

**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 Banking and Insurance

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BILL: SB 1316

INTRODUCER: Senator Simmons

SUBJECT: Uniform Voidable Transactions Act

DATE: January 29, 2018

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	<b>Pre-meeting</b>
2.			JU	
3.			RC	

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**I. Summary:**

SB 1316 amends Florida’s version of the Uniform Fraudulent Transfer Act (UFTA). The UFTA codified as ch. 726, F.S., 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. In 2014, the Uniform Law Commission adopted amendments and renamed the UFTA as the Uniform Voidable Transactions Act (UVTA). This bill adopts the UVTA in Florida. 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;
- Changes the way partnerships are considered insolvent and subjects partnerships to the same solvency standard as other debtors; and
- 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 1 year from when the transfer or obligation was or could have been discovered. The bill changes the 1 year provision to provide that it begins to run when the wrongful nature of the transfer or obligation was or could reasonably have been discovered.

## II. Present Situation:

According to the National Conference of Commissioners on Uniform State Laws, 45 states and the U.S. Virgin Islands have adopted the Uniform Fraudulent Transfer Act (“UFTA”).<sup>1</sup> 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. Florida enacted the UFTA in 1987<sup>2</sup> and codified it as ch. 726, F.S.

Chapter 726, F.S., provides redress to creditors by allowing them to recover assets from debtors, when the debtors have fraudulently transferred assets to third parties or incurred obligations before or after a creditor’s claim arises. For example, s. 726.105(1), F.S., provides that a transfer made is fraudulent as to a creditor if the debtor made the transfer:

- 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.

Section 726.105(2), F.S., provides factors that a court uses to determine whether actual intent exists.

Section 726.106, F.S., provides that a transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Similar statutes have led to confusion in some courts in other jurisdictions that have adopted the UFTA. Courts have held that creditors must show intent to hinder, delay, or defraud by “clear and convincing evidence” or have shifted the burden to transferees to show a debtor is not insolvent.<sup>3</sup>

In either situation, the UFTA provides statutory remedies to creditors, most notably through a “clawback” action, whereby a prevailing creditor may have a debtor’s fraudulent transfer or obligation made to a third party voided and surrendered back to the creditor.<sup>4</sup> These remedies are generally subject to a 4-year statute of limitations, unless otherwise specified in s. 726.110, F.S. The UFTA contains some exceptions to the clawback remedy, primarily for any “person who

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<sup>1</sup> <http://www.uniformlaws.org/shared/docs/fraudulent%20transfer/UVTA%20-%20Summary.pdf> (last visited January 13, 2018).

<sup>2</sup> Chapter 87-79, L.O.F.

<sup>3</sup> [https://www.americanbar.org/publications/probate\\_property\\_magazine\\_2012/2015/july\\_august\\_2015/2015\\_aba\\_rpte\\_pp\\_v29\\_3\\_article\\_foster\\_boughman\\_uniform\\_voidable\\_transactions\\_act.html](https://www.americanbar.org/publications/probate_property_magazine_2012/2015/july_august_2015/2015_aba_rpte_pp_v29_3_article_foster_boughman_uniform_voidable_transactions_act.html) (last visited January 13, 2018).

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

took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.”<sup>5</sup>

In 2014, National Conference of Commissioners on Uniform State Laws amended the UFTA. The amendments included renaming the act as the “Uniform Voidable Transactions Act” (UVTA). A commenter argues that “the UVTA is not a new act; it is the UFTA, renamed and lightly amended.”<sup>6</sup> The UVTA has been adopted in 16 states and is under consideration in 2018 in five other states, including Florida.<sup>7</sup>

### III. Effect of Proposed Changes:

The bill makes changes to ch. 726, F.S., to adopt the UVTA in Florida. The UVTA includes numerous “Official Comments” from the drafters for use in interpreting the UVTA. Although this bill does not adopt the comments as Florida law, Florida courts have used comments from uniform acts as interpretative aids.<sup>8</sup>

#### Changes in Title and Style (Sections 1, 2, 5, and 6)

**Section 2** amends s. 726.101, F.S., to change the name of the “Uniform Fraudulent Transfer Act” to the “Uniform Voidable Transactions Act.” **Section 1** changes the chapter title from “Fraudulent Transfers” to “Voidable Transactions.” **Sections 5 and 6** amend ss. 726.105 and 726.106, F.S., to replace the word “fraudulent” with “voidable.”

#### Definitions (Sections 3 and 7)

**Section 3** 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

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<sup>5</sup> s. 726.109(1), F.S.

<sup>6</sup> Kenneth C. Kettering, *The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act*, *The Business Lawyer*, Volume 70, Summer 2015 at p. 779.

<sup>7</sup>[http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Voidable%20Transactions%20Act%20Amendments%20\(2014\)%20-%20Formerly%20Fraudulent%20Transfer%20Act](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Voidable%20Transactions%20Act%20Amendments%20(2014)%20-%20Formerly%20Fraudulent%20Transfer%20Act) (last visited January 24, 2018).

