

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 Committee on Rules

BILL: CS/SB 1098

INTRODUCER: Banking and Insurance Committee and Senator Richter

SUBJECT: General Assignments

DATE: April 12, 2013 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|------------------|
| 1. | Munroe | Cibula | JU | Favorable |
| 2. | Johnson | Burgess | BI | Fav/CS |
| 3. | Munroe | Phelps | RC | Favorable |
| 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:

CS/SB 1098 streamlines for the discharge of duties by an assignee under an assignment for the benefit of creditors. The changes to the law relating to an assignment for the benefit of creditors were recommended by the Business Law Section of The Florida Bar as part of its comprehensive review of the law.¹ This bill:

- Creates a negative notice procedure to allow an assignee when discharging duties under an assignment for the benefit of creditors to give notice to interested parties of a planned action. In the absence of objection, the assignee may proceed without a hearing. A form is created for providing negative notice of certain acts to be undertaken by the assignee.
- Sets a minimum bond for assignees under an assignment for the benefit of creditors of at least \$25,000 or double the liquidation value of the unencumbered and liquid assets of the insolvent estate, whichever is higher.
- Authorizes an assignee to conduct discovery as provided for in the Florida Rules of Civil Procedure in the course of prosecuting or objecting to claims.

¹ See, The Business Law Section of The Florida Bar, *White Paper: Support for Proposed Amendments to Chapter 727, F.S., Assignments for the Benefit of Creditors* (on file with the Senate Committee on Judiciary).

- Eliminates a conflict in existing law relating to an extension of the time within which an assignee may conduct the business of an insolvent debtor to allow the assignee to conduct the business of the insolvent debtor for 45 days, or longer, if needed and appropriate notice is given.
- Identifies the parties entitled to notice and the contents of the notice when an assignee rejects a lease when discharging his or her duties for an insolvent estate.
- Creates a form for deeds for use by an assignee in the sale of real property by an insolvent estate.

This bill substantially amends the following sections of the Florida Statutes: 727.103, 727.104, 727.108, 727.109, 727.110, 727.111, and 727.113.

This bill creates section 727.117, Florida Statutes.

II. Present Situation:

The practice of assignment for the benefit of creditors is a state law procedure to administer an insolvent estate. Under an assignment for the benefit of a creditor, a debtor may voluntarily assign its assets to a third party.² The practice of assignment for the benefit of creditors involves an assignment in which the debtor voluntarily assigns its assets to a third party as a trustee for the purpose of liquidating the assets to satisfy, in full or in part, creditors' claims against the debtor.³

The practice of assignment for the benefit of creditors existed at common law and was codified in Florida law in 1889.⁴ Florida law codifying the practice of assignment for the benefit of creditors was substantially re-drafted and codified in ch. 727, F.S.⁵

Under Florida law,⁶ an assignment for the benefit of creditors "accomplishes the same result as a [federal] bankruptcy."⁷ An assignment for the benefit of creditors is similar to federal bankruptcy proceedings by allowing the liquidation of a debtor's property for an equal distribution to creditors.⁸ An assignment to the benefit of creditors may be distinguished from a federal bankruptcy proceeding in that it does not impose an automatic stay of collection efforts in favor of the debtor and the debtor is not discharged from his or her debt.⁹

An assignment for the benefit of creditors under ch. 727, F.S., commences with an assignment proceeding in which the insolvent debtor (assignor)¹⁰ executes an irrevocable assignment in

² See, *id.*

³ See *Moecker v. Antoine*, 845 So. 2d 904, 910 (Fla. 1st DCA 2003) (citing *Brainard v. Fitzgerald*, 3 Cal.2d 157, 44 P.2d 336, 339 (Cal. 1935)). See also, The Business Law Section of The Florida Bar, *supra* note 1.

⁴ *Moecker*, 845 So. 2d at 910.

⁵ See generally, chapter 3891, Laws of Florida and substantial redrafting with the enactment of ch. 87-174, ss. 1-17, Laws of Florida.

⁶ See ch. 727, F.S.

⁷ Henry P. Trawick, Jr., *Trawick's Florida Practice and Procedure*, s. 37:18 (2012 ed.).

⁸ See also, The Business Law Section of The Florida Bar, *supra* note 1.

