

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/HB 491 Assignment for the Benefit of Creditors

**SPONSOR(S):** Civil Justice Subcommittee, Fernandez-Barquin

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/CS/SB 600

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**FINAL HOUSE FLOOR ACTION:** 112 Y's 0 N's **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/HB 491 passed the House on April 20, 2023, as CS/CS/SB 600.

Chapter 727, F.S., provides a uniform procedure for assignments for the benefit of creditors, a process for administering insolvent businesses under Florida law that is roughly analogous to Chapter 7 bankruptcy proceedings. To begin an administration for the benefit of creditors, the insolvent business ("assignor") must make an irrevocable assignment of the business's assets ("estate") in writing to a third party ("assignee"). After recording the assignment in the public records of the county in which the assignor had its principal place of business and a certified copy of the assignment in each county where estate assets are located, the assignee must then collect all estate assets in the possession of others, except for certain creditors, and sell or otherwise liquidate such assets to ensure full reporting to the estate's creditors and the equal distribution of assets to such creditors in accordance with statutorily-specified priorities. The assignee may also operate the insolvent business for specified time periods and reject an unexpired lease of personal or nonresidential real property in which the business was the lessee.

Upon distribution of all estate assets, the assignee must petition the court for his or her discharge, which petition must include an annexed final report setting forth all receipts and disbursements of the estate. Proceedings may not be brought against the assignee except as provided in ch. 727, F.S.

The bill:

- Clarifies that the intent of ch. 727, F.S., is, in part, to provide a uniform procedure for an insolvent business's orderly liquidation;
- Modifies the procedures for an assignment's recording;
- Limits an assignee's personal liability for actions relating to the administration and liquidation of an insolvent business under ch. 727, F.S.;
- Specifies which creditors do not have to turn over estate assets in their possession, custody, or control upon notice by the assignee of the assignment proceedings; and
- Provides that an assignee's service of a notice of rejection of an unexpired lease of personal property or nonresidential real property on the property's owner or lessor and, for personal property, on the landlord of the premises on which the property is located, may be by negative notice, which, unless a response is filed within 21 days after the date of service of the notice, allows certain actions set forth in the notice to occur without a hearing.

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

The bill was approved by the Governor on June 12, 2023, ch. 2023-219, L.O.F., and takes effect on July 1, 2023.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Background

Chapter 727, F.S., provides a uniform procedure for assignments for the benefit of creditors, a process for administering insolvent businesses under Florida law that is roughly analogous to Chapter 7 bankruptcy proceedings.<sup>1</sup>

#### Initiating an Assignment for the Benefit of Creditors

To begin an administration for the benefit of creditors, the insolvent business (“assignor”) must make an irrevocable assignment of the business’s assets (“estate”)<sup>2</sup> in writing to a third party chosen by the assignor (“assignee”),<sup>3</sup> which assignment must:

- Contain the name and address of the assignor and assignee;<sup>4</sup>
- Provide for an equal distribution of the estate according to statutorily-specified priorities;<sup>5</sup> and
- Include as “Schedule A” a list of all the assignor’s known creditors and as “Schedule B” a list of all estate assets.<sup>6</sup>

During the pendency of such proceedings, the assignor must:

- Assist the assignee in the estate’s administration and comply with all court orders;
- Upon delivery of the assignment to the assignee, deliver to the assignee all estate assets in the assignor’s possession, custody, or control, including, but not limited to, all accounts, books, papers, records, and other documents; and
- Within 30 days after the filing date, submit to examination by the assignee, under oath, concerning the acts, conducts, assets, liabilities, and financial condition of the assignor or any matter related to estate administration.<sup>7</sup>

#### Assignee’s Duties

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<sup>1</sup> Under a Chapter 7 bankruptcy, the bankruptcy trustee gathers and sells the debtor’s nonexempt assets and uses the proceeds of such assets to pay holders of claims – that is, creditors – in accordance with the provisions of the Bankruptcy Code. Part of the debtor’s property may be subject to liens and mortgages that pledge the property to other creditors; the Bankruptcy Code will also allow the debtor to keep certain “exempt” property, but a trustee will liquidate the debtor’s remaining assets. Insolvent businesses may choose to use the assignment for the benefit of creditors process in lieu of filing for Chapter 7 bankruptcy to avail themselves of a simpler process for discharging their debts in state court, ensure larger payouts to creditors made possible due to cost savings, and avoid the bankruptcy stigma. Jeffrey Davis, *Florida’s Beefed Up Assignment for the Benefit of Creditors as an Alternative to Bankruptcy*, 19 U. Fla. J. L. & Pub. Pol’y 17 (2008), <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1321&context=facultypub> (last visited April 26, 2023); United States Courts, *Chapter 7 – Bankruptcy Basics*, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics> (last visited April 26, 2023); S. 727.101, F.S.

