

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 95 Charitable Contributions
SPONSOR(S): Regulatory Affairs Committee; Holder
TIED BILLS: **IDEN./SIM. BILLS:** SB 102

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	12 Y, 0 N	Bauer	Cooper
2) Finance & Tax Subcommittee	16 Y, 0 N	Tarich	Langston
3) Regulatory Affairs Committee	16 Y, 0 N, As CS	Bauer	Hamon

SUMMARY ANALYSIS

Chapter 726, F.S. (hereinafter “Florida Uniform Fraudulent Transfer Act” or “FUFTA”), provides remedies for creditors when debtors fraudulently make transfers or incur obligations. Under FUFTA, creditors are granted a statutory remedy commonly referred to as a “clawback” action. These clawback actions allow for a debtor’s fraudulently transferred property to be surrendered to the creditors and/or voided. FUFTA does not contain an exception for contributions received in good faith by charitable or religious organizations.

The federal Bankruptcy Code also gives bankruptcy trustees clawback powers against fraudulent transfers made within 2 years before the filing of a bankruptcy petition. The filing of a bankruptcy petition also stays lawsuits by creditors, including state fraudulent transfer claims. Unlike FUFTA, the Bankruptcy Code contains a specific exception for charitable contributions made to qualified religious or charitable entities or organizations by natural persons, if certain criteria are met. Thus, while charities are protected from bankruptcy trustees and creditors during a bankruptcy proceeding, they may still be subject to a creditor’s FUFTA clawback action if there is no bankruptcy proceeding.

The bill first amends FUFTA by a) creating a statutory defense that protects qualified entities against clawback actions that attempt to recover charitable contributions, if the recipient organization received the contribution in good faith, and b) by defining “charitable contribution” and “qualified religious or charitable entity or organization.” The bill states that a natural person’s charitable contributions are fraudulent transfers if they were received on, or within 2 years before, the commencement of a FUFTA, bankruptcy, or insolvency proceeding, unless a) the transfer was made consistent with the debtor’s practices in making charitable contributions, or b) the transfer was received in good faith and did not exceed 15% of the debtor’s gross annual income for the year in which the transfer was made. These requirements parallel those found in the Bankruptcy Code’s protection for charitable contributions against a bankruptcy trustee’s clawback action.

The bill amends various provisions of the Florida Statutes to conform and correct cross-references to FUFTA’s current definition of “insider.” The bill does not make any substantive changes to the definition of “insider.”

The bill has no fiscal impact on state or local government, and has a private sector impact.

The bill provides for an effective date of July 1, 2013, and applies prospectively to all charitable contributions made on or after July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida Uniform Fraudulent Transfer Act

According to the National Conference of Commissioners on Uniform State Laws, 43 states, the District of Columbia, and the U.S. Virgin Islands have adopted the Uniform Fraudulent Transfer Act (“UFTA”).¹ UFTA “provides a creditor with the means to reach assets that a debtor has transferred to another person to keep them from being used to satisfy a debt.”² Florida adopted the UFTA in 1987³ (codified at Chapter 726, F.S., “FUFTA”) to provide a civil cause of action for creditors in addition to their rights under the federal Bankruptcy Code. FUFTA broadly defines “creditor” as “a person who has a claim.”⁴ Courts have interpreted “creditor” to include lenders, investors - seeking to hold a corporate officer liable,⁵ the U.S. government seeking delinquent taxes,⁶ and court-appointed receivers in Securities and Exchange Commission enforcement actions to recover assets used to defraud investors in Ponzi schemes.⁷

FUFTA provides redress to creditors by allowing them to recover transferred property when a debtor has fraudulently transferred it to third parties, or fraudulently incurred obligations, before or after a creditor’s claim arises.⁸ The debtor’s transfer or obligation may involve actual fraud, whereby a debtor makes a transfer or incurs an obligation with the intent to hinder, delay, or defraud his or her creditors, or it may involve constructive fraud, whereby the debtor makes a transfer or incurs an obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation.⁹ In both situations, FUFTA provides statutory remedies to creditors; most notably through a “clawback” action that allows a prevailing creditor to void a debtor’s fraudulent transfer or obligation to a third party, and surrender the property to the creditor.¹⁰ These remedies are generally subject to a 4-year statute of limitations, unless otherwise specified in s. 726.110, F.S.

