The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Community Affairs

BILL:	SB 688
INTRODUCER:	Senator Berman
SUBJECT:	Waivers of Exemptions of Applicable Assets
DATE:	March 1, 2021
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hackett	Ryon	CA	**Pre-meeting**
2.			FT	
3.			AP	

I. Summary:

Certain assets, such as a person's homestead property and retirement accounts, are statutorily exempt from the reach of creditors. SB 688 prescribes the method by which an individual may waive that protection and use such assets as collateral. The bill provides that such protection can only be waived by specifically identifying the asset in a contract. The bill provides that language referring to "all of a person's" assets and rights, wherever located, whether now owned or after acquired, and all proceeds thereof," or of similar nature is not sufficient to waive the exemption. Similarly, references only to the type of collateral are insufficient under the bill to waive such protection.

These changes are in response to a recent court case which held that mere contractual reference to "all assets" included certain property previously understood to be excluded from such an agreement.

The bill takes effect October 1, 2021, and applies only to security interests created after the effective date.

II. Present Situation:

Asset Protection From Legal Process

A creditor can collect money owed by filing an action for a judgment in state court. A judgment is an order of the court creating an obligation, such as a debt. The creditor may then use that judgment to collect assets from the debtor. Chapter 222, F.S., contains exemptions that protect certain assets from legal process under Florida law. Florida has protected the following assets from creditor claims:

- Homestead property (ss. 222.01-222.05, F.S.).
- Certain items of personal property (s. 222.061, F.S.).

- Certain disposable earnings of head of family (s. 222.11, F.S.).
- The proceeds of a life insurance policy (s. 222.13, F.S.).
- The cash surrender value of a life insurance policy and the proceeds of an annuity contract (s. 222.14, F.S.).
- Disability benefits payable from any insurance (s. 222.18, F.S.).
- Certain pension, retirement, or profit sharing benefits (s. 222.21, F.S.).
- Prepaid College Trust Fund moneys and Medical Savings Account funds (s. 222.22, F.S.).
- A debtor's interest in a motor vehicle, up to $1,000 in value (s. 222.25, F.S.).
- The debtor's interest in any professionally prescribed health aids (s. 222.25, F.S.).
- Social security benefits, unemployment compensation, or public assistance benefits; veterans' benefits; disability, illness, or unemployment benefits; alimony, support, or separate maintenance; and stock or pension plans under specified circumstances (s. 222.201, F.S.).

Exemptions throughout ch. 222, F.S., have historically been construed liberally in favor of protecting the consumer against creditors' claims to exempt property.[1] When a consumer enters a security agreement – a contract in which a debtor offers assets as collateral ("security") to guarantee repayment – the contract describes what assets are offered as security. Historically, a contract's blanket offering of "all assets" as security has not been interpreted to include assets subject to ch. 222, F.S., exemptions.

An individual must take additional steps in order to offer certain exempt assets as collateral. For example, in the case of homestead exemptions, which in Florida stem from a constitutional right, a contractual waiver of those rights must be "knowing, voluntary, and intelligent" to have any effect.[2] As another example, wages are exempt from legal process under s. 222.11, F.S., and such exemption may only be waived in writing, in a separate document attached to the security agreement, and must contain mandatory waiver language in at least 14-point font. This protection ensures the consumer understands they are waiving a statutory exemption. If a consumer waives their asset's protection, they are agreeing to allow a creditor to claim that asset to satisfy debts.

Sufficiency of Description for Collateral in Security Agreements

Under Florida's Uniform Commercial Code, an effective description of collateral in a security agreement identifies the asset by:

- Specific listing;
- Category;
- Type of collateral;
- Quantity, computational or allocational formula; or
- Any method under which the identity of the collateral is objectively determinable.[3]

[1] *See e.g. Havoco of Am. Ltd. v. Hill*, 790 So.2d 1018 (Fla. 2001); *Connor v. Seaside National Bank*, 135 So.3d 508 (Fla. 5th DCA 2014); *Killian v. Lawson*, 387 So.2d 960 (Fla. 1980).
[2] *See e.g. Chames v. DeMayo*, 972 So.2d 850, 861 (Fla. 2007) (citing State v. Upton, 658 So.2d 86, 87 (Fla.1995)).
[3] Section 679.1081(2), F.S.

