
12 ment is made; or

13 “(C) other transfers or obligations that are out-
14 side the ordinary course of business and not justified
15 by the facts and circumstances of the case.

16 “(2) For purposes of paragraph (1)(C), transfers
17 made to, or obligations incurred for the benefit of, officers,
18 managers, or consultants hired after the date of the filing
19 of the petition shall be considered outside the ordinary
20 course of business.”.

21 **SEC. 105. LIMITATION ON AVOIDANCE OF CERTAIN TRANS-**
22 **FERS.**

23 Section 546(e) of title 11, United States Code, is
24 amended to read as follows:

1 “(e) Notwithstanding section 544, 545, 547,
2 548(a)(1)(B), or 548(b), the trustee—

3 “(1) may not avoid any transfer that is a mar-
4 gin payment (as defined in section 101, 741, or 761)
5 or settlement payment (as defined in section 101 or
6 741) that is made before the commencement of the
7 case to any entity, including any commodity broker,
8 forward contract merchant, stockbroker, financial in-
9 stitution, or securities clearing agency, unless that
10 entity—

11 “(A) receives the transfer or the benefit of
12 the transfer on behalf of its own account; or

13 “(B) made such transfer with actual intent
14 to hinder, delay, or defraud any entity, as pro-
15 vided in section 548(a)(1)(A); and

16 “(2) may avoid a transfer described in para-
17 graph (1) with respect to any entity that receives the
18 benefit of the transfer or on whose behalf the trans-
19 fer is made.”.

20 **SEC. 106. EFFECTIVE DATE.**

21 This title and the amendments made by this title
22 shall take effect on the date of enactment of this Act with
23 respect to cases and proceedings arising under title 11,
24 United States Code, or arising in or related to cases or
25 proceedings arising under title 11, United States Code,

1 that are pending on or commenced before, on, or after the
2 date of enactment of this Act.

3 **TITLE II—ENHANCING THE**
4 **TREATMENT OF EMPLOYEE**
5 **CLAIMS**

6 **SEC. 201. FAIR TREATMENT OF EMPLOYEE BENEFITS.**

7 (a) DEFINITION OF CLAIM.—Section 101(5) of title
8 11, United States Code, is amended—

9 (1) in subparagraph (A), by striking “or” at
10 the end;

11 (2) in subparagraph (B), by inserting “or”
12 after the semicolon; and

13 (3) by adding at the end the following:

14 “(C) right or interest in equity securities
15 of the debtor, or an affiliate of the debtor, held
16 in a pension plan (within the meaning of sec-
17 tion 3(2) of the Employee Retirement Income
18 Security Act of 1974 (29 U.S.C. 1002(2))) for
19 the benefit of an individual who is not an offi-
20 cer or director of the debtor, if such securities
21 were attributable to—

22 “(i) employer contributions by the
23 debtor or an affiliate of the debtor other
24 than elective deferrals (within the meaning
25 of section 402(g) of the Internal Revenue

1 Code of 1986), and any earnings thereon;
2 and

3 “(ii) elective deferrals (and any earn-
4 ings thereon) that are required to be in-
5 vested in such securities under the terms
6 of the plan or at the direction of a person
7 other than the individual or any bene-
8 ficiary,

9 except that this subparagraph shall not apply to
10 any such securities during any period during
11 which the individual or any beneficiary has the
12 right to direct the plan to divest such securities
13 and to reinvest an equivalent amount in other
14 investment options of the plan;”.

15 (b) PRIORITIES.—Section 507(a)(4) of title 11,
16 United States Code, is amended—

17 (1) in subparagraph (B), by indenting the left
18 margin of clauses (i) and (ii) 2 ems to the right and
19 redesignating such clauses as subclauses (I) and
20 (II), respectively;

21 (2) by indenting the left margin of subpara-
22 graphs (A) and (B) 2 ems to the right and redesign-
23 ating such subparagraphs as clauses (i) and (ii),
24 respectively;

1 (3) in the matter preceding clause (i), as so re-
2 designated, by striking “Fourth” and all that follows
3 through “plan—” and inserting the following:

4 “Fourth—

5 “(A) allowed unsecured claims for con-
6 tributions to an employee benefit plan—”;

7 (4) by striking the period at the end and insert-
8 ing the following: “or”; and

9 (5) by adding at the end the following:

10 “(B) allowed claims with respect to rights
11 or interests in equity securities of the debtor, or
12 an affiliate of the debtor, that are held in a
13 pension plan (within the meaning of section
14 3(2) of the Employee Retirement Income Secu-
15 rity Act of 1974 (29 U.S.C. 1002(2))), without
16 regard to when services were rendered or limita-
17 tion in amount, and measured by the market
18 value of the stock at the time the stock was
19 contributed to, or purchased by, the plan.”.

20 **SEC. 202. WAGE PRIORITY AND EMPLOYEE BENEFIT CAP.**

21 Section 507(a) of title 11, United States Code, is
22 amended—

23 (1) in paragraph (3), by striking “\$4,000” and
24 inserting “\$13,500”; and

1 (2) in paragraph (4)(B)(i), by striking
2 “\$4,000” and inserting “\$13,500”.

