

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1159 Uniform Voidable Transactions Act
SPONSOR(S): Civil Justice & Claims Subcommittee and Moraitis, Jr.
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1566

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	13 Y, 0 N, As CS	Aziz	Bond
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The Uniform Fraudulent Transfer Act (UFTA) provides a creditor with a means to reach assets a debtor has transferred to another person or entity. Florida adopted UFTA in 1987.

In 2014, the Uniform Law Commission amended UFTA for the first time since its creation in 1984. The amendments replaced UFTA with the Uniform Voidable Transactions Act (UVTA), which address issues with UFTA such as providing a choice of law provision, specifying the burden of proof on creditors and debtors in actions under the UVTA, and making clear that fraudulent intent is not required when seeking to set aside a transfer of property.

The bill adopts the Uniform Voidable Transaction Act to replace the UFTA. The bill provides that a creditor making a claim has the burden of proving the elements of their claim by a preponderance of the evidence. The bill removes the way partnerships are considered insolvent and instead subjects partnerships to the same solvency standard as other debtors. The bill adds a choice of law provision by providing a claim for relief is governed by the claims law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred. The bill also outlines how the UVTA applies to a business organization structured as a series organization, a form of business organization recognized in some other states.

The statute of limitations for filing an action to set aside a transfer or obligation is the later of 4 years from the transfer or obligation, or one year from when the transfer or obligation was or could have been discovered. The bill changes the one year provision to provide that it starts when the wrongful nature of the transfer or obligation was or could reasonably have been discovered.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Uniform Fraudulent Transfer Act

According to the National Conference of Commissioners on Uniform State Laws, the Uniform Fraudulent Transfer Act (UFTA) was enacted by 45 states, as well as the District of Columbia and the U.S. Virgin Islands.¹ Florida adopted the UFTA in 1987.² 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 if the transfer was made 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:

- With actual intent to hinder, delay, or defraud any creditor; or
- Without receiving reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
 - Engaged, or 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 that he or she would incur debts beyond his or her ability to pay as they became due.³

For present creditors only, 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 because of the transfer or obligation.⁴

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.⁵ This remedy is subject to a 4-year statute of limitations.⁶

Uniform Voidable Transactions Act

In 2014, the Uniform Law Commission amended the Uniform Fraudulent Transfer Act for the first time since its creation in 1984.⁷ The Commission changed the name of UFTA to the Uniform Voidable Transaction Act (UVTA) to clarify its purpose and application. According to the Commission, fraud has never been a necessary element of a claim under UFTA and UFTA has always applied to the incurrence of obligations as well as transfers to property.⁸ Additionally, UVTA makes the following changes:

- Adds a choice of law rule for claims governed by UVTA;
- Creates uniform rules allocating the burden of proof;
- Deletes the special definition of insolvency for partnerships; and

¹ Uniform Law Commission, Legislative Fact Sheet – Fraudulent Transfer Act, *available at* [http://uniformlaws.org/LegislativeFactSheet.aspx?title=Fraudulent Transfer Act \(1984\)](http://uniformlaws.org/LegislativeFactSheet.aspx?title=Fraudulent%20Transfer%20Act%20(1984)) (1984) (last visited March 20, 2017).

² Ch. 1987-79, Laws of Fla. The short title for ch. 726, F.S., is the “Uniform Fraudulent Transfer Act.”

³ s. 726.105, F.S.

⁴ s. 726.106(1), F.S.

⁵ See s. 726.108, F.S.

⁶ s. 726.110, F.S.

⁷ Uniform Law Commission, “The Uniform Voidable Transactions Act (2014 Amendments)”, <http://www.uniformlaws.org/shared/docs/fraudulent%20transfer/UVTA%20-%20Summary.pdf> (last visited March 20, 2017).

⁸ *Id.*

- Revises the defenses available to a transferee or obligee.⁹

UVTA has been enacted in 10 states¹⁰ and legislation has been introduced in 9 states¹¹ in 2017.¹²

Effect of the Bill

The bill adopts UVTA in Florida and replaces FUFTA.

Title

The bill renames ch. 726, F.S., from "Fraudulent Transfers" to "Voidable Transactions." The bill amends s. 726.101, F.S., to be cited as the "Uniform Voidable Transactions Act." The bill removes the term "fraudulent" from ch. 726, F.S., and replaces it with "voidable."

