

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1445 Debts and Debtors and Administration of Insolvent Estates  
**SPONSOR(S):** Schwartz and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 2118

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Constitution &amp; Civil Law</u>	<u>8 Y, 0 N</u>	<u>Thomas</u>	<u>Birtman</u>
2) <u>Safety &amp; Security Council</u>	<u>14 Y, 0 N, As CS</u>	<u>Thomas</u>	<u>Havlicak</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

The bill amends provisions of Florida Statutes relating to debtors and creditors. The bill amends s. 222.25, F.S., to add an additional exemption from attachment, garnishment, or other legal process to include personal property of a debtor of a value up to \$4,000, provided that the debtor does not receive the homestead exemption under the State Constitution.

The bill amends existing law relating to legal notice concerning foreclosure proceedings to state that such notice may be made in a newspaper that is published a minimum of 5 days a week, exclusive of legal holidays.

The bill amends statutes relating to the general assignment of assets for the benefit of creditors to:

- amend definitions;
- revise duties of the assignor and assignee;
- provide a form for verification of assignment of assets;
- revise provisions relating to proceedings against an assignee;
- revise provisions relating to the powers of the court;
- require notice be given to all consensual lienholders and counsel;
- limit certain claims;
- clarify that creditors of assignors may file objections to a claim;
- require the assignee to create a register of all creditors that have filed claims against the assignor's estate and to make the register available upon request to any creditor or party of interest;
- provide that the assignee and any creditor or party in interest shall have standing to challenge the validity, extent, or priority of any claim filed by a creditor;
- provide deadlines to file a claim for an unsecured deficiency, and eliminate an entitlement to a share in the distribution if the deficiency claim is untimely filed; and
- revise provisions relating to the priority of claims.

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

The bill takes effect on July 1, 2007.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty – The exemption of specified interest in personal property from the claims of creditors for debtors that do not receive the protection from creditors under the constitutional homestead exemption increases the options of individuals and private entities regarding the conduct of their own affairs.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Protection from Creditors**

The Florida Constitution allows a debtor to exempt a homestead of unlimited value from the claims of creditors as long as it is used as a residence.<sup>1</sup> Section 4(a)(1) of Article X provides that a person may exempt up to 160 acres if the property is located outside a municipality or up to 1/2 acre if the property is located within a municipality. Courts have held that the purpose of this exemption is to preserve for an unfortunate citizen and his or her family certain things necessary to earn a livelihood.<sup>2</sup> In addition, a debtor is entitled to an exemption from the claims of creditors for “personal property to the value of one thousand dollars.”<sup>3</sup>

In addition to the protection from creditors contained in the State Constitution, chapter 222, F.S., protects other personal property, from certain claims of creditors and legal process: garnishment of wages for a head of family;<sup>4</sup> proceeds from life insurance policies;<sup>5</sup> wages or unemployment compensation payments due certain deceased employees;<sup>6</sup> disability income benefits;<sup>7</sup> assets in qualified tuition programs; medical savings accounts; Coverdell education savings accounts; hurricane savings accounts;<sup>8</sup> \$1000 interest in a motor vehicle; professionally prescribed health aids; and certain refunds or credits from financial institutions.<sup>9</sup>

##### **Legal Notice Concerning Foreclosure Proceedings**

Under present law, if a legal advertisement, publication, or notice relating to a foreclosure proceeding is required to be placed in a newspaper, and the publication is made in a county with a population of more than 1 million – that newspaper must be published a minimum of 5 days a week, and must have been in existence and published a minimum of 5 days a week for 1 year or must be a direct successor to a newspaper that has been in existence for 1 year that has been published a minimum of 5 days a week.<sup>10</sup> The present law does not exclude legal holidays from the 5 day requirement.

##### **General Assignment**

The law regarding assignments has been summarized as follows:

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<sup>1</sup> FLA. CONST. art. X, sec. 4(a).

<sup>2</sup> *Vandiver v. Vincent*, 139 So.2d 704 (Fla. 2d DCA 1962). See also *In re Owen*, 961 F.2d 170 (under the Florida Constitution, homestead property is exempt from forced sale and is insulated from judgment, decree or execution lien).

<sup>3</sup> FLA. CONST. art. X, sec. 4(a)(2).

<sup>4</sup> Section 222.11, F.S.

<sup>5</sup> Section 222.13, F.S.

<sup>6</sup> Section 222.15, F.S.

<sup>7</sup> Section 222.18, F.S.

<sup>8</sup> Section 222.22, F.S.

<sup>9</sup> Section 222.25, F.S.

