

**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.)

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Prepared By: The Professional Staff of the Committee on Commerce and Tourism

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BILL: SB 856

INTRODUCER: Senator Detert

SUBJECT: Uniform Fraudulent Transfer Act

DATE: February 28, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Malcolm	Hrdlicka	CM	<b>Pre-meeting</b>
2.			BI	
3.			RC	

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**I. Summary:**

SB 856 amends the Florida Uniform Fraudulent Transfer Act to expand the protection against a creditor’s clawback action for charitable contributions received in good faith by qualified religious or charitable organizations. The bill protects charitable contributions made by a debtor who makes such a contribution without receiving equivalent value in exchange for the contribution while the debtor was insolvent or became insolvent as a result of making the contribution. The bill aligns this exemption with similar provisions in the Federal Bankruptcy Code.

**II. Present Situation:**

**Florida Uniform Fraudulent Transfer Act**

According to the National Conference of Commissioners on Uniform State Laws, the Uniform Fraudulent Transfer Act (UFTA) has been enacted by 43 states, as well as the District of Columbia and the U.S. Virgin Islands.<sup>1</sup> Florida adopted the UFTA in 1987.<sup>2</sup> Chapter 726, F.S., the Florida Uniform Fraudulent Transfer Act (FUFTA), gives a present or future creditor the ability to reach assets that a debtor has transferred to another person or entity in order to shield the assets from being used to satisfy a debt to the creditor.

For present and future creditors, s. 726.105, F.S., provides that a transfer made or an obligation incurred by a debtor is fraudulent if the debtor made the transfer or incurred the obligation:

- (1)(a) With actual intent to hinder, delay, or defraud any creditor; or
- (1)(b) Without receiving reasonably equivalent value in exchange for the transfer or obligation, and either the debtor:

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<sup>1</sup> Uniform Law Commission, Legislative Fact Sheet – Fraudulent Transfer Act, *available at* <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Fraudulent%20Transfer%20Act> (last visited Feb. 25, 2014).

<sup>2</sup> Chapter 87-79, L.O.F. The short title for ch. 726, F.S., is the “Uniform Fraudulent Transfer Act.”

- 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.<sup>3</sup>

For present creditors only, s. 726.106(1), F.S., provides that a transfer made or an obligation incurred by a debtor is fraudulent if the debtor made the transfer or incurred the obligation without receiving reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent or became insolvent as a result of the transfer or obligation.

For the fraudulent transfers described above, the FUFTA provides a statutory remedy for creditors primarily through a “clawback” action in which a creditor may have a debtor’s transfer or obligation voided and surrendered back to the creditor.<sup>4</sup> Clawback actions under the FUFTA are permitted in federal district and bankruptcy courts to allow receivers to bring suits “against Ponzi scheme investors to the extent that the investors have received payments in excess of the amounts invested and those payments are avoidable as fraudulent transfers.”<sup>5</sup> This remedy is subject to a 4 year statute of limitations, unless otherwise specified in s. 726.110, F.S.<sup>6</sup>

The FUFTA also provides protections for an innocent third party transferee. A transfer from a debtor is not voidable when the transferee is “a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee . . . .”<sup>7</sup> In addition to this “good faith and value” exception, in 2013, the Legislature amended the FUFTA to add specific protections for certain transfers received by charitable organizations, which generally do not give value in exchange for contributions and thus would not qualify for the “good faith and value” exception.<sup>8</sup>

The 2013 amendment protects charitable contributions that would otherwise be considered fraudulent transfers under s. 726.105(1)(b), F.S. The protections provided under the 2013 amendment do not apply if the charitable transfer occurred in the 2 years preceding commencement of a clawback action, insolvency proceedings, or a petition for bankruptcy, unless the transfer was consistent with the debtor’s charitable contribution practices or the transfer was received in good faith and the contribution amount did not exceed 15 percent of the debtors gross annual income.<sup>9</sup>

The 2013 amendment did not include protections for charitable contributions that would otherwise be considered fraudulent transfers under s. 726.106(1), F.S. As a result of the 2013 amendment, a charitable organization is protected against a clawback action under FUFTA for transfers under s. 726.105(1)(b), F.S., but is not protected against a clawback action for similar transfers under s. 726.106(1), F.S.