Further, current law provides that a description of collateral as "all the debtor's assets" or "all the debtor's personal property" does not reasonably identify collateral.[4]

Finally, current law also provides that a description defined by "type" of collateral alone of a commercial tort claim or, in a consumer transaction, of a security entitlement, securities account, or commodity account, is not sufficient.[5] For example, "all existing and after-acquired investment property" or "all existing and after-acquired security entitlements," without more, would be insufficient in a consumer transaction to describe a security entitlement, securities account, or commodity account.[6]

Kearney Construction Co, LLC v. Travelers Casualty & Surety Company of America

A recent federal court case brought doubt to Floridians' assumption that general, broad offers of "all assets" do not waive ch. 222, F.S., protections.[7] In this case, *Kearney Construction Company, LLC v. Travelers Casualty and Surety Company of America*,[8] the debtor obtained a line of credit and pledged collateral as security as provided for in a contract. The contract stated the collateral as:

> all assets and rights of the Pledgor, wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof, all goods (including inventory, equipment and any accessories thereto), instruments (including promissory notes)[,] documents, accounts, chattel paper, deposit accounts, letters of credit, rights, securities and all other investment property, supporting obligation[s], any contract or contract rights or rights to the payment of money, insurance claims, and proceeds, and general intangibles.[9]

The Eleventh Circuit considered whether this language included assets held in the debtor's Individual Retirement Account (IRA). The debtor argued that the IRA should not have been included in all assets and was never intended to have been offered as collateral.[10] The court found that the security agreement's language constituted an "unambiguous pledge" of all assets, which does include those exempt under ch 222, F.S.[11] Kearney's IRA was not specifically listed in the agreement, but the court concluded that the broad language of the contract "encompassed potential retirement accounts or funds, such as the [IRA] at issue here."[12] The court did not engage substantively with whether ch 222, F.S., exemptions or ch. 679, F.S., description requirements should have any weight in determining the breadth of the contract. Additionally, the Magistrate Judge failed to explain what part of the security agreement did encompass the

[4] Section 679.1081(3), F.S.
[5] Section 679.1081(5), F.S.
[6] Section 679.1081(5), F.S.; Official Comment 5 to U.C.C. s. 9-108 (s. 679.1081(5), F.S.).
[7] These concerns were raised by the Florida Bar's Real Property, Probate, and Trust Law Section, which formed a "Kearney Subcommittee" within its Asset Protection Committee. *See* the Kearney Subcommittee's White Paper (Jan. 26, 2021) (on file with the Senate Community Affairs Committee).
[8] 795 Fed.Appx. 671 (Fla. 11th Cir. Nov. 13, 2019).
[9] *Id.*
[10] *Id*. at 673.
[11] *Id.*
[12] Magistrate Judge's Report and Recommendation, Case 8:09-cv-01850-JSM-TBM, Docket 865, at 28.

IRA, whether it fell into the category "deposit account," "investment property," "general intangible," or another category entirely.[13]

Importantly, federal law prohibits the use of any funds inside a tax-advantaged retirement account from being used as security on a loan. Using such funds as security is treated as a taxable distribution from a consumer's retirement account.[14]

III. Effect of Proposed Changes:

Section 1 creates s. 222.105, F.S., which prescribes the method by which an individual may waive statutory exemptions protecting certain assets and accounts from reach of creditors. The bill provides that such protection can only be waived by specifically identifying the "applicable asset," as defined in the bill, in a security agreement, rather than by general reference to "all assets" or to the general category of assets. The bill provides that language referring to all of a person's "assets and rights, wherever located, whether now owned or after acquired, and all proceeds thereof," or of similar nature is not sufficient to waive the protections provided for in ch. 222, F.S. References only to the type of collateral, similarly, are insufficient under the bill to waive such an exemption.

The bill defines "applicable assets" as those accounts and entitlements described in ss. 222.13-222.16, s. 222.18, and ss. 22.201-222.22, F.S., which include life insurance policies, cash surrender value of life insurance policies and annuity contracts; wages or reemployment assistance or unemployment compensation payments due deceased employees; disability income benefits; certain payments protected by the federal Bankruptcy Reform Act of 1978; pension money and tax exempt retirement accounts; and assets in qualified tuition programs, medical savings accounts, Coverdell education savings accounts, and hurricane savings accounts. These accounts and entitlements, deemed "applicable assets," are currently exempt under current law from the reach of creditors.

Section 2 amends s. 679.1081(5), F.S., to provide that the accounts and entitlements identified in section 1 of the bill are not adequately described by general reference to the type of collateral. In order to include such an asset in a security agreement the asset must be described by specific reference to the individual asset as provided in s. 679.1081, F.S. For example, "all existing and after-acquired retirement accounts," without more, would be insufficient in a consumer transaction to describe an IRA.

Section 3 provides that the bill applies to security interests created after the effective date of the act.

Section 4 provides the bill takes effect October 1, 2021.

[13] *Id.*
[14] I.R.C. 408(e)(4).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 222.105 of the Florida Statutes.
This bill substantially amends section 679.1081 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.