<sup>8</sup> See, e.g., *Winner v. Cataldo*, 559 So.2d 696 (Fla.3d DCA 1990).

association, unincorporated nonprofit association, common law business trust, statutory trust, and association joint venture.

**Section 7** amends s. 726.107, F.S., to provide that an obligation is incurred evidenced by a “record” so that obligations can be evidenced by electronic or other records instead of just written documents.

#### **Insolvency (Section 4)**

**Section 4** amends s. 726.103, F.S., which provides the statutory criteria for insolvency under the Act. 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 at fair valuation.<sup>9</sup> A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.<sup>10</sup> The bill provides that the party against whom the presumption of insolvency is directed has the burden to prove that nonexistence of insolvency is more probable than the existence of insolvency.

Under current law, s. 726.103(3), F.S., provides a different calculation of insolvency for partnerships than for other persons. 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. 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.

#### **Burden and Standard of Proof (Sections 5 and 6)**

**Sections 5 and 6** amend ss. 726.105 and 726.106, F.S., to provide that a creditor has the burden of proof to prove the elements necessary to show a transfer is voidable. The bill sets the standard as preponderance of the evidence. This will make clear to Florida practitioners that the burden of proof is on the creditor and the standard of proof is preponderance of the evidence.

#### **Defenses (Section 9)**

**Section 9** amends s. 726.109, F.S. Current law provides a defense to actions alleging actual intent to defraud the creditor if the person took in good faith and for a reasonably equivalent value. The bill requires that the reasonably equivalent value must be given to the debtor.

The bill provides that recovery pursuant to a judgment for the asset transferred or the amount necessary to satisfy the creditor's claim is available only against the first transferee of the asset and an immediate transferee. It exempts transferees who took in good faith from having the judgment 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

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<sup>9</sup> s. 726.103(1), F.S.

<sup>10</sup> s. 726.103(2), F.S.

lease terms or by enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. The bill revises the later defense related to the UCC by specifying that the defense does not include the acceptance of collateral in full or partial satisfaction of the obligation it secures.

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.

### **Statute of Limitations (Section 10)**

Under current law, a claim that a transaction is voidable is extinguished unless brought within 4 years or, if later, within 1 year after the transaction was or could have reasonably been discovered by the claimant. This bill amends the 1 year time period in s. 726.110, F.S., to within 1 year after the transaction and its wrongful nature was or could have reasonably been discovered by the claimant.

### **Choice of Law (Section 13)**

The bill creates s. 726.113, F.S. It provides that a claim for relief is governed by the law of the jurisdiction where the debtor is located when the transfer is made or the obligation is incurred. The bill provides criteria for determining a debtor's physical location for purposes of ch. 726, F.S.:

- A debtor that is an individual is located at his or her principal residence.
- A debtor that is an organization and has only one place of business is located at its place of business.
- A debtor that is an organization and has more than one place of business is located at its chief executive office.

This provision only governs claims under ch. 726, F.S. The bill does not affect a debtor's entitlement to homestead protections under the Florida Constitution.

### **Series Organizations (Section 14)**

A series mechanism "creates an elastic single vehicle for operating multiple businesses or owning multiple properties in a limited liability environment."<sup>11</sup> It allows, for example, a limited liability company to designate specific assets in a specific series. Once designated, creditors of one series cannot look to the assets of another series even if the series are owned by the same limited liability company. This emulates creating multiple limited liability companies without actually doing so.<sup>12</sup> The bill creates s. 726.114, F.S., to govern how ch. 726, F.S., applies to

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<sup>11</sup> 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).

<sup>12</sup> *Id.* at 354-355.

series organizations. It defines “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.
- 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 provides that a series organization and each protected series of the organization is a separate person for purposes of ch. 726, F.S.

One commenter argues that a state should adopt the series organization provision of the UVTA because the choice of law provision of the UVTA could result in a transfer made by a series organization of another state being governed by Florida’s voidable transfer law.<sup>13</sup>

### **Electronic Signatures (Section 15)**

The Electronic Signatures in the Global and National Commerce Act of 2000 (E-Sign Act) provides that electronic signatures, contracts, and records with respect to a transaction are valid as a written document. The E-Sign Act does not require contracts, records, or signatures in electronic form. 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. 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.

**Section 15** creates s. 726.115, F.S., to provide that 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.

### **Technical Changes (Sections 8, 11, and 12)**

**Sections 8, 11, and 12** make technical changes.

### **Effective Date (Section 16)**

**Section 16** provides an effective date of July 1, 2018.

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<sup>13</sup> Kenneth C. Kettering, *The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act*, *The Business Lawyer*, Volume 70, Summer 2015 at p. 831-832.

**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:

The bill does not appear to have a significant fiscal impact on the private sector.

## C. Government Sector Impact:

The bill does not appear to have a significant fiscal impact on government.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 726.101, 726.102, 726.103, 726.105, 726.106, 726.107, 726.108, 726.109, 726.110, 726.111, and 726.112.

This bill creates the following sections of the Florida Statutes: 726.113, 726.114, and 726.115.

**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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