<sup>10</sup> Section 702.035, F.S.

A general assignment for the benefit of creditors is a conveyance by a debtor [the assignor] without consideration from the grantee [the assignee] of substantially all his property to a party in trust to collect the amount owing to him, to sell and convey the property, to distribute the proceeds of all the property among his creditors, and to return the surplus, if any, to the debtor. It is a voluntary transfer by a debtor of his or her property to an assignee in trust for the purpose of applying the property or proceeds thereof to the payment of his or her debts.

The purpose of such an assignment is to afford an equal distribution of the assignor's estate to all of his creditor's in proportion to their claims. The common-law right to make a general assignment existed as a corollary to the legal axiom that the power to dispose of property as one may see fit, when unrestricted by statute, is a necessary incident to the ownership of property. The common law also embraced, in addition to the general assignment, a nonliquidating device known as a partial assignment, by which a debtor could transfer a part of his property in payment of creditors. Under the principle that a debtor may, while he retains dominion over his property, dispose of it as he chooses, an assignment of part of his property to part of his creditors was valid unless it could be attacked as a fraudulent conveyance. Thus, at common law, a debtor could make either a general or partial assignment, and in the absence of fraud no creditor could object.

A valid assignment for creditors vests the legal title in the assignee and places the property beyond the control of the assignor or the reach of any of his creditors, except as they have a right, under the assignment, to share in the distribution of the assigned estate. The assignee takes title to the assigned property as a trustee, and in general, his duties, powers, and liabilities are those that usually pertain to this office. Those creditors who are secured by the assignment are the beneficiaries.<sup>11</sup>

As one Florida Court has noted:

An assignment for the benefit of creditors is an alternative to bankruptcy, but unlike federal bankruptcy proceedings, which operate upon a uniform procedure in all jurisdictions, the procedure for assignments for the benefit of creditors varies from jurisdiction to jurisdiction. Further, assignment is seen as a cooperative effort which can benefit creditors by affording prompt and relative inexpensive resolution of claims. [citation omitted].... Although the Bankruptcy Code preempts state laws governing insolvent debtors, [citation omitted], state laws governing voluntary assignments for the benefit of creditors are permitted if such laws do not provide for a discharge of debts.<sup>12</sup>

In 1987, Florida codified the law governing assignments for the benefit of creditors in ch. 727, F.S.<sup>13</sup> The intent of the statutes governing assignments for the benefit of creditors is "to provide a uniform procedure for the administration of insolvent estates, and to ensure full reporting to creditors and equal distribution of assets according to priorities as established under this chapter."<sup>14</sup> The process under this chapter has been described as follows:

Once an assignment is made under section 727.104, all creditors except for lien holders are required to file proofs of claim pursuant to section 727.112. Claims, whether contingent, liquidated, unliquidated, or disputed, must be filed within 120 days from the date that the chapter 727 petition is filed or the claim will be barred "unless for cause shown." s. 727.112(1), (2), F.S. Section 727.114 establishes the priority for payment of claims. Creditors with perfected liens on assets of the estate have the highest priority; unsecured claims have the lowest priority; and if all of the described claims are paid in full, "any residue shall be paid to the assignor." s.

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<sup>11</sup> 6 Am. Jur. 2d Assignments for Benefit of Creditors § 1.

<sup>12</sup> *Moecker v. Antoine*, 845 So.2d 904, 910 and fn. 7 (Fla. 1st DCA 2003).

<sup>13</sup> See Ch. 87-174, Laws of Florida.

<sup>14</sup> Section 727.101, F.S.

727.114, F.S. Section 727.108 also requires an assignee to abandon assets to duly perfected secured or lien creditors after the assignee determines the estate has no equity in such assets or that the assets are burdensome or of inconsequential value and benefit to the estate.<sup>15</sup>

Current law provides that if the assignee properly performs his or her trust, the assignee is entitled to reasonable compensation for his or her services and to reimbursement for all reasonable and necessary expenses incurred in administering the trust, even though the assignment does not specifically provide for these allowances.<sup>16</sup>

### Priority of Claims

Claims under this chapter are distributed on a pro rata basis [except for those claims under subsection (1)], in the following order of priority:

- (1) Creditors with liens on assets of the estate, which liens are duly perfected pursuant to applicable law [secured lienholders do not take on a pro rata share, but rather in full in order of the priority of the lien pursuant to applicable law].
- (2) Expenses incurred during the administration of the estate.
- (3) Unsecured claims of governmental units for taxes which accrued prior to the filing date.
- (4) Claims for wages, salaries, or commissions earned within 90 days of the filing date or the cessation of the assignor's business, whichever occurs first, but only to the extent of \$2,000.
- (5) Allowed unsecured claims, to the extent of \$900 for each individual, arising from the deposit with the assignor before the filing date of money in connection with the purchase, lease, or rental of property or the purchase of services for personal, family, or household use by such individuals that were not delivered or provided. and
- (6) Unsecured claims.

