

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 Banking and Insurance Committee

BILL: SB 458

INTRODUCER: Senator Bennett

SUBJECT: Uniform Fraudulent Transfer Act

DATE: February 2, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rubio	Burgess	BI	Pre-meeting
2.			BC	
3.				
4.				
5.				
6.				

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 avoid 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 defining an exempt organization as an organization exempt from federal income taxation under s. 501(c)(3) or (4) of the Internal Revenue Code. The bill provides that an exempt organization is deemed to have

exchanged a reasonably equivalent value for a charitable contribution that was accepted in good faith.

This bill substantially amends the following sections of the Florida Statutes: 718.704, 721.05, 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

Federal Bankruptcy Code

The Federal Bankruptcy Code (code) provides that a trustee may avoid 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

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).

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 an exempt organization as an organization that is exempt from federal income taxation under s. 501(c)(3) or (4) of the Internal Revenue Code. The bill amends s. 726.109(1), F.S., by providing that an exempt organization is deemed to have exchanged a reasonably equivalent value for a charitable contribution that was accepted in good faith. Therefore, an organization exempt from federal income taxation under s. 501(c)(3) or (4) that accepted a charitable contribution in good faith would not be subject to clawback actions.

The bill corrects cross-references and provides that the act shall take effect upon becoming a law.

Other Potential Implications:

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

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.

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Under the bill, creditors would not be able to void fraudulent transfers to organizations exempt from federal income taxation under s. 501(c)(3) or (4) of the Internal Revenue Code. This would result in a disproportionate balance of protections against fraudulent transfers for the exempt organizations and the victim creditors.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Implementation of this bill may raise issues relating to uniformity between state and federal law and balance of protections for charitable organizations and creditors. Due to the discrepancy between the state and federal law, a different result may be obtained depending on which forum an action is brought, resulting in a potential for forum shopping. Under the bill charitable organizations would receive more protections from fraudulent transfers than creditors.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.