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HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIARY
ANALYSIS

BILL #: CS/HB 715

RELATING TO: Bulk Sales

SPONSOR(S): Representative Minton

COMPANION BILL(S): SB 1042(c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) BUSINESS REGULATION AND CONSUMER AFFAIRS YEAS 10 NAYS 0
(2) JUDICIARY YEAS 8 NAYS 0
(3) FINANCIAL SERVICES
(4)
(5)

I. SUMMARY:

This bill relates to fraudulent transfers 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 transaction by requiring the seller to give notice of the proposed transfer to unsecured creditors not less than 15 days prior to the transfer.

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

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Currently, bulk sales are not defined in the statutes, but are commonly referred to as the sale of a substantial part of a person's inventory or other assets which are sold outside the seller's normal course of business.

Chapter 93-77, Laws of Florida, repealed chapter 676, Florida Statutes, titled Article 6 - Bulk Transfers.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.

Chapter 726, F.S., addresses fraudulent transfers of assets of a business. A transfer of assets by a debtor is fraudulent in relation to a creditor if it occurs with intent to defraud a creditor or it occurs without receiving reasonable compensation for the assets (selling at a significantly reduced or discounted price.) Pursuant to the remedies section of chapter 726, F.S., and subject to any defenses asserted by the transferee, the creditor may obtain a court order: Avoiding the transfer to the extent necessary to satisfy the creditor's claim; enjoining against further disposition by the debtor or a transferee, or both; or, appointing a receiver to take charge of the transferred assets.

B. EFFECT OF PROPOSED CHANGES:

The bill creates notice requirements regarding sales when 51% or more of the inventory is sold. A bulk sale of inventory, supplies, merchandise, materials or other property, not sold in the ordinary course of the seller's business, would be considered a fraudulent transfer pursuant to chapter 726, F.S., unless the seller gives notice to every unsecured creditor not less than 15 days prior to the proposed transfer.

Persons associated with the seller who knowingly participate in a fraudulent transfer would be liable to secured and unsecured creditors for the amount of their claims, plus costs, to perfect their claims.

C. APPLICATION OF PRINCIPLES:

1. <u>Less Government:</u>

   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?

      Yes. The bill requires debtors to provide notice to their unsecured creditors in certain cases.

      (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?

      The bill does not reduce an agency or program.

      (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. <u>Lower Taxes:</u>

   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?

      No.

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

      The bill allows creditors to seek recovery of losses due to a debtor's failure to provide notice of a bulk transfer. This right does not currently exist in statute.

5. Family Empowerment:

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

      (1) Who evaluates the family's needs?

          The bill does not purport to provide services to families or children.

      (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?

      No.

   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?

The bill does not create or change a program providing services to families or children.

(2) service providers?

N/A

(3) government employees/agencies?

N/A

C. STATUTE(S) AFFECTED:

Amends s. 726.105 and creates ss. 726.202 and 726.203, F.S.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 726.105, F.S., to provide that the failure to give timely notice to creditors of the intended sale of a substantial portion of a business's assets would constitute a fraudulent transfer.

Section 2. Creates s. 726.202, F.S., to provides rights and responsibilities between a seller and creditors in a sale transaction where a seller is selling more than half of the inventory in stock outside the normal course of business. Provides for notice of the sale to be provided to creditors by the seller and creates a fraudulent transfer of assets if the notice is not supplied.

Section 3. Creates s. 726.203, F.S., to provide that persons associated with the seller who knowingly participate in a fraudulent transfer would be liable to secured and unsecured creditors for the amount of their claims plus costs.

Section 4. 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:

   None.

2. Recurring Effects:

   None.

3. Long Run Effects Other Than Normal Growth:

   None.

4. Total Revenues and Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

   None.

2. Recurring Effects:

   None.

3. Long Run Effects Other Than Normal Growth:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

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

2. Direct Private Sector Benefits:

   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 notice requirements to those persons in an unsecured position.

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

   Unless the seller indemnities the buyer or makes other provisions for the claims of creditors, the sale of a majority of a business's assets will be delayed while the process of creditor notification runs its course.

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.

V. COMMENTS:

The Committee on Judiciary adopted a strike-everything amendment. The amendment requires debtors to provide notice to their unsecured creditors of their intention to sell 51% or more of the value at cost of the supplies, inventory, merchandise, equipment, real property, or tangible personal property held by such debtors, with the intent to terminate their businesses. Such notice must be provided at least 15 days prior to the sale. The amendment contains definitions of "claimant," "unsecured," and "debtor." The amendment allows unsecured creditors to recover actual damages incurred as the result of the intentional failure of the debtor to provide notice, and provides for attorneys fee awards to prevailing parties. The amendment requires actions under the bill to be brought within one year after the effective date of a transfer subject to the bill, and contains a clarifying cross-reference to Chapter 95, F.S.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The committee substitute differs from the original bill by removing all provisions relating to bulk sales as defined in the bill. The CS provides that a sale of 51 percent or more of a business outside the normal course of the seller's business would constitute a violation of chapter 726, F.S., and the seller would be subject to the penalties imposed for a fraudulent transfer. The CS also penalizes persons who knowingly participate in the fraudulent transfer.

The Committee on Judiciary adopted a single strike-everything amendment, which is traveling with the bill. The amendment requires sellers to provide notice to their unsecured creditors whenever the sellers sell 51 percent or more of the value, at cost, of the supplies, inventory, merchandise, real or tangible personal property, or equipment, with the intent of terminating the sellers' business, not less than 15 days prior to the effective date of the transfer. Provides that if the seller has less than 50 unsecured claimants, that such notice must be provided by personal delivery or first class U.S. mail, and that if the seller has more than 50 claimants, notice may be provided by publication in a newspaper. The amendment defines "claimant," "unsecured claimant," "transfer," and "debtor," and the bill is limited by definition to sellers (debtors) who are motor vehicle dealers as defined in s. 320.27, F.S., motor vehicle repair shops as defined in s. 559.903(7), F.S., or persons who deal in automotive or automotive services industry goods. The amendment provides that an unsecured claimant may recover actual damages form the seller that the claimant sustains as the result of the intentional failure of the seller to provide notice of the transfer, and provides for an award of attorney's fees to the prevailing party. The amendment finally provides a 1 year period of limitations.

VII. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION AND CONSUMER AFFAIRS:

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