

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 Commerce and Tourism

BILL: SB 336

INTRODUCER: Senator Berman

SUBJECT: Uniform Commercial Code

DATE: November 1, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

The model Uniform Commercial Code (UCC) was created to simplify the law that governs commercial transactions—especially contracts—and to substantially harmonize applicable law among various jurisdictions.¹ Article 9 of the UCC specifically governs transfers of property (security interests) to secure loans, but also applies to outright sales of certain personal property.

Florida's UCC substantially reflects the model UCC. The Legislature has periodically amended Florida's UCC in accordance with updates made to the model UCC.

SB 336 amends sections 679.4061 and 679.4081, F.S., to reflect updates recently made to Article 9 of the model UCC. These amendments simplify the interaction of a general partnership's, a limited partnership's, or a limited liability company's ownership interest with that of a creditor who seeks to enforce its secured interest in the entity.

The Florida Business Law Section recommends these changes to clarify applicable law and reduce the potential for litigation over these issues.²

II. Present Situation:

UCC and Article 9

Florida's UCC, codified in chs. 671-680, F.S., is based on the model UCC that was drafted, and is periodically updated, by a joint committee of the American Law Institute and the Uniform

¹ 47 Fla. Jur 2d Secured Transactions s. 1 (Sept. 2021), *Uniform Commercial Code, generally; Article 9* (2021). *See also*, s. 671.102, F.S.

² Florida Business Law Section, *Proposed Amendments to Fla. Stat. §§679.4061 and 679.4081 Executive Summary*, p. 2, available at <http://www.flabizlaw.org/files/Summary%20and%20Materials%20-%20UCC%209-406%20and%209-408%20Amendments%20%28v2%29.pdf> (last visited Nov. 1, 2021).

Law Commission.³ The UCC governs specific contracts and commercial transactions that are based on the effect of a contract.

Article 9 of the UCC specifically governs transactions that create a security interest.⁴ For example, a transaction that creates a debt in exchange for an interest in a debtor's personal property is subject to Article 9. If the debtor in such a transaction defaults, the creditor may repossess and sell the property (collateral) to satisfy the debt. The creditor's interest, if recorded (perfected) in accordance with the protocols required by Article 9, is called a "security interest." Article 9 is codified in Florida law mainly in ch. 679, F.S., "Uniform Commercial Code—Secured Transactions."

Article 9: Anti-Assignment Override Provisions

Sections 679.4061 and 679.4081, F.S., mirror the former anti-assignment override provisions of Article 9,⁵ which voided legal or contractual provisions that restricted the transfer of intangible interests, including the grant or enforcement of security interests. The anti-assignment override provisions were drafted to ensure the transferability of property interests and other security interests subject to Article 9.

Section 679.4061, F.S., applies to restrictions created by agreement that require an account debtor's⁶ consent to transfer a security interest in a payment intangible (but not the outright sale of a payment intangible), an account, a chattel paper, and a promissory note. Section 679.1021(1)(iii), F.S., defines a payment intangible as "a general intangible under which the account debtor's principal obligation is a monetary obligation." For purposes of this legislation—a payment intangible is the economic interest portion of a member or partner's ownership interest in a general partnership, a limited partnership, or a limited liability company (LLC). Stated simply—it is the monetary interest in the business entity.⁷ An important distinction in this section is that the restriction must be found in an agreement with an entity, such as the LLC or general partnership (the account debtor)—not an individual person, such as the co-owner.

Section 679.4081, F.S., prohibits restrictions on the transfer of general intangibles. It further invalidates laws or rules that restrict such transfers. Section 679.1021(1)(pp), F.S., defines a general intangible as "any personal property, including...payment intangibles." Therefore, s. 679.4081, F.S., prohibits specific restrictions on the following transactions:

- The outright sale of a payment intangible;

³ The American Law Institute, *Uniform Commercial Code UCC*, <https://www.ali.org/publications/show/uniform-commercial-code/> (last visited Nov. 1, 2021). Forty-nine states have adopted language based on the model UCC; Louisiana has adopted most of the model UCC, but deviates to maintain certain provisions of its civil code.

⁴ 47 Fla. Jur 2d Secured Transactions s. 21 *Transactions or Interests Subject to Article 9, Generally* (2021).

⁵ Sections 9-406 and 9-408 of the U.C.C.

⁶ Section 679.1021(1)(c), F.S., defines an "account debtor" as a person who is obligated on an account, chattel paper, or general intangible. For purposes of this analysis, an account debtor is usually the business entity itself, rather than a member of the LLC, or a partner in a general partnership.

⁷ Carl Bjerre, Daniel Kleinberger, Edwin Smith, and Steven Weise, *LLC and Partnership Transfer Restrictions Excluded From UCC Article 9 Overrides* (Feb. 7, 2019), <https://businesslawtoday.org/2019/02/llc-partnership-transfer-restrictions-excluded-ucc-article-9-overrides/> (last visited Nov. 1, 2021).

- The outright sale of ordinary security interests in general intangibles that are not payment intangibles (i.e., most complete ownership interests, as well as an interest in the member’s governance interest alone); and
- The outright sale of economic rights.

Again, however, s. 679.4081, F.S., applies only in transactions where the restriction comes from the account debtor—or business entity—not a co-owner or fellow partner.