<sup>2</sup> “Asset” means a legal or equitable interest of the assignor in property, which includes anything that may be the subject of ownership, whether real or personal, tangible or intangible, including claims and causes of action, whether arising by contract or in tort, wherever located, and by whomsoever held at the date of assignment, except property exempt by law from forced sale. Exempt property includes that property which is specified in ch. 222, F.S., personal property up to the value of \$1,000, and homestead property up to a specified number of acres. Ch. 222 and s. 717.103(1), F.S.; Art. X, s. 4, cl. 1 and 2, Fla. Const.

<sup>3</sup> Professional assignees chosen under ch. 727, F.S., are often experts in liquidating estates and operating insolvent businesses to maximize their return by securing a going-concern value.

<sup>4</sup> S. 727.104(1)(a), F.S.

<sup>5</sup> *Id.*

<sup>6</sup> S. 727.104(1)(c), F.S.

<sup>7</sup> S. 727.107, F.S.

Within ten days after receipt of an assignment, the assignee must:

- Record the original assignment in the public records of the county in which the assignor had its principal place of business and a certified copy of the assignment in each county where estate assets are located; and<sup>8</sup>
- File in the Clerk's Office in the county of the assignor's place of business if it has one, in the county of its chief executive office if it has more than one place of business, or in the county of the assignor's residence if the assignor is an individual not engaged in business, a:
  - Petition setting forth the name and address of the assignor and the assignee;
  - Copy of the assignment, along with Schedules A and B; and
  - Request that the court fix the amount of the assignee's bond to be filed with the Clerk.<sup>9</sup>

The assignee must then give notice of the assignment<sup>10</sup> by:

- Publication in a newspaper of general circulation published in the county where the petition is filed and in any other counties where the assignment must be recorded, once a week for four consecutive weeks, with the first notice to be published within ten days after filing; and
- Mailing notice to all known creditors within 20 days after filing the petition.<sup>11</sup>

Further, during the pendency of the proceedings, the assignee must:

- Give the assignor and all creditors:
  - Not less than ten days' mailed notice of the assignor's examination;
  - At least 21 days' mailed notice of a proposed sale of estate assets other than in the ordinary course of business; the assignee's continued operation of the assignor's business for longer than 45 calendar days; the compromise or settlement of a controversy; and the payment of fees and expenses to the assignee and professionals employed by the assignee; and
  - Not less than 20 days' mailed notice of the filing of a petition for discharge and the final report of receipts and disbursements, which notice shall include a summary of all receipts and disbursements and set forth the date and place of the final hearing;
- Collect and reduce to money all estate assets, whether by suit in any court with jurisdiction or by public or private sale;<sup>12</sup>
- Within 30 days after the filing date, examine the assignor, under oath, about the assignor's acts, conduct, assets, liabilities, and financial condition or any matter related to estate administration;
- Give notice to creditors of all matters concerning estate administration;
- Conduct the assignor's business for a limited period not to exceed 45 calendar days, if doing so is in the estate's best interests, or for a longer period if in the estate's best interests, upon notice and until such time as the court sustains an objection, if any;
- Reject, to the extent reasonable in the assignee's business judgment, an unexpired lease of nonresidential real property or of personal property under which the assignor is the lessee;
- Pay the estate's administrative expenses as reasonable and necessary;
- If necessary, employ, at the estate's expense, appraisers, auctioneers, accountants, attorneys, or other professionals to assist the assignee in carrying out his or her duties;
- Keep regular accounts and furnish such information about the estate as may be reasonably requested by creditors or other interested parties;
- File with the court an interim report of receipts and disbursements within six months after the filing date unless excused by the court or the estate has been sooner distributed in full;

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<sup>8</sup> S. 727.104(2)(a), F.S.

<sup>9</sup> The bond is payable to the Clerk of the Court, in an amount not less than \$25,000 or double the liquidation value of the unencumbered and liquid asset of the estate as set forth in Schedule B, whichever is higher, conditioned upon the assignee's faithful discharge of his or her duties. Within 30 days after the court enters an order setting the bond amount, the assignee must file the bond with the Clerk. S. 727.27(2)(b), F.S.

<sup>10</sup> Such notice must include the petition's filing date; the name of the court where the petition is filed; the petition's assigned case number; the last day on which a proof of claim may be served upon the assignee; and the name and address of the assignor and the assignee. S. 727.111(1), F.S.

