

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 Budget Subcommittee on Finance and Tax

BILL: CS/SB 458

INTRODUCER: Banking and Insurance Committee and Senator Bennett

SUBJECT: Uniform Fraudulent Transfer Act

DATE: February 16, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rubio	Burgess	BI	Fav/CS
2.	Fournier	Diez-Arguelles	BFT	Pre-meeting
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The Florida Uniform Fraudulent Transfer Act, ch. 726, F.S., provides that a transfer made or obligation incurred by a debtor is fraudulent as to a creditor if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation. Under the act, “clawback” actions provide a remedy for creditors who are victims of fraud, by allowing for the fraudulently transferred property to be surrendered or the transfer to be voided. The act provides that a transfer or obligation is not voidable against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee. However, the act does not provide an exception for conveyances accepted by charitable organizations in good faith.

The Federal Bankruptcy Code provides that a trustee may void any transfer of property or any obligation by the debtor, if the debtor voluntarily or involuntarily received less than a reasonably equivalent value in exchange for such transfer or obligation. The code provides that a charitable contribution transferred to a qualified religious or charitable entity or organization is not considered to be a transfer in any case in which the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or if the contribution made by a debtor exceeded the 15 percent of gross

annual income, if the transfer was consistent with the practices of the debtor in making charitable contributions.

The bill amends the Florida Uniform Fraudulent Transfer Act by inserting definitions for a charitable contribution and a qualified religious or charitable entity. The bill provides that a charitable contribution received in good faith by a qualified religious or charitable entity is not a transfer covered under ch. 726, F.S. However, a charitable contribution will be subject to clawback actions if it was received within 2 years before the commencement date of an action under any state or federal law, was not received in good faith, exceeds 15 percent of the gross annual income of the transferor for the year in which the transfer is made, or was inconsistent with the practices of the transferor in making charitable contributions.

This bill substantially amends the following sections of the Florida Statutes: 726.102, and 726.109.

II. Present Situation:

Florida Uniform Fraudulent Transfer Act

The Florida Uniform Fraudulent Transfer Act (act), ch. 726, F.S., provides that a transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- With actual intent to hinder, delay, or defraud any creditor of the debtor; or
- Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
 - Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
 - Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.¹

The act provides a statutory remedy for creditors who are victims of fraud by allowing for the fraudulently transferred property to be surrendered or the transfer to be voided, which is commonly referred to as a “clawback” action. The act provides for a 4 year statute of limitations on clawback actions. Under the act, a transfer or obligation is not voidable against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.² The act provides that value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied.³ The act does not provide an exception for conveyances accepted by charitable organizations in good faith. The seventh Circuit Court of Appeal has ruled that a similar Illinois law, that did not specifically exclude charities, would not prevent a clawback action by a creditor to recover from a charity, even though the charity took the donation in good faith.⁴

¹ Section 726.105, F.S.

² Section 726.109(1), F.S.

³ Section 726.104(1), F.S.

⁴ *Scholes v. Lehmann*, 56 F.3d 750, 761 (7th Cir. 1995).

Federal Bankruptcy Code

The Federal Bankruptcy Code (code) provides that a trustee may void any transfer of property or any obligation by the debtor, if the debtor voluntarily or involuntarily received less than a reasonably equivalent value in exchange for such transfer or obligation. The debtor must have been insolvent on the date the transfer was made or obligation was incurred, or became insolvent as a result of such transfer or obligation, engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital, intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as the debts matured; or made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.⁵ The code provides that a charitable contribution transferred to a qualified religious or charitable entity or organization is not considered to be a transfer in any case in which the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or if the contribution made by a debtor exceeded the 15 percent of gross annual income, if the transfer was consistent with the practices of the debtor in making charitable contributions.⁶ The code provides for a two year statute of limitation.

The code uses the Internal Revenue Code's (IRC) definition for a charitable contribution to a qualified religious or charitable entity or organization. Under the IRC, a charitable contribution to a qualified religious or charitable entity includes a contribution or gift to or for the use of a corporation, trust, or foundation created or organized in the United States, operating exclusively for certain purposes including religious and charitable, no part of the net earnings of which inures to the benefit of any private shareholder or individual; and which is not disqualified for tax exemption under s. 501(c)(3), I.R.C., by reason of attempting to influence legislation.⁷

III. Effect of Proposed Changes:

Senate bill 458 amends s. 726.102, F.S., of the Florida Uniform Fraudulent Transfer Act, by defining "charitable contribution" as the term is defined in s. 170(c), I.R.C., if the contribution is made by a natural person or qualified religious or charitable entity and consists of a financial instrument as defined in s. 731(c)(2)(C), I.R.C., or cash. Section 731(c)(2)(C), I.R.C., defines a financial instrument as including "stocks and other equity interests, evidences of indebtedness, options, forward or futures contracts, notional principal contracts, and derivatives."

The bill defines a "qualified religious or charitable entity or organization" as an entity described in s. 170(c)(1), I.R.C., or an entity or organization described in s. 170(c)(2), I.R.C. The IRC in s. 170(c)(1) defines a qualified entity as a "State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes." Section 170(c)(2) defines a qualified entity as a corporation, trust, or foundation created or organized in the United States, operating exclusively for certain purposes including religious and charitable, no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

⁵ 11 U.S.C.A. §548(a)(1).

⁶ 11 U.S.C.A. §548(a)(2).

⁷ Section 170(c), I.R.C.

which is not disqualified for tax exemption under s. 501(c)(3), I.R.C., by reason of attempting to influence legislation.

The bill provides that a charitable contribution transfer that is received in good faith by a qualified religious or charitable entity or organization is not a transfer covered under ch. 726, F.S. However, under the bill the transfer of a charitable contribution received on or within 2 years before the commencement date of an action under any state or federal law will not be shielded from clawback actions unless the transfer is received in good faith and does not exceed 15 percent of the gross annual income of the transferor for the year in which the transfer is made or if the transfer does exceed 15 percent it must be consistent with the practices of the transferor in making charitable contributions.

Other Potential Implications:

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Under the bill, creditors will be able to void transfers received on or within 2 years prior to the commencement date of an action under any state or federal law that exceed 15 percent of the transferor's gross annual income for the year in which the transfer is made or are inconsistent with practices of the transferor in making charitable contributions.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Implementation of this bill would result in conformity between state and federal law in the balance of protections for charitable organizations and creditors.

VIII. Additional Information:

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

CS by Banking and Insurance on February 7, 2012:

The committee substitute makes the following major changes:

- Defines charitable contribution.
- Defines qualified religious or charitable entity.
- Provides that a charitable contribution received in good faith by a qualified religious or charitable entity is not a transfer covered under ch 726, F.S.
- Provides that a transfer of a charitable contribution received on or within 2 years before the commencement date of an action under any state or federal law will not be shielded from clawback actions unless the transfer is received in good faith and does not exceed 15 percent of the gross annual income of the transferor for the year in which the transfer is made or if the transfer does exceed 15 percent it must be consistent with the practices of the transferor in making charitable contributions.

- B. **Amendments:**

None.