Definitions

The bill amends s. 726.102, F.S, regarding definitions for ch. 726, F.S. The bill adds the following definitions:

- "claims law" means a fraudulent conveyance, fraudulent transfer, or voidable transfer laws or other laws of similar effect.
- "electronic" means technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- "organization" means a person other than an individual.
- "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- "sign" means to execute or adopt a tangible symbol, or attach to or logically associate with the record an electronic symbol, sound, or process, with present intent to authenticate or adopt a record .

The bill amends the definition of person to include limited partnership, business corporation, nonprofit business corporation, public corporation, limited liability company, limited cooperative association, unincorporated nonprofit association, common law business trust, statutory trust, and association joint venture.

Insolvency

Current law provides that a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets.¹³ A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.¹⁴ FUFTA treats the calculation of insolvency for partnerships different than the way a person is calculated as being insolvent. A partnership is considered insolvent if the sum of the partnership's debts is greater than the aggregate, at fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.¹⁵

The bill amends s. 726.103, F.S, to remove the special definition of insolvency for partnerships and treats a partnership like a person. Thus, under the bill, a partnership is insolvent if, at a fair valuation, the sum of the partnership's debts is greater than the sum of the partnerships' assets. The bill limits the presumption of insolvency to provide where a debt is not being paid because of a dispute, that

⁹ *Id.*

¹⁰ California, Georgia, Idaho, Iowa, Kentucky, Michigan, Minnesota, New Mexico, North Carolina, and North Dakota.

¹¹ Alabama, Arkansas, Indiana, New Jersey, New York, South Carolina, Utah, Vermont, and Washington.

¹² Uniform Law Commission, Legislative Fact Sheet-Voidable Transactions Act Amendments (2014)-Formerly Fraudulent Transfer Act, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Voidable Transactions Act Amendments \(2014\) - Formerly Fraudulent Transfer Act](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Voidable%20Transactions%20Act%20Amendments%20(2014)%20-%20Formerly%20Fraudulent%20Transfer%20Act)(last visited March 20, 2017).

¹³ s. 726.103(1), F.S.

¹⁴ s. 726.103(2), F.S.

¹⁵ s. 726.103(3), F.S.

non-payment does not trigger a finding of insolvency. Additionally, the bill provides that the presumption of insolvency is placed on the debtor to prove he or she is not insolvent.

Burden of Proof

Section 726.105(1), F.S., provides that a creditor who is a victim of fraud may have some recourse against the recipient of a transfer from the debtor if the transfer was made with actual intent to hinder, delay, or defraud any creditor of the debtor, or if the transfer was made without receiving reasonably equivalent value in exchange for the transfer. In determining actual intent of the debtor, a court may consider a number of factors, including whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred.¹⁶ Section 726.106(1), F.S., provides a transfer by a debtor is per se fraudulent when the debtor made the transfer without receiving a reasonably equivalent value in exchange and the debtor was insolvent at the time or the transfer made the debtor insolvent.¹⁷ Also, s. 726.106(2), F.S., provides a transfer made by a debtor is fraudulent as to a creditor if the transfer was made to an insider for an antecedent debt,¹⁸ the debtor was insolvent at that time, and the insider had reasonable cause to believe that debtor was insolvent.

The bill amends ss. 726.105-.106, F.S., to provide that a creditor making a claim for relief under ss. 726.105 or 726.106, F.S., has the burden of proving the voidable transaction by a preponderance of the evidence.¹⁹ Additionally, the bill provides that when a court considers the intent of the debtor under s. 726.105(1), F.S., the court may consider the value of the consideration received and the value by way of asset substitution to ensure conversion of assets alone is not seen as an attempt to defraud creditors.

Defenses

A creditor may obtain a judgment on a claim against a debtor and may, if the court so orders, levy execution on the asset transferred or its proceeds if such transfer is voidable pursuant to ch. 726, F.S.²⁰ However, s. 726.109, F.S., provides a number of defenses or protections to a transferee. For example, a transfer or obligation is not voidable against a person who took in good faith and for a reasonably equivalent value.²¹ Additionally, a good faith transferee is entitled to a lien on or a right to retain any interest in the asset transferred.²²

The bill provides recovery pursuant to a judgment of the asset transferred or its proceeds is available only against the first transferee of the asset and an immediate transferee and exempts good faith transferees and their immediate good faith transferees, from having judgments enforced against them.

