

STORAGE NAME: h0715.brc

DATE: March 4, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
BUSINESS REGULATION AND CONSUMER AFFAIRS
ANALYSIS**

BILL #: HB 715

RELATING TO: Bulk Sales

SPONSOR(S): Representative Minton

COMPANION BILL(S): SB 1042 (i)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) BUSINESS REGULATION AND CONSUMER AFFAIRS
 - (2) JUDICIARY
 - (3) FINANCIAL SERVICES
 - (4)
 - (5)
-

I. SUMMARY:

This bill relates to bulk sales and is designed to provide a mechanism for protecting interests in certain business transactions when inventory is sold in bulk, outside the normal course of business. Benefits of this legislation would accrue to parties to a bulk sale transaction by creating these protections, primarily for those persons in an unsecured position.

This bill establishes statutory guidelines for bulk sales transactions. Primary components of the bill include the following: definitions of applicable terms relating to bulk sales and commercial transactions; specific exemptions from the provisions of the bill; the buyers responsibilities in the bulk sale transaction; responsibilities of the buyer regarding notice of sale; transaction parameters; and, limitations on actions against the buyer.

The bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Chapter 93-77, Laws of Florida, repealed chapter 676, Florida Statutes, titled Article 6 - Bulk Transfers. These provisions were a part of Florida's Uniform Commercial Code (UCC).

Prior to the repeal of these provisions, the Bankruptcy/Uniform Commercial Code Committee and the Financial Institutions Committee of the Florida Bar Business Law Section established a subcommittee to study and report on Article 6 of Florida's UCC, chapter 676, F.S. The study was initiated, in part, in response to recommendations of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. These organizations had reviewed various state's bulk sales laws and recommended the repeal of Article 6 of the UCC in those states which had adopted it. In the alternative, a recommended draft revision of the Article was approved.

The Florida committee, in its report, noted that Article 6 of the UCC had its genesis around the turn of the century in an effort to protect the creditors of a seller of goods who might be predisposed to transfer the entire inventory and "abscond" with the proceeds without making adequate provision for the seller's creditors. Both pre-UCC bulk sale legislation, as well as UCC Article 6, imposed upon the buyer-in-bulk a duty to notify the creditors of the seller of the proposed sale.

The committee reported that compliance with Article 6 had substantially decreased for a number of stated reasons. Among these reasons include the criticism that the remedy that Article 6 provided (i.e., nullifying the sale or transfer) is not consistent with the practicalities of today's transactions. The committee, therefore, recommended repeal of Article 6 rather than recommending the adoption of model legislation.

In the 1993 session, legislation was adopted, ch. 97-77, Laws of Florida, which repealed chapter 676, F.S., relating to bulk transfers.

Currently, the Uniform Commercial Code (UCC) does not address bulk sales transactions as an Article of the UCC. Part III of chapter 559, Florida Statutes, is titled "Fire and Going-Out-Of Business Sales and Auctions".

Part III of ch. 559, F.S., establishes guidelines for conducting a going-out-of-business sale. The provisions require that a permit be obtained from the local tax collector. The tax collector must require that all taxes be paid prior to the sale. This part specifies guidelines relating to the sale and requires that the seller must conduct the sale in a business-like fashion, without fraud or deception.

B. EFFECT OF PROPOSED CHANGES:

The bill creates operational guidelines regarding bulk sales when a substantial part of the inventory is sold outside the seller's ordinary course of business. The bill does not address a specific statutory chapter, but is drafted in a generic fashion for placement in the Florida Statutes by the Division of Statutory Revision of the Office of Legislative Services, if enacted.

Definitions

The bill defines the term "bulk sale" as a sale [that is not held in the ordinary course of business] of more than half of the seller's inventory. The bill also attempts to calculate value of the inventory as part of the definition. More than half of the inventory would mean the value of the goods as measured on the date of the bulk sale agreement, but only if the buyer has been notified that the seller will no longer be conducting that particular business or a similar business.

A "claim" means a right to payment from the seller. A "claimant" means a person holding a claim arising from the seller's business, but does not include certain claims arising from the seller's normal business activities, such as a workers compensation claim. A "creditor" means any person holding a claim. The bill defines "date of the bulk sale" as the time when ten percent of the value of the inventory is paid to the seller, or ten percent of the inventory is transferred to the buyer. This definition also specifies the time lines for a person holding an unsecured claim to be able to posture for improved or superior claim rights or standing under the sale.

Application/exemptions

The bill specifies that the provisions apply if the seller normally sells from inventory and the seller is in this state or has a major executive office located in the state. The bill further specifies numerous exemptions from the provisions of the bill to include, among others, sales transactions involving payment of the seller's debts or actions under judicial process. Exemptions for buyers located outside Florida are provided if certain actions are taken to protect claimants. The bill would not apply to a sale valued at less than \$10,000 or more than \$25 million.