If all of the above classes have been paid in full, any residue shall be paid to the assignor.<sup>17</sup>

### **Effect of proposal:**

Exemption From Attachment, Garnishment, or Other Legal Process - The bill amends s. 222.25, F.S., to add an additional exemption from attachment, garnishment, or other legal process to include personal property up to \$4,000, provided that the debtor does not receive the homestead exemption under the State Constitution. Legal process includes any writ, summons, or other order to appear or respond to a court.<sup>18</sup> The bill further provides that the new exemption from attachment, garnishment, or other legal process does not apply to child support or spousal support obligations.

Legal Notice Concerning Foreclosure Proceedings – The bill amends s. 702.035, F.S., to provide that a legal notice concerning foreclosure proceedings published in a county with a population over 1 million may be made in a newspaper that is published a minimum of 5 days a week, **exclusive of legal holidays**.

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<sup>15</sup> *Hillsborough County v. Lanier*, 898 So.2d 141, 143 (Fla. 2nd DCA 2005).

<sup>16</sup> *Armour v. Doig*, 45 Fla. 162, 34 So. 249 (1903).

<sup>17</sup> Section 727.114, F.S.

<sup>18</sup> Black's Law Dictionary (8th ed. 2004).

Definitions - The bill addresses the following definitions:

- The definition of “asset” is revised to include claims and causes of action, whether arising in tort or contract;
- The definition of “assignee” is revised to include a natural person solely in such person’s capacity as an assignee;
- The definition of “claims bar date” is created to mean the date that is 120 days after the date on which the petition is filed with the court;
- The definition of “consensual lienholder” is created to mean a creditor that has been granted a security interest or lien in personal or real property of the assignor prior to the petition being filed, and whose security interest or lien has been perfected.

Assignment - The bill provides that the assignor is required to grant the assignee all books, records, and electronic data pertaining to assigned assets. The bill also requires the assignee to protect and preserve all assigned assets in accordance with the provisions of chapter 727. The bill includes a form for verification of assignment and schedules by the assignor.

Proceedings Against Assignee - The bill prohibits the levy, execution, and attachment against any assets of the estate in the possession, custody, or control of the assignee, including real property, and exempts consensual lienholders that are enforcing rights in personal or real property from the prohibition.

Duties of Assignee – The bill authorizes the assignee:

- To prosecute any tort claim or cause of action that was previously held by the assignor, regardless of any generally applicable law concerning the nonassignability of tort claims or causes of action.<sup>19</sup>
- To prosecute the estate’s claims and causes of actions, or sell or assign such claims or causes of action to another entity on terms that the assignee determines are in the best interest of the estate. The bill provides that in an action by an assignee against a defendant to assert a claim of the estate, the claim shall not be subject to any defense based on the assignor’s acquiescence, cooperation, or participation in the wrongful act by the defendant that forms the basis of the claim.
- To conduct the business of the assignor not to exceed 14 calendar days if in the best interest of the estate, or for a longer period if notice is given and until such time as an objection is sustained by the court. The bill prohibits the assignee from operating the business of the assignor for longer than 45 calendar days without a court order if an objection by a party in interest is interposed to the assignee’s motion for authority to operate the assignor’s business.
- To reject an unexpired lease of nonresidential real property or personal property under which the assignor is the lessee.

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<sup>19</sup> Generally, personal injury and wrongful death claims are not assignable. *Clar v. Dade County*, 116 So.2d 34 (Fla. 3d DCA 1959). However, the right to contribution acquired by a joint tortfeasor who has paid more than his pro rata share of the liability has been held to be assignable. *Robarts v. Diaco*, 581 So.2d 911 (Fla. 2nd DCA 1991).

Powers of the Court - The bill provides that the court has the power to:

- Authorize the business of the assignor to be conducted by the assignee for longer than 14 calendar days upon notice and hearing, if requested;
- Establish a deadline for filing of all claims against the assignment estate arising from and after the date the assignment petition was filed, which deadline shall occur not less than 30 days prior to notice by mail of the order establishing the deadline;
- Authorize the assignee to reject an unexpired lease of nonresidential real property or of personal property under which the assignor is the lessee;
- Upon notice to all creditors and consensual lienholders, to hear and determine a motion made by the assignee for approval of a proposed sale of assets of the estate other than in the ordinary course of business, or the compromise or settlement of a controversy, and enter an order granting such motion notwithstanding the lack of objection if the assignee reasonably believes that such order is necessary to proceed with the action.