Another defense provided in ch. 726, F.S., is that a transfer is not voidable if the transfer results from a termination of a lease upon default by the debtor when the termination is pursuant to the lease terms or by enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

The bill outlines who carries the burden of proving the defenses or right to attach judgments against transferees. Anyone seeking to invoke the defenses in s. 726.109, F.S., has the burden of proving the applicability of that defense. A creditor has the burden of proving applicability of judgments against a first transferee or an immediate transferee. A good faith transferee has the burden of proving they are a good faith transferee or a mediate good faith transferee. The standard of proof is a preponderance of the evidence.

¹⁶ s. 726.105(2)(h), F.S.

¹⁷ s. 726.106(1), F.S.; *Gass v. Comreal Miami*, 653 So. 2d 1069, 1071 (Fla. 3d DCA 1995).

¹⁸ Antecedent debt means "a debtor's prepetition obligation that existed before a debtor's transfer of an interest in property." BLACK'S LAW DICTIONARY (8th ed. 2004).

¹⁹ Preponderance of the evidence means "the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force." BLACK'S LAW DICTIONARY (8th ed 2004).

²⁰ s. 726.108, F.S.

²¹ s. 726.109(1), F.S.

²² s. 726.109(4), F.S.

Additionally, the bill provides that when an entity²³ is formed or converted into another entity and it is determined that a holder of equity interest in the entity violated ch. 726, F.S., the formation or conversion of the entity is not presumed to be voidable.

Statute of Limitations

Section 726.110(1), F.S., provides a cause of action relating to a fraudulent transfer or obligation is barred unless brought within 4 years after the transfer was made or obligation was incurred or, if later, within 1 year after the transfer or obligation was discovered by claimant. The bill adds the element of discovery of the wrongful nature of the transfer or obligation to the 1 year statute of limitations that applies once the transfer is discovered.

Choice of Law

The bill creates s. 726.113, F.S., to provide that a claim for relief under ch. 726, F.S., is governed by the claims law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred. For purposes of determining a debtor's physical location, the bill provides:

- An individual debtor's physical location is at his or her principal residence;
- A debtor's physical location, if the debtor is an organization with only one place of business, is at the debtor's place of business; and
- A debtor's physical location, if the debtor is an organization and has more than one place of business, is at its chief executive office.

The bill provides this choice of law provision does not govern any claims between the parties arising outside of ch. 726, F.S. The bill also provides that if a foreign jurisdiction applies, it will not affect the debtor's entitlement to any protections under the debtor's homestead under the Florida Constitution.

Application to Series Organizations

A series organization is a business organization concept in which a limited partnership or a limited liability company may designate their separate assets in specific series.²⁴ Once designated, the creditors to an individual series may not look to the assets of another series, even if both series are owned by the same limited liability company or partnership.²⁵ In the context of limited partnerships, the series is intended to emulate the existence of multiple limited partnerships without creating separate entities.²⁶ Twelve states have enacted legislation regarding series organizations.²⁷

The bill creates s. 726.114, to outline how ch. 726, F.S., applies to a series organization. A series organization and each protected series organization is a separate person for purposes of ch. 726, F.S., even if for other purposes a protected series is not a person separate from the organization. The bill defines a series organization as an organization that, pursuant to the law under which it is organized, has the following characteristics:

- The organic record of the organization provides for creation by the organization of one or more protected series, however denominated, with respect to specified property of the organization, and for records to be maintained for each protected series that identify the property of, or associated with, the protected series.

²³ For purposes of this presumption, an entity is defined as an entity in s. 605.0102(23), F.S., which includes a business corporation, a nonprofit corporation, a general partnership, a limited partnership, a limited liability company, a real estate investment trust, or any other domestic or foreign entity that is organized under an organic law.

²⁴ Adam Hiller, *But Series-ly, Folks--The Series Laws, and How They (May) Intersect with Bankruptcy Law*, 20 AM. BANKR. INST. L. REV. 353, 354 (2012).