<sup>11</sup> *Id.*

<sup>12</sup> If the assignee sells the estate's real property, the deed must be in a specified form. S. 727.117, F.S.

- Examine the validity and priority of all claims against the estate;
- Abandon assets to duly perfected secured<sup>13</sup> or lien<sup>14</sup> creditors, where, after due investigation, he or she determines that the estate has no equity in such assets or such assets are burdensome to the estate or are of inconsequential value and benefit to the estate;
- Pay dividends<sup>15</sup> and secured or priority claims as often as is compatible with the estate's best interests and close the estate as expeditiously as possible; and
- File with the court a final report of all receipts and disbursements and an application for his or her discharge.<sup>16</sup>

### Assignee's Rejection of Certain Unexpired Leases

An assignee's duties include, to the extent reasonable in the assignee's business judgment, rejecting an unexpired lease of personal or nonresidential real property in which the insolvent business was the lessee.<sup>17</sup> To reject such a lease, the assignee must file a notice of rejection with the court and serve a copy on the owner or lessor of the affected property and, for personal property, on the landlord of the premises on which the property is located.<sup>18</sup> The rejection's effective date is the date of entry of a court order authorizing such rejection, and if the affected property's lessor fails to take possession thereof after notice of the rejection, the estate's rights and obligations to and liability for the property terminate upon the rejection's effective date.<sup>19</sup>

### Turnover

Any person or entity, other than a creditor, in possession, custody, or control of estate assets must, upon notice by the assignee of the assignment proceedings, turn over such assets to the assignee.<sup>20</sup>

### Claims Against the Estate

All claims other than claims of creditors with liens on estate assets which arose before the petition's filing date must be filed in accordance with ch. 727, F.S., or else the claimant is barred from further recovery against the estate.<sup>21</sup> Claims must be:

- Filed by delivering the claim to the assignee within 120 days from the filing date unless for cause shown;<sup>22</sup>
- In written form entitled "proof of claim," setting forth the creditor's name and address and the claim's nature and amount;<sup>23</sup>

<sup>13</sup> A secured creditor is a creditor who loans money to a borrower in exchange for the borrower's pledge of specific collateral which the creditor may seize if the borrower defaults on the loan; such creditor is said to have a "security interest" in such collateral. Common forms of secured debt included mortgages and motor vehicle loans. Contrast this to an unsecured creditor, who loans money to a borrower based on the borrower's creditworthiness and promise to repay the debt. Common forms of unsecured debt include credit cards, personal loans, and student loans. Investopedia, *Unsecured Debt*, <https://www.investopedia.com/terms/u/unsecureddebt.asp> (last visited April 26, 2023); Thompson Reuters Practical Law, *Secured Creditor*, [https://uk.practicallaw.thomsonreuters.com/0-382-3801?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/0-382-3801?transitionType=Default&contextData=(sc.Default)) (last visited April 26, 2023).

<sup>14</sup> A lien is a claim against property that evidences a debt, obligation, or duty. A lien creditor is a creditor that holds a lien against and gains an interest in a debtor's property by means of attachment, levy, or other process; an "attachment" is a process whereby a court designates a debtor's specific property to be transferred to or sold for the benefit of a creditor, while a "levy" is the court-authorized seizure of a debtor's property to satisfy a debt. Fla. Jur. 2d Liens s. 37:1; Legal Information Institute, *Lien Creditor*, [https://www.law.cornell.edu/wex/lien\\_creditor#:~:text=A%20creditor%20that%20has%20gained,levy%2C%20or%20some%20similar%20manner](https://www.law.cornell.edu/wex/lien_creditor#:~:text=A%20creditor%20that%20has%20gained,levy%2C%20or%20some%20similar%20manner) (last visited April 26, 2023).

<sup>15</sup> "Dividends" are the payment of a corporation's profits to its shareholders. Legal Information Institute, *Dividend*, <https://www.law.cornell.edu/wex/dividend> (last visited April 26, 2023).

<sup>16</sup> Ss. 727.108 and 727.111, F.S.

<sup>17</sup> S. 727.108, F.S.

<sup>18</sup> S. 727.110(3)(a), F.S.

<sup>19</sup> S. 727.110(3)(b) and (c), F.S.

<sup>20</sup> S. 727.106, F.S.

<sup>21</sup> S. 727.112(1), F.S.

<sup>22</sup> A proof of claim, executed and delivered in accordance with s. 727.112, F.S., is prima facie evidence of the claim's validity and amount. S. 727.112(2) and (5), F.S.