Buyers responsibilities

The bill requires that the buyer of the bulk sale inventory must:

- give appropriate notice of the bulk sale;
- obtain from the seller a list of the seller's suppliers or other businesses used by the seller in the previous three years;
- obtain from the seller the assurance that the buyer's payment to the seller is applied to claimant's debts;
- obtain from the seller a list of claimants, along with their addresses and the amounts they are owed (distribution of the list by the buyer is not required if the buyer has published the appropriate notice of the sale);
- make the list of claimants available to: 1) any claimant, without charge, who requests the list in writing within six months after the sale, or 2) any claimant who desires to personally review the list and the buyer receives the request within six months of the sale (production of the list by the buyer is not necessary if the buyer complies with the publication of the appropriate notice requirements regarding the sale).

Buyers notice of sale

The bill requires the buyer to provide written notice of the bulk sale to claimants. The notice must include a list of information relating to the sale in order for the claimants to be made aware of the transaction. The notice must include:

- a statement that the buyer has entered into an agreement with the seller that may be considered a bulk sale;
- the name and address of the seller and buyer;
- the date of the agreement, as well as, the dates for transfer of the assets and payment for the assets;
- a description of the assets;
- a description of the process by which the buyer will distribute the list of claimants; and
- the amount of debt and to whom owed, if the sale is being conducted to satisfy an antecedent debt¹ of the seller.

Transaction parameters

The bill identifies several parameters which apply to a bulk sale transaction. These include, among others, the following: 1) Failure to give notice or provide required information would make the buyer liable to creditors and claimants. 2) A responsible effort, based on a good-faith and commercially reasonable belief or effort, on the part of the buyer to comply with these requirements, would remove liability of the buyer to creditors. 3) The bill elevates an unsecured creditor, who is not paid by the buyer, to the equivalent standing of a secured transaction under the UCC, chapter 679, F.S. 4) The bill allows a buyer to be reimbursed from the seller for amounts paid to a creditor by the buyer.

Limitations on actions against the buyer

¹ "Antecedent debt" means "In contract law, that which may or may not furnish consideration for a new contract to pay. A negotiable instrument given for an antecedent debt is supported by adequate consideration." Black's Law Dictionary at 92 (6th ed. 1990).

The bill requires that an action against a buyer must be commenced within one year after the date of the bulk sale. The time to bring an action may be extended if the buyer has concealed the fact that the sale had taken place.

Effective date

The bill provides that the act shall take effect October 1, 1999.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

b. Does the bill reduce total taxes, both rates and revenues?

No.

- c. Does the bill reduce total fees, both rates and revenues?

No.

- d. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Though the bill does not specify location within the Florida Statutes, the provisions closely mirror themes that are consistent with the Uniform Commercial Code. These concepts are designed to govern commercial transactions. Florida does not have a chapter relating to bulk sales or bulk transfers which is similar to the UCC. The marketplace principally regulates these affairs at this time, though UCC provisions, such as for secured transactions, may apply to portions of the transaction. The provisions of the bill would create guidelines for commercial transactions which would be applicable, as specified in the bill.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

C. STATUTE(S) AFFECTED:

The bill does not cite a specific chapter of the Florida Statutes.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Provides rights and responsibilities between a seller, buyer and other interested parties in a bulk sale transaction where a seller is selling more than half of the inventory in stock outside the normal course of business.

Section 2. Provides that the act shall take effect October 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Compliance with the provisions of the bill would impact parties to the bulk sale transaction. Direct private sector costs, however, are not imposed in the bill. Compliance costs would be incurred on the part of the seller, the buyer, and suppliers. These costs would be incurred in varying degrees, on a case by case basis.

2. Direct Private Sector Benefits:

As indicated in this analysis, bulk sale legislation is designed to provide a mechanism for protecting interests in certain business transactions (when inventory is sold in bulk, outside the normal course of business). Benefits of this legislation would accrue to parties to a bulk sale transaction by creating these protections, primarily for those persons in an unsecured position.

3. Effects on Competition, Private Enterprise and Employment Markets:

Unknown.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the state tax shared with counties or municipalities.

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V. COMMENTS:

The bill does not address a specific statute nor does it create a specific location for placement within the statutes. The bill also does not address penalties for noncompliance. It does require the buyer to make payment to a creditor for damages resulting from the failure of the buyer to comply with the notice requirements. Thus, two scenarios appear to exist in relation to violations of the provisions of the bill. First, the provisions are a mandate to conduct business transactions, as spelled out in the bill, but there is no penalty if the mandates are not carried out. It could be anticipated that a violation of these statutory mandates would give standing to the aggrieved party in a lawsuit resulting from the bulk sale transaction.

Second, when the provisions of the bill are codified into statute by the Division of Statutory Revision, their location could create an appropriate remedy. Should the provisions be placed in a regulatory statute, a violation of the provisions of the statutory regulations could create an appropriate remedy as a violation of that regulatory code. If the provisions were to be placed in the UCC, certain lawful rights would be created and carried out through appropriate legal proceedings.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION AND CONSUMER AFFAIRS:

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