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<sup>3</sup> Section 726.105, F.S.

<sup>4</sup> See s. 726.108, F.S.

<sup>5</sup> *Wiand v. Dancing \$, LLC*, 919 F. Supp. 2d 1296, 1300 (M.D. Fla. 2013).

<sup>6</sup> Section 726.110, F.S.

<sup>7</sup> Section 726.109(1), F.S.

<sup>8</sup> Chapter 2013-189, L.O.F.; s. 726.109(7), F.S.

<sup>9</sup> Section 726.109(7)(b), F.S.

## Federal Bankruptcy Code

Like the FUFTA, the Federal Bankruptcy Code<sup>10</sup> (bankruptcy code) allows certain fraudulent transfers made by a debtor to be voided. However, unlike the FUFTA, which relies on individual creditors to bring actions to void the transfer, the code empowers the bankruptcy trustee to bring the action to void the fraudulent transfers for the benefit of all the debtor's creditors.

Section 548 of the bankruptcy code deals exclusively with fraudulent transfers and allows a bankruptcy trustee to void fraudulent transactions.<sup>11</sup> The elements that must be established to void a fraudulent transfer under this provision are substantially similar to those that are required under the FUFTA. Section 548 also parallels the innocent transferee protections in the FUFTA by providing a "good faith and value" defense that is nearly identical to the defense provided by the FUFTA and that is available to a transferee that takes in good faith for reasonably equivalent value.<sup>12</sup> Additionally, like the 2013 amendment to the FUFTA, the bankruptcy code also provides that a transfer or contribution to a charitable or religious organization is not voidable as a fraudulent transfer, even if it does not meet the "good faith and value" defense.<sup>13</sup>

Unlike the FUFTA, however, the charitable transfer exemption under the bankruptcy code encompasses transfers identical to those identified in s. 726.106(1), F.S., in which the debtor did not receive reasonably equivalent value in exchange for the transfer and the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer.<sup>14</sup> Consequently, the bankruptcy code affords broader protections to charitable organizations against clawback actions than the FUFTA.

### III. Effect of Proposed Changes:

Section 726.106(1), F.S., identifies a fraudulent transfer as one in which the debtor made the transfer without receiving equivalent value in exchange for the transfer and the debtor was insolvent at the time or the debtor became insolvent due to the transfer.

**Section 1** amends s. 726.109, F.S., to expand the exemption for charitable contributions received by a qualified religious or charitable entity in good faith to include otherwise fraudulent transfers under s. 726.106(1), F.S. This addition makes the charitable contribution exemption under the FUFTA the same as that provided under the bankruptcy code.

A charitable contribution may still be subject to a clawback action if it is received within 2 years of the commencement of an action under the FUFTA, a bankruptcy petition, or an insolvency proceeding, unless the transfer was consistent with the debtor's practices in making charitable contributions or the transfer did not exceed 15 percent of the debtor's gross annual income.

**Section 2** provides that the act will take effect upon becoming law.

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<sup>10</sup> 11 U.S.C. s. 101 et. seq.

<sup>11</sup> 11 U.S.C. s. 548(a)(1).

<sup>12</sup> 11 U.S.C. s. 548(c); *see* s. 726.109(1), F.S.

<sup>13</sup> 11 U.S.C. s. 548(a)(2); *see* s. 726.109(7), F.S.

<sup>14</sup> *Id.*

**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 would not be able to void certain fraudulent transfers that they currently are able to void under the FUFTA. Thus, fewer assets may be available to make creditors whole in certain circumstances. However, charities may feel more secure about contributions they receive.

## C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 726.109 of the Florida Statutes.

**IX. Additional Information:**

## A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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