²⁵ For example, if an investor group wished to purchase a chain of thirty-five fast food restaurants, the investors can create a single limited liability company, isolate each restaurant into its own series, and divert creditors of one restaurant from reaching assets of other owned restaurants. *Id.* at 355.

²⁶ *Id.* at 354.

²⁷ Alabama, Delaware, Illinois, Iowa, Kansas, Missouri, Montana, Nevada, Oklahoma, Tennessee, Texas and Utah. Michelle Masoner, *In This Issue: Lien on Me, How Are Security Interests in Series LLC Assets Perfected, and Is It Even Possible?*, 35-9 ABIJ 22, fn. 2 (Sept. 2016).

- Debt incurred or existing with respect to the activities of, or property of or associated with, a particular protected series is enforceable against the property of or associated with the protected series only and not against the property of or associated with the organization or other protected series of the organization.
- Debt incurred or existing with respect to the activities or property of the organization is enforceable against the property of the organization only, and not against the property of or associated with a protected series of the organization.

The bill defines protected series as an arrangement, however denominated, created by a series organization that meets the requirements of a series organization. By enacting this application on series organizations even when Florida law does not contemplate a series organization, a Florida court may find a voidable transaction of a series organization organized in a state which has adopted series organization laws.

Electronic Signatures in Global and National Commerce Act

The Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign Act) provides electronic signatures, contracts, and records with respect to a transaction are valid as a written document.²⁸ The E-Sign Act does not require contracts, records, or signatures in electronic form.²⁹ It also provides that if a statute requires a transaction to a consumer be made in writing, then the use of electronic record satisfies the requirement if the consumer consents or is informed of the right to have it in non-electronic form.³⁰ Additionally, the E-Sign Act does not apply to court orders, notice of cancellation of utility services, foreclosure or eviction, cancellation of health insurance, or a recall of a product.³¹

The bill provides ch. 726, F.S., modifies, limits, and supersedes the E-Sign Act but does not modify limit or supersede the portion of the Act regarding consumer disclosures, or authorize electronic delivery of any of the prohibited notices described in the E-Sign Act.

B. SECTION DIRECTORY:

Section 1 renames ch. 726, F.S., as "Voidable Transactions."

Section 2 amends s. 726.101, F.S., relating to the Uniform Fraudulent Transfer Act.

Section 3 amends s. 726.102, F.S., relating to definitions.

Section 4 amends s. 726.103, F.S., relating to insolvency.

Section 5 amends s. 726.105, F.S., relating to transfers fraudulent as to present and future creditors.

Section 6 amends s. 726.106, F.S., relating to transfers or obligations fraudulent as to present creditors.

Section 7 amends s. 726.107, F.S., relating to when transfer made or obligation incurred.

Section 8 amends s. 726.108, F.S., relating to remedies of creditors.

Section 9 amends s. 726.109, F.S., relating to defenses, liability, and protection of transferee.

Section 10 amends s. 726.110, F.S., relating to extinguishment of cause of action.

²⁸ 15 U.S.C. s. 7001(a).

²⁹ 15 U.S.C. s. 7001(b).

³⁰ 15 U.S.C. s. 7001(c).

³¹ 15 U.S.C. s. 7003(b).

Section 11 amends s. 726.111, F.S., relating to supplementary provisions.

Section 12 amends s. 726.112, F.S., relating to uniformity of application and construction.

Section 13 creates s. 726.113, F.S., relating to governing law.

Section 14 creates s. 726.114, F.S., relating to application to series organization.

Section 15 creates s. 726.115, F.S., relating to relation to Electronic Signatures in Global and National Commerce Act.

Section 16 provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government revenues.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce, the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 28, 2017, the Civil Justice & Claims Subcommittee adopted three amendments and reported the bill favorably as a committee substitute. The amendments provide:

- When considering the intent of the debtor, the court may consider the value of the consideration received and the value by way of asset substitution to ensure conversion of assets alone is not an attempt to defraud creditors;
- The formation of an entire entity is not presumptively voidable where a holder of an equity interest violated ch. 726, F.S., in the conversion or formation of the entity; and
- Corrected a cross reference to a federal statute.

This analysis is drafted to the committee substitute as passed by the Civil Justice & Claims Subcommittee.