In 2018, the National Conference of Commissioners on Uniform State Laws and the American Law Institute revised Article 9 to provide that the anti-assignment override provisions “do not apply to a security interest in an ownership interest in a general partnership, limited partnership, or limited liability company.” These amendments clarified potential conflicts between Article 9 and the pick your partner principle within partnership and LLC and partnership law.⁸ As of 2019, 12 states, including Delaware, Texas, North Carolina, and Virginia had at least partially adopted language similar in effect to the ALI’s 2018 Article 9 revisions.⁹

Business Organizations and the Pick Your Partner Principle

The pick your partner principle allows a co-owner of a privately held business to determine who else may serve as a co-owner, usually by requiring express permission or a related action from a co-owner or the business entity to transfer his or her ownership interest to another party.¹⁰ A partner or member’s ownership interest in the business organization consists of governance rights and economic rights.¹¹ Most LLC or partnership interests are classified as a general intangible under ch. 679, F.S. However, the economic interest portion of a member’s ownership interest is classified as a payment intangible.¹²

In conflict with ss. 679.4061 and 679.4081, F.S., Florida LLC law states that a member cannot transfer their full ownership interest in the LLC, but may transfer their economic interest. Additionally, s. 605.0502 F.S., permits co-owners of an LLC or partnership to contractually add additional restrictions to the transfer of an ownership interest, including a restriction on the transfer of any of the ownership interest. These limitations reduce the economic value of a member’s interest and help to ensure that the LLC or partnership continues to exist in its original form—a closely held business operated with a known individual or group.¹³

⁸ Florida Business Law Section, *Proposed Amendments to Fla. Stat. §§679.4061 and 679.4081 Executive Summary*, p. 2, available at <http://www.flabizlaw.org/files/Summary%20and%20Materials%20-%20UCC%209-406%20and%209-408%20Amendments%20%28v2%29.pdf> (last visited Nov. 1, 2021).

⁹ Florida Business Law Section and the Uniform Law Commission, *State Overrides of UCC Sections 9-406 and 9-408* (Dec. 11, 2019), available at <http://www.flabizlaw.org/files/Summary%20and%20Materials%20-%20UCC%209-406%20and%209-408%20Amendments%20%28v2%29.pdf> (last visited Nov. 1, 2021).

¹⁰ Bjerre, et al., *supra* note 7.

¹¹ Bjerre, et al., *supra* note 7, at 2.

¹² Florida Business Law Section, *supra* note 8, at 1.

¹³ See Hank Jackson, *Anatomy of a Business Divorce: Florida LLCs*, Fla. Bar Journal, Vol. 95, No. 3, p. 8 (May/June 2021), available at <https://www.floridabar.org/the-florida-bar-journal/anatomy-of-a-business-divorce-florida-llcs/#u6a6b> (last visited Nov. 1, 2021).

The Florida Business Law Section illustrates the conflict that the pick your partner principle attempts to resolve as follows:

Two individuals go into business together and form an LLC. Each owner is a 50/50 member in the LLC. Their operating agreement (like most operating agreements) restricts the ability of one member to convey or encumber their membership interest without the consent of the other member, in keeping with the “pick your partner” principle engrained in LLC and partnership law. If one partner unilaterally encumbered their 50% membership interest to secure a personal loan from a bank (in violation of the operating agreement), then arguably, Section 9-406 and 9-408 would “override” the restriction in the operation agreement. If the member defaulted on the loan, the lender could foreclose on its security interest in the LLC membership interest and take ownership of the membership interest. The other member would now be saddled with a bank as its new business partner, a result not contemplated or permitted by the members’ contract (the operating agreement).¹⁴

Some firms attempt to transact their way out of the anti-assignment override provision by classifying their ownership interests in the business entity as an investment security, which is subject to Article 8 of the model UCC instead of Article 9. However, this requires additional legal structuring at the outset, and does not shield the interest from litigation over its classification.¹⁵

III. Effect of Proposed Changes:

Sections 1 and 2 of the bill exclude payment intangible and general intangible interests in a general partnership, a limited partnership, or an LLC from the “anti-assignment override” provisions found in ss. 679.4061 and 679.4081, F.S., respectively. Therefore, the bill gives priority to a statute or agreement that restricts specific transfers of a general intangible (ownership interest) and a security interest in a payment intangible (the monetary interest portion of an ownership interest) within the context of a general partnership, limited partnership, or LLC.

SB 336 will conform Florida’s version of the UCC to reflect updates made to Article 9 of the model UCC by the National Conference of Commissioners on Uniform State Laws and the American Law Institute to void the “anti-assignment override” provisions in the context of a general partnership, a limited partnership, or a limited liability company.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹⁴ Florida Business Law Section, *Proposed Amendments to Fla. Stat. §§679.4061 and 679.4081 Executive Summary*, p. 1, available at <http://www.flabizlaw.org/files/Summary%20and%20Materials%20-%20UCC%209-406%20and%209-408%20Amendments%20%28v2%29.pdf> (last visited Nov. 1, 2021).

¹⁵ Bjerre, et al., *supra* note 7, at 6.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

This clarification may reduce transaction costs incurred when establishing specific business entities by removing the need to “opt-in” to Article 8 by defining the underlying ownership interests as a security, which is not subject to ch. 679, F.S. Additionally, this clarification may reduce litigation costs related to disputes of the character of an ownership interest in a general partnership, limited partnership, or limited liability company.¹⁶

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

¹⁶ Florida Business Law Section, *Proposed Amendments to Fla. Stat. §§679.4061 and 679.4081 Executive Summary*, p. 2, available at <http://www.flabizlaw.org/files/Summary%20and%20Materials%20-%20UCC%209-406%20and%209-408%20Amendments%20%28v2%29.pdf> (last visited Nov. 1, 2021).

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 679.4061 and 679.4081.

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.

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