Notice - The bill requires notice to be given to all consensual lienholders and counsel that have filed a notice of appearance with the court or are identified in the schedules.

Proof of Claim – The bill limits claims resulting from the assignee’s rejection of a lease of real property to unpaid rent due and specified rent reserved by such lease; reasonable attorney’s fees and costs; and reasonable costs of reletting the premises. The bill also limits claims resulting from the termination of employment contracts to any unpaid compensation and the specified compensation provided by the contract.

Objections to Claims – The bill clarifies that creditors of assignors may file objections to a claim. The bill requires the assignee to create a register of all creditors that have filed claims against the assignor’s estate and to make the register available upon request to any creditor or party of interest. The bill provides that the assignee and any creditor or party in interest shall have standing to challenge the validity, extent, or priority of any claim filed by a creditor. The bill provides deadlines to file a claim for an unsecured deficiency, and eliminates an entitlement to a share in the distribution if the deficiency claim is untimely filed.

Priority of Claims - As part of the secondary priority of claims, the bill includes rent incurred by the assignee in occupying premises in which the assets of the assignment estate are located or the business of the assignor is conducted. The bill limits the unsecured claims of governmental units<sup>20</sup> for taxes to those that accrued within 3 years of the filing date, and increases to 180 the number of days for which claims for specified earnings of employees of the assignor may be paid, not to exceed \$10,000 per individual employee. The bill increases the amount of unsecured claims to \$2,225 per individual. The bill provides that subrogation agreements are enforceable. The bill provides that for purposes of distribution, a claim arising from rescission of a purchase or sale of a security shall be subordinate to all claims or interests that are senior or equal to the claim or interest represented by such security, unless the security is common stock. Lastly, the bill deletes authorization for any residue to be paid to the assignor if all of the priority classes have been paid in full.

The bill becomes effective on July 1, 2007.

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<sup>20</sup> The bill does not define the term “governmental units” and there is not a definition in ch. 727, F.S. Several other statutes do define this term which may be instructional towards its use here. *See* ss. 159.823, 215.84, 274.01, 280.02, 383.302, 395.002, 627.971, and 679.1021, F.S. These definitions all vary somewhat, but seem to approximate the definition in 395.002(12), F.S., which reads “Governmental unit” means the state or any county, municipality, or other political subdivision, or any department, division, board, or other agency of any of the foregoing.”

C. SECTION DIRECTORY:

Section 1 amends s. 222.25, F.S., relating to other individual property exempt from legal process.

Section 2 amends s. 702.035, F.S., relating to legal notice concerning foreclosure proceedings.

Section 3 amends s. 727.103, F.S., relating to definitions.

Section 4 amends s. 727.104, F.S., relating to commencement of proceedings.

Section 5 amends s. 727.105, F.S., relating to proceedings against an assignee.

Section 6 amends s. 727.108, F.S., relating to the duties of an assignee.

Section 7 amends s. 727.109, F.S., relating to powers of the court.

Section 8 amends s. 727.110, F.S., relating to actions by an assignee and other parties in interest.

Section 9 amends s. 727.111, F.S., relating to notice given to the assignor and all creditors.

Section 10 amends s. 727.112, F.S., relating to proof of a claim.

Section 11 amends s. 727.113, F.S., relating to objections to a claim.

Section 12 amends s. 727.114, F.S., relating to priority of a claim.

Section 13 provides an effective date.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides that a debtor that does not receive the protection from creditors under the constitutional homestead exemption may keep an additional \$4,000 in personal property protected from creditors.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement was submitted by the original bill sponsor.

The chair of the Safety & Security Council chose not to submit any further comments regarding the council substitute.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 21, 2007, the Committee on Constitution & Civil Law adopted an amendment and reported the bill favorably as amended. The amendment makes a technical change to the title to provide that the bill is an act relating to "debts and debtors."

On April 18, 2007, the Safety & Security Council adopted 3 additional amendments to the bill and reported the bill favorably as amended. The additional amendments provide:

- that the new exemption from attachment, garnishment, or other legal process does not apply to child support or spousal support obligations.
- that the priority of claims for wages and other contributions to an employee are increased up to \$10,000 per individual employee.
- that legal notice concerning foreclosure proceedings may be made in a newspaper that is published a minimum of 5 days a week, exclusive of legal holidays.

This analysis is addressed to the bill as amended by the Council.