

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 451 Fraudulent Transfers
SPONSOR(S): Civil Justice Subcommittee; Steube and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 458

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|-------------------------------|------------------|---------|--|
| 1) Civil Justice Subcommittee | 14 Y, 0 N, As CS | Cary | Bond |
| 2) Judiciary Committee | 16 Y, 0 N | Cary | Havlicak |

SUMMARY ANALYSIS

The Uniform Fraudulent Transfer Act provides a creditor with the means to reach assets a debtor has transferred to another person. One form of fraudulent transfer is a transfer made without receiving a reasonably equivalent value in exchange for the transfer. Most fraudulent transfers may be recovered from the recipient up to 4 years after the transfer. A gift to charity is a transfer made without receiving a reasonably equivalent value in exchange.

The bill reduces the limitations period for recovery from a charity from 4 years to 2 years.

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

The bill provides an effective date of upon becoming a law and applies to any charitable contributions made after that date.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Chapter 726, F.S., is Florida's Uniform Fraudulent Transfer Act (hereinafter referred to as the "Act"), It is based on the 1984 model act of the same name.¹ According to the National Conference of Commissioners on Uniform State Laws,

The Uniform Act was a codification of the "better" decisions applying the Statute of 13 Elizabeth. See Analysis of H.R. 12339, 74th Cong., 2d Sess. 213 (1936). The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of fraudulent transfer was part of the law of every American jurisdiction. Since the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on badges of fraud. The weight given these badges varied greatly from jurisdiction, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on evidence of actual intent. An important reform effected by the Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing an action to avoid a transfer as fraudulent.²

The Act provides a "claw back", whereby a creditor who is a victim of fraud may have some recourse against the recipient of a transfer from the debtor if the transfer was made with actual intent to hinder, delay, or defraud any creditor of the debtor, or if the transfer was made without receiving reasonably equivalent value in exchange for the transfer.³ If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.⁴ The Act provides a four-year limitation on such an action, from the time the transfer was made.⁵

There is no exception in the Act for conveyances accepted by charitable organizations in good faith. A federal Circuit Court of Appeal ruled that a similar Illinois law that did not specifically exclude charities would not prevent a creditor from using the claw back to recover from the charity, even though the charity took the donation in good faith.⁶ When a charity accepts a donation in good faith, it can create a great hardship to the charity to be forced to relinquish funds if the funds have already been obligated or spent.⁷

Effects of the Bill

The bill amends s. 726.102, F.S., to add a definition of "qualified charity" to mean an entity described as such in the federal Internal Revenue Code.

¹ Chapter 87-79, L.O.F.

² National Conference of Commissioners of Uniform State Laws, Uniform Fraudulent Transfer Act Prefatory Note.

³ Section 726.105, F.S.

⁴ Section 726.108, F.S.

⁵ Section 726.110, F.S. In limited circumstances, when the transfer was made to an insider for an antecedent debt, with other conditions, there is a one-year statute of limitations.

⁶ *Scholes v. Lehmann*, 56 F.3d 750, 761 (7th Cir. 1995).

⁷ David Donell and Eric Rieder, *Charities Face Greater Threat From Ponzi Schemes Than Lost Investments*, Huffington Post Business, http://www.huffingtonpost.com/david-donell/charities-face-greater-th_b_223088.html (last visited January 28, 2012).

The bill amends s. 726.110, F.S., to create a two period of limitations, from the time of the transfer, for a creditor to bring an action against the recipient of a fraudulent transfer where the transfer was accepted by a qualified charity in good faith.

The bill provides an effective date upon becoming a law, and applies to any charitable contribution made on or after the effective date.

B. SECTION DIRECTORY:

Section 1 amends s. 726.102, F.S., relating to definitions.

Section 2 amends s. 726.110, F.S., relating to extinguishment of a cause of action.

Section 3 provides an effective date of upon becoming a law and an application 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:

Qualified charities will be able to keep charitable donations at the expense of creditors and victims of the person who made the fraudulent transfer if the cause of action is not brought within the shorter statute of limitation.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

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.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 31, 2012, the Civil Justice Subcommittee reported the bill favorably as a committee substitute. The committee substitute differs from the filed bill:

- Changed the definition of "exempt organization" to "qualified charity".
- Removed the provision that considered a contribution for a charitable purpose to be deemed an exchange for reasonably equivalent value.
- Reduced the statute of limitations for the claw back from 4 years to 2 years.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.