⁹ *Id.*

¹⁰ "Assignor" means one who transfers property rights or powers to another. BLACK'S LAW DICTIONARY (9th ed. 2009).

writing in compliance with a statutory form.¹¹ Then, the original assignment must be recorded in the county where the assignor had its principal place of business and a certified copy recorded in each county where assets of the assignor's estate are located.¹² The assignee¹³ must file a petition with the clerk of the court to commence an assignment proceeding, and then file a motion requesting the court to fix the appropriate amount of the assignee's bond.¹⁴ The amount of the bond may not be less than double the liquidation value of the assets and is conditioned upon the assignee's discharge of the duties.¹⁵

Practitioners have stated that a need exists for more consistency and guidance in the procedures used to handle an assignment for the benefit of creditors.

III. Effect of Proposed Changes:

Negative Notice

The bill creates a new procedure for use with an assignment for the benefit of creditors. The purpose of the procedure is to reduce the administrative burden on courts and the administrative costs to the estate for hearings for relief that are not contested or opposed.¹⁶ "Negative notice is a common procedural tool in federal bankruptcy court."¹⁷ Under the bill, notice may be served by negative notice by including a specific form warning in the document (as set forth in s. 727.114(4), F.S., that:

- The assignee proposes to take certain actions described in the notice without further notice or hearing unless a party in interest files an objection within 21 days of service of the notice;
- Any objection to the notice must be filed with the clerk of the court and served on the assignee's attorney and any other appropriate person;
- If an objection is filed and served within the time permitted, the court must schedule a hearing; and
- If no objection is filed, the assignee and the court will presume that no party opposes the granting of the relief requested in the notice.

If an objection is not filed within the time prescribed, the assignee may take the actions described in the notice.¹⁸

¹¹ See Ronald G. Neiwirth and Jason Bloom, *Florida Legislature Overhauls Assignment for the Benefit of Creditors: More Similar to Bankruptcy, But With a Twist*, 82 FLA. B.J. 20, 20 (Jan. 2008) and s. 727.104(1)(a), F.S.

¹² *Id.* at 20 and s. 727.104(2)(a), F.S.

¹³ "Assignee" means one to whom property rights or powers are transferred by another. BLACK'S LAW DICTIONARY (9th ed. 2009).

¹⁴ See Ronald G. Neiwirth and Jason Bloom, *supra* note 11 at 20 and s. 727.104(2)(b), F.S.

¹⁵ "The assignee must accept the trust created by the assignment and agree to carry it out as provided by law without delay." See Henry P. Trawick, Jr., *supra* note 6 and s. 727.104(1), F.S.

¹⁶ See The Business Law Section of The Florida Bar, *supra* note 1.

¹⁷ See Ronald G. Neiwirth and Jason Bloom, *supra* note 11 at 26 (citing Local Rule 9013-1(D) of the U.S. Bankruptcy Court for the Southern District of Florida which generally explains that "certain motions may be considered by the court without a hearing if appropriate notice and an opportunity to object to the relief requested is provided to interested parties ("negative notice").")

¹⁸ Under s. 727.111(4), F.S., the actions include: a proposed sale of assets of the estate other than in the ordinary course of business, the assignee's continued operation of the assignor's (insolvent debtor's) business for longer than 45 calendar days,

Notice

A subtle conflict currently exists between s. 727.108(4), F.S., which allows an assignee to conduct the business of the assignor for up to 14 days (or longer upon notice), and s. 727.111(4), F.S., which requires not less than 20 days' notice of an assignee's continued operation of the assignor's business for longer than 14 calendar days. Thus, an assignee's compliance with both provisions is impossible unless the notice required by s. 727.111(4), F.S., is sent before the assignment has occurred.

To remedy the conflict, the bill provides an extension of the time within which an assignee may conduct the business of the assignor under s. 727.108(4), F.S., from 14 days to 45 days. The additional time is a larger window within which an assignee can assess the business, determine a strategy for liquidation, and, if necessary, give notice of intent to operate the business for an additional period. The assignee may continue to operate the business for up to 90 days if there is no objection to a negative notice given to interested parties. This period may also be extended. The bill leaves intact the condition that such operation of the business must be in the best interest of the estate.

Notice to Creditors

Currently, s. 727.111, F.S., requires a notice to be mailed at least 20 days before a proposed sale of assets, the payment of fees, or the settlement of a case, which might be an asset of the estate. To streamline the deadlines set forth in the statute into multiples of 7 days, the bill extends the minimum amount of time for notice under the statute from 20 days to 21 days.