<sup>23</sup> S. 727.112(3), F.S.

- Executed by the creditor or his or her agent;<sup>24</sup> and
- Filed with any writing on which the claim is based, together with evidence of the perfection of any security interest.<sup>25</sup>

All claims properly filed with the assignee and not disallowed by the court constitute all claims entitled to distribution from the estate.<sup>26</sup> However, at any time before the entry of an order approving the assignee's final report, the assignee or any interested party may file with the court an objection to a claim, which objection must be in a writing setting forth the objection's nature, and must serve a copy of the objection on the creditor and the assignee.<sup>27</sup>

After the claims bar date, the assignee must create a register of all creditors that have filed claims against the assignor's estate and make the register available upon request to any creditor or other interested party.<sup>28</sup> Allowed claims receive distribution in the following order of priority:

- Creditors with perfected liens on estate assets;
- Expenses incurred during estate administration;
- Unsecured claims of governmental units for taxes that accrued within three years before the petition's filing date;
- Claims for wages, salaries, or commissions;
- Allowed unsecured claims, to the extent of \$2,225 for each individual, arising from the deposit with the assignor before the filing date of money in connection with the purchase, lease, or rental of property or the purchase of services that were not delivered or provided; and
- Unsecured claims.<sup>29</sup>

The assignee, along with any creditor or interested party, may challenge the validity, extent, or priority of any claim filed by a creditor against the assignor's estate.<sup>30</sup> If all claims have been paid in full, any estate residue is paid to the assignor.<sup>31</sup>

#### Assignee's Final Report and Discharge

Upon distribution of all estate assets, the assignee must petition the court for his or her discharge upon notice and a hearing.<sup>32</sup> The assignee's final report setting forth all receipts and disbursements of the estate must be annexed to the petition for discharge and filed with the court.<sup>33</sup> Upon the final reports' approval, the court must discharge the assignee and release his or her bond.<sup>34</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> S. 727.112(4), F.S.

<sup>26</sup> S. 727.113(1), F.S.

<sup>27</sup> *Id.*

<sup>28</sup> S. 727.113(2), F.S.

<sup>29</sup> S. 727.114(1), F.S.

<sup>30</sup> S. 727.113(3), F.S.

<sup>31</sup> S. 727.114(4), F.S.

<sup>32</sup> S. 727.116(1), F.S.

<sup>33</sup> S. 727.116(2), F.S.

<sup>34</sup> S. 727.116(3), F.S.

## Proceedings Against Assignees

Proceedings may not be brought against the assignee except as provided in ch. 727, F.S., but nothing in that chapter affects any action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.<sup>35</sup> Further, except in the case of a consensual lienholder enforcing its right in personal or real property collateral, there shall be no levy, execution, attachment, or the like in respect to any judgment against estate assets in the assignee's possession, custody, or control.<sup>36</sup>

## Negative Notice

Some of the notices required in ch. 727, F.S., may be made by "negative notice," meaning notice as set forth in s. 727.111(4), F.S., which, unless a response is filed within 21 days after the date of service of the notice, allows certain actions set forth in the notice to occur without a hearing.<sup>37</sup> Section 727.111(4), F.S., provides that notice must be by mail on all creditors at the address provided in the creditor's proof of claim, or, if a proof of claim has not been filed by a creditor that is registered to do business in this state, on the creditor's registered agent listed with the Division of Corporations of the Department of State. Where the creditor does not have a registered agent within the state, the notice must be served on the creditor at the address listed in the schedules. In any case, objection to a proposed action, if any, must be filed and served upon the assignee within 21 days after service of the notice.

## **Effect of the Bill**

The bill amends various provisions of ch. 727, F.S., relating to assignment for the benefit of creditors; this includes an amendment to s. 727.101, F.S., to clarify that the intent of this chapter is, in part, to provide a uniform procedure for the orderly liquidation of insolvent estates.

## Initiating an Assignment for the Benefit of Creditors

The bill amends s. 727.104, F.S., to modify the way an assignee must record the assignment. Specifically, the bill provides that, within ten days after the assignment's delivery, the assignee must:

- Record the original assignment, with or without the schedules, in the official records of the county in which the assignor has its principal place of business; and
- Thereafter promptly record a certified copy of the assignment, with or without the schedules, in each county in this state in which real property assets of the estate are located.