FUFTA contains defenses to fraudulent transfers, some of which operate as exceptions and protect against a clawback.¹¹ The primary defense 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” (emphasis added).¹² However, since this defense mandates that “reasonably equivalent value” be exchanged, in practice FUFTA does not protect contributions by charitable organizations since they generally do not give value in exchange for such contribution. Currently, FUFTA leaves charitable organizations vulnerable to clawback actions, in that they may be ordered to turn over funds that they may have already spent. In fact, under a similar Illinois law, the U.S. Court of Appeals for the Seventh Circuit ruled in favor of a creditor in a clawback action, and noted that the fraudulent conveyance statute could not be interpreted to exclude gifts to religious groups and other charitable organizations, even though the organization received the contribution in good faith.¹³

¹ Legislative Fact Sheet, at <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Fraudulent%20Transfer%20Act> (last accessed March 4, 2013).

² Overview of the Uniform Fraudulent Transfer Act, at [http://uniformlaws.org/Act.aspx?title=Fraudulent Transfer Act](http://uniformlaws.org/Act.aspx?title=Fraudulent%20Transfer%20Act) (last accessed March 5, 2013).

³ Chapter 87-79, L.O.F.

⁴ Section 726.102(4), F.S.; Section 726.102(3) broadly defines “claim” as “a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.”

⁵ *Dillon v. Axxsys Int’l, Inc.*, 185 Fed. Appx. 823, 830 (11th Cir. 2006).

⁶ *Harper v. U.S.*, 769 F. Supp. 362, 367 (M.D. Fla. 1991).

⁷ *Wiand v. Waxenberg*, 611 F.Supp.2d 1299, 1309 (M.D. Fla. 2009).

⁸ Section 726.108 F.S.

⁹ Sections 726.105 and 726.106, F.S.

¹⁰ Section 726.108 F.S.

¹¹ Section 726.109, F.S.

¹² *Id.*

¹³ See, *Scholes v. Lehmann*, 56 F.3d 750, 761 (7th Cir. 1995).

Federal Bankruptcy Code

Like FUFTA, the federal Bankruptcy Code authorizes bankruptcy trustees (who are appointed to marshal, manage, and distribute a debtor's assets) to void certain transfers or obligations by debtors if they involve actual or constructive fraud on, or within 2 years before, the date of the debtor filing for bankruptcy ("lookback period").¹⁴ The Bankruptcy Code provides a general defense, similar to the FUFTA defense in s. 726.109, F.S., which states that a transferee may retain a transfer that it takes for value and in good faith.¹⁵

Unlike the FUFTA, however, the Bankruptcy Code insulates charitable contributions¹⁶ made by natural persons to a qualified religious or charitable entity or organization if: a) the amount of the contribution does not exceed 15% of the debtor's gross annual income for the year in which the contribution was made, or b) if the contribution does exceed 15% of the debtor's gross annual income, such contribution would still be protected if the contribution was consistent with the debtor's practices in making charitable contributions.¹⁷ However, the Bankruptcy Code does not exempt charitable contributions made with actual intent to hinder, delay or defraud creditors (i.e., actual fraud), nor does it protect charitable donations received from non-natural persons.¹⁸

Generally, bankruptcy trustees have the power to step into the roles of existing creditors, under authority outside the Bankruptcy Code, such as a state UFTA, to void a debtor's transfers or obligations,¹⁹ however, the filing of a petition for bankruptcy will preempt such an action, as well as all other federal and state claims to void a transfer of a charitable contribution as described above.²⁰

Additionally, once a debtor files a bankruptcy petition, creditors are subject to the "automatic stay" provision of the Bankruptcy Code, which bars litigation and other actions, judicial or otherwise. The automatic stay prevents creditors from enforcing or collecting on claims arising before the bankruptcy petition, subject to some exceptions.²¹

Thus, once a debtor files for bankruptcy, a charitable organization that has received a contribution from the debtor is protected from creditors and is partially protected from a bankruptcy trustee's clawback action. However, if no bankruptcy is filed, the charitable organization could still be subject to a clawback action brought by creditors in a state action, such as FUFTA.