3 **SEC. 203. ENHANCED TREATMENT OF CLAIMS ARISING**
4 **FROM FAILURE TO MEET FIDUCIARY OBLIGA-**
5 **TIONS TOWARD EMPLOYEES AND RETIREES.**

6 (a) TREATMENT AS ADMINISTRATIVE EXPENSE.—
7 Section 503(b) of title 11, United States Code, is
8 amended—

9 (1) in paragraph (5), by striking “and” at the
10 end;

11 (2) in paragraph (6), by striking the period at
12 the end and inserting “; and”; and

13 (3) by adding at the end the following:

14 “(7) claims arising out of the breach of any fi-
15 duciary duty under part 4 of subtitle B of title I of
16 the Employee Retirement Income Security Act of
17 1974 (29 U.S.C. 1101 et seq.) or State law with re-
18 spect to any pension plan maintained by the debtor,
19 along with any reasonable fees, costs, or charges re-
20 lated to those claims.”.

21 (b) DETERMINATION OF SECURED STATUS.—Section
22 506 of title 11, United States Code, is amended by adding
23 at the end the following:

24 “(e) Any pension plan or any participant or bene-
25 ficiary of such plan with administrative expense claims de-

1 scribed in section 503(b)(7) may recover any unpaid
2 amount of such claims from any property securing an al-
3 lowed secured claim.

4 (c) PRIORITY.—Section 507(b) of title 11, United
5 States Code, is amended—

6 (1) by striking “(b) If” and inserting the fol-
7 lowing:

8 “(b)(1) If”; and

9 (2) by adding at the end the following:

10 “(2) A claim allowable under section 503(b)(7) shall
11 have priority over every other claim allowable under sub-
12 section (a)(1) of this section.”.

13 **SEC. 204. ENHANCED REVIEW OF PRE-BANKRUPTCY TERMI-**
14 **NATIONS OF RETIREE BENEFITS.**

15 Section 1114 of title 11, United States Code, is
16 amended by adding at the end the following:

17 “(m)(1) If any retiree benefits have been modified
18 within the 180-day period before the date of the filing of
19 the petition, the court shall appoint an authorized rep-
20 resentative pursuant to subsection (b) to investigate the
21 modification of retiree benefits and to enforce the rights
22 of persons under this title as they relate to retiree benefits.

23 “(2) If the court determines, after notice and a hear-
24 ing, that the modification of retiree benefits was made in
25 contemplation of bankruptcy and was not essential to the

1 continuation of the business of the debtor, the court shall
2 order that—

3 “(A) the modified retiree benefits be reinstated
4 effective as of the date on which the retiree benefits
5 were modified; and

6 “(B) the trustee promptly perform all
7 unperformed obligations of the debtor to provide re-
8 tiree benefits, as reinstated, for the period dating
9 from the date of the modification to the date of the
10 filing of the petition.

11 “(3) For purposes of this subsection, any modifica-
12 tion of retiree benefits within the 180-day period before
13 the date of the filing of the petition is presumed to have
14 been made in contemplation of bankruptcy, and the trust-
15 ee has the burden of proving that the modification of re-
16 tiree benefits was not made in contemplation of bank-
17 ruptcy.

18 “(4) For purposes of this subsection, the term ‘retiree
19 benefits’ means any employee benefits provided to a retiree
20 or a beneficiary of a retiree.”.

21 **SEC. 205. LOCAL FILING OF BANKRUPTCY CASES.**

22 (a) VENUE OF CASES UNDER TITLE 11.—Section
23 1408 of title 28, United States Code, is amended—

24 (1) by striking “Except” and inserting the fol-
25 lowing:

1 “(a) Except”;

2 (2) in paragraph (2), by inserting “as defined
3 in section 101(2)(A) of title 11” after “affiliate”;
4 and

5 (3) by adding at the end the following:

6 “(b) For purposes of subsection (a)—

7 “(1) if the debtor is a corporation, the domicile
8 and residence of the debtor are conclusively pre-
9 sumed to be where the debtor’s principal place of
10 business in the United States is located; and

11 “(2) if an affiliate, as defined in section
12 101(2)(A) of title 11, is not a debtor in a case under
13 title 11, but the debtor is an affiliate as defined in
14 subparagraph (B), (C), or (D) of that section, then
15 the bankruptcy case may be filed in the district in
16 which the principal place of business of the affiliate
17 with the greatest assets in the United States is lo-
18 cated.”.

19 (b) CHANGE OF VENUE.—Section 1412 of title 28,
20 United States Code, is amended—

21 (1) by striking “A” and inserting the following:

22 “(a) A”; and

23 (2) by adding at the end the following:

24 “(b) The district court of a district in which is filed
25 a case laying venue in the wrong division or district shall

1 dismiss, or if it be in the interest of justice, transfer such
 2 case to any district or division in which it could have been
 3 brought.

4 “(c) Nothing in this chapter shall impair the jurisdic-
 5 tion of a district court of any matter involving a party
 6 who does not interpose timely and sufficient objection to
 7 the venue.

8 “(d) As used in this section—

9 “(1) the term “district court” includes—

10 “(A) the bankruptcy judges of each such
 11 court as defined in section 151 of this title; and

12 “(B) the District Court of Guam, the Dis-
 13 trict Court for the Northern Mariana Islands,
 14 and the District Court of the Virgin Islands, in-
 15 cluding any bankruptcy judge of each such
 16 court; and

17 “(2) the term “district” includes the territorial
 18 jurisdiction of each such court.”.

19 **SEC. 206. EFFECTIVE DATE.**

20 (a) IN GENERAL.—Except as provided in subsection
 21 (b), this title and the amendments made by this title shall
 22 take effect on the date of enactment of this Act with re-
 23 spect to cases and proceedings arising under title 11,
 24 United States Code, or arising in or related to cases or
 25 proceedings arising under title 11, United States Code,

1 that are pending on or commenced before, on, or after the
2 date of enactment of this Act.

3 (b) LIENS.—The amendment made by section 203(b)
4 shall only apply to liens created on or after the date of
5 enactment of this Act.

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