The assignee must also promptly record a certified copy of the assignment, without schedules, in the land records of each recording jurisdiction outside of this state in which real property assets of the estate are located. However, under the bill, if a certified copy of the assignment is not acceptable for recording in a particular jurisdiction, the assignee must record a lis pendens or similar notice of action permitted in that jurisdiction referencing the pendency of the proceedings. In either instance, the bill provides that the recorded original assignment, certified copy of the assignment, or lis pendens or similar notice of action must include the legal description of any real property located in the recording jurisdiction. Further, the bill provides that the court may determine proper compliance with Rule 1.200 of the Florida Rules of Civil Procedure,<sup>38</sup> in an action filed under ch. 727, F.S., including, but not limited to, scheduling a case management conference and requiring a periodic status report.

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<sup>35</sup> S. 727.105, F.S.

<sup>36</sup> *Id.*

<sup>37</sup> S. 727.103(13), F.S.

<sup>38</sup> This rule relates to pre-trial procedure.

## Assignee's Rejection of Certain Unexpired Leases

The bill amends s. 727.110, F.S. to provide that:

- When an assignee files a notice of rejection and serves a copy on the affected property's owner or lessor, and, for personal property, on the landlord of the premises on which the property is located, such service shall be by negative notice.
- The court order authorizing such rejection may specify an alternative effective date for the rejection other than the date of the order.

## Turnover

The bill amends s. 727.106, F.S., to clarify that the creditors who do not have to turn over estate assets in their possession, custody, or control upon notice by the assignee of the assignment proceedings are those creditors holding a lien or a right of setoff<sup>39</sup> or recoupment<sup>40</sup> with respect to the subject assets.

## Proceedings Against Assignees

The bill amends s. 727.105, F.S., to limit an assignee's liability for actions related to proceedings for an assignment for the benefit of creditors. Specifically, the bill provides that an assignee may rely on any:

- Outstanding court orders, judgments, decrees, and rules of law, and is not personally liable for the assignee's own good faith compliance with any such orders, judgments, decrees, or rules of law.
- Resolution, certificate, statement, opinion, report, notice, consent, or other document believed by the assignee to be genuine and to have been signed or presented by the proper parties.

The bill also provides that the assignee is not personally liable for the assignee's:

- Good faith compliance with his or her duties and responsibilities as an assignee.
- Acts or omissions, except upon a finding by the court presiding over an action or proceeding under ch. 727, F.S., that the assignee's acts or omissions:
  - Were outside the scope of his or her duties;
  - Were grossly negligent; or
  - Constituted malfeasance ("prohibited actions").

Further, the bill specifies that:

- With the exception of claims related to a prohibited action, any creditor or interested party seeking to assert a claim against the assignee must look only to the assignment estate's assets and any bond posted by the assignee to satisfy any liability, and the assignee is not personally liable to satisfy any such obligation.
- Any creditor or interested party seeking to assert a claim against the assignee for a prohibited action must first obtain leave of the court presiding over the assignment proceedings.
- Any claim against the assignee must be brought before the assignee's discharge, if the claim had accrued and is predicated upon facts that are known or reasonably should have been known at the time of the discharge, or else be deemed released and forever barred.
- These changes do not alter or limit any other immunity otherwise held by the assignee.

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<sup>39</sup> A "right of setoff" is a contractual clause allowing a creditor to seize a debtor's deposits when he or she defaults on a loan or to offset mutual debts. For example, if a bank lends money to a borrower with a checking or savings account, a right of setoff in the loan agreement would make the money in such accounts available for the bank to seize should the borrower default on the loan. Juli A Kagan, *Set-Off Clause: Definition, How it Works, Benefits, and Examples*, <https://www.investopedia.com/terms/s/set-off-clause.asp> (last visited April 26, 2023); *In re Graves*, 234 B.R. 149 (Bankr. M.D. Fla. 1999).

<sup>40</sup> A "right of recoupment" is an equitable remedy allowing the recoupment of money that was previously unduly paid out; such a claim must arise from the same transaction as the plaintiff's original claim and be so closely intertwined that the debtor's claim cannot be resolved without the creditor's claim. This right often applies where the relevant claims arise out of a single contract that provides for advanced payments based on estimates of what would ultimately be owed, subject to later correction. Legal Information Institute, *Recoupment*, <https://www.law.cornell.edu/wex/recoupment> (last visited April 26, 2023); *In re Chapman*, 265 B.R. 796 (Bankr. N.D. Ill. 2001).

The bill was approved by the Governor on June 12, 2023, ch. 2023-219, L.O.F., and takes effect on July 1, 2023.

## 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:

The bill may limit the liability of assignees as it relates to proceedings under ch. 727, F.S.

### D. FISCAL COMMENTS:

None.