Effect of CS/HB 95

CS/HB 95 amends FUFTA by a) creating a statutory defense that protects qualified entities against clawback actions that attempt to recover charitable contributions, if the recipient organization received the contribution in good faith, and b) by defining "charitable contribution" and "qualified religious or charitable entity or organization."

- a) The bill states that a natural person's charitable contributions are fraudulent transfers if they were received on, or within 2 years before, the commencement of a FUFTA, bankruptcy, or insolvency proceeding, *unless* a) the transfer was consistent with the debtor's practices in making charitable contributions, or b) the transfer was received in good faith and did not exceed 15% of the debtor's gross annual income for the year in which the transfer was made.

¹⁴ 11 U.S.C. § 548(a)(1).

¹⁵ 11 U.S.C. §548(c).

¹⁶ "Charitable contribution" must be made by a natural person in the form of cash or a financial instrument (defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986). 11 U.S.C. § 548(3).

¹⁷ 11 U.S.C. § 548(a)(2).

¹⁸ 11 U.S.C. § 548(a)(1)(A).

¹⁹ 11 U.S.C. § 544(b).

²⁰ 11 U.S.C. § 544(b)(2).

²¹ 11 U.S.C. § 362.

The bill's requirements substantially parallel those found in the Bankruptcy Code's protection for charitable contributions against a bankruptcy trustee's clawback action. Like the Bankruptcy Code, the bill does not protect charitable contributions made with actual fraud from clawback actions.

- b) The bill defines "charitable contribution" as either cash or a "financial instrument" as defined in s. 731(c)(2)(C) of the Internal Revenue Code of 1986, which includes 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 ss. 170(c)(1) or 170(c)(2) of the Internal Revenue Code, meaning 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 exclusively for public purposes," or 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 inure to the benefit of any private shareholder or individual; and which is not disqualified for tax exemption under s. 501(c)(3) of the Internal Revenue Code, by reason of attempting to influence legislation.

The bill's definitions of "charitable contributions" and "qualified religious or charitable entity or organization" are identical to those in the Bankruptcy Code.

The bill amends various provisions of the Florida Statutes to conform and correct cross-references to the definition of "insider" currently found in s. 726.102(7), F.S. The bill does not make any substantive changes to the definition of "insider." The bill also makes minor technical revisions to s. 721.05, F.S.

The bill provides that the act shall take effect on July 1, 2013, and applies to all charitable contributions made on or after that date.

B. SECTION DIRECTORY:

Section 1: Amends s. 726.102, F.S., relating to definitions.

Section 2: Amends s. 726.109, F.S., relating to defense, liability, and protection of transferee.

Section 3: Amends s. 213.758, F.S., relating to transfer of tax liabilities.

Section 4: Amends s. 718.704, F.S., relating to assignment and assumption of developer rights by bulk assignee; bulk buyer.

Section 5: Amends s. 721.05, F.S., relating to definitions.

Section 6: Provides an effective date of July 1, 2013, and provides that the bill applies to all charitable contributions made on or after that date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Under the bill, creditors cannot void a natural person's charitable contributions received on, or within 2 years before, the commencement of a FUFTA, bankruptcy, or insolvency proceeding, if the transfer was received in good faith and was less than 15% of the debtor's gross annual income for the year in which the transfer was made, or was consistent with the debtor's practices in making charitable contributions.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take an action requiring the expenditure of funds, reduce the authority of counties or municipalities to raise revenues in the aggregate, or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 14, 2013, the Regulatory Affairs Committee considered and adopted three amendments and reported the bill favorably as a committee substitute. One amendment clarified that the bill's protection for charitable contributions does not include transfers made with actual fraud, and will thus provide consistency with the Bankruptcy Code. The second amendment replaced the bill's use of the term "transferor" with "debtor," which current law defines as a "person who is liable on a claim." The third

amendment clarifies that the bill applies prospectively to charitable contributions made on or after the July 1, 2013 effective date.

This analysis is drafted to the committee substitute as passed by the Regulatory Affairs Committee.