Assignee Bond

The purpose of the bond under an assignment for the benefit of creditors is to "protect the assignor's creditors from potential loss in the event of the assignee's improper and irreparable disposition of the assignor's assets."¹⁹ Under current law, courts must set the bond in an amount not less than double the liquidation value of the assets of the estate. This requirement has led some courts to impose an unnecessarily high bond requirement, which adds costs to the administration of an insolvent estate under assignment for the benefit of creditors.²⁰ The bill amends s. 727.104(4), F.S., to revise the assignee's bond requirement to be at least \$25,000 or double the liquidation value of the unencumbered and liquid assets of the estate, whichever is higher. The amendment will have the effect of requiring a minimum bond amount without artificially inflating the bond amount based on a large amount of secured or unliquidated debt.

the compromise or settlement of a controversy, and the payment of fees and expenses to the assignee and to professional persons employed by the assignee.

¹⁹ The Business Law Section of The Florida Bar, *supra* note 1 (citing *Williamson v. Leith*, 36 F.2d 643, 644 (Fla. 5th DCA 1929)).

²⁰ *Id.*

Objections to Claims

In an assignment for the benefit of creditors, creditors of an assignor file claims with the assignee who is charged with determining the validity and priority of such claims before distributing the assignor's assets in accordance with statutory requirements.²¹ The assignee or any other party in interest may object to a creditor's claim.²² The bill adds procedural amendments to s. 727.113(1), F.S., to specify which parties are entitled to service of any such objection and the service address of the claimant for objections to claims. This provision is also subject to the negative notice procedure created in the bill.

Assignee's Deed

The bill creates s. 727.117, F.S., adding a form deed to statutory provisions for an assignment for the benefit of creditors. The deed is in substantially the same form as the warranty deed set forth in s. 689.02, F.S., without the warranties of title. Instead, the assignee states that the grantor executes the instrument in its capacity as assignee of the estate of the insolvent debtor. The deed also states that the assignee is not personally liable because of the instrument.

Rejection of Unexpired Leases

The statute currently allows an assignee to reject an unexpired lease of non-residential real property or personal property.²³ However, it provides little guidance regarding the proper procedure for such rejection.²⁴ In the interest of establishing consistent practices, the bill revises s. 727.110, F.S., to codify the procedure for such rejection.

The bill specifies:

- The parties entitled to notice of the rejection;
- The information that must be included in the notice of such rejection; and
- The effective date of the rejection.

The bill also confirms the termination of an estate's rights, obligations, and liability concerning the leased property if a lessor fails to take possession upon rejection. The bill also authorizes an assignee to use the negative notice procedure for the notice of rejection.

Discovery

The Business Law Section of The Florida Bar has indicated that disputes have arisen among practitioners regarding the applicability of the discovery provisions in the Florida Rules of Civil Procedure to cases involving the discharge of an assignee's statutory duties to:

²¹ Section 727.113, F.S.

²² Section 727.113(3), F.S.

²³ See ss. 727.108(5) and 727.109(6), F.S.

²⁴ The Business Law Section of The Florida Bar, *supra* note 1.

- Determine whether to prosecute estate claims and causes of action;²⁵
- Examine the validity and priority of claims against the estate;²⁶ and
- Investigate the value or benefits of an asset of the estate.²⁷

The bill amends s. 727.108(1)(a), F.S., and s. 727.113, F.S., to confirm an assignee's right to conduct discovery as provided in the Florida Rules of Civil Procedure in the discharge of the assignee's duty to determine whether to prosecute such claims or causes of actions; and concerning objections to claims in all cases pending on July 1, 2013, or filed thereafter.

The bill takes effect upon becoming a law.

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:

To the extent that the bill reduces costs associated with assignments for the benefit of creditors, additional funds will be available to pay creditor claims.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

²⁵ Section 727.108(1)(a), F.S.

²⁶ Section 727.108(10), F.S.

²⁷ Section 727.108(11), F.S.

VII. Related Issues:

None.

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 April 9, 2013

The CS amends the deed form to include the parcel identification number of real property transferred; and clarifies that the assignee’s deed form provided in the bill is to be used to transfer real property.

- B. **Amendments:**

None.