

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 Rules

BILL: CS/SB 1316

INTRODUCER: Rules Committee and Senator Simmons

SUBJECT: Uniform Voidable Transactions Act

DATE: February 16, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	Favorable
2.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	Favorable
3.	<u>Billmeier</u>	<u>Phelps</u>	<u>RC</u>	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/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 prevent the assets 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 its claim by a preponderance of the evidence;
- Changes the criteria used to determine whether partnerships are insolvent and subjects partnerships to the same solvency standard as other debtors; and
- Requires a claim for relief to be governed by the claims law of the jurisdiction in which the debtor is located when a transfer is made or an obligation is incurred.

The bill also specifies that each “protected series” in a “series organization,” as well as the organization itself, must be regarded as a separate business for the purpose of the UVTA. A series organization is a limited liability corporation that is divided into several series, or cells, which for many purposes are treated as distinct entities.

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”).¹ This state enacted the UFTA in 1987² and codified it as ch. 726, F.S.

Chapter 726, F.S., provides redress to creditors by allowing them to recover assets from debtors who 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 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, if the debtor also:
 - 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.

Subsection 726.105(2), F.S., authorizes a court to consider, among other factors, the 11 factors set forth in that subsection to determine whether a transfer of assets or taking on of an obligation was done “with actual intent to hinder, delay, or defraud a creditor.” For example, a court may consider whether the transfer or obligation was to an insider, whether the debtor retained possession or control of the property transferred after the transfer, and whether the transfer or obligation was disclosed or concealed.

Section 726.106, F.S., deems a debtor’s transfer to be 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.” Additionally, some courts have shifted the burden to transferees to show a debtor is not insolvent.³

¹ UNIFORM LAW COMMISSION, THE UNIFORM VOIDABLE TRANSACTION ACT (2014 AMENDMENTS), <http://www.uniformlaws.org/shared/docs/fraudulent%20transfer/UVTA%20-%20Summary.pdf> (last visited Feb. 5, 2018).

² Chapter 87-79, Laws of Fla.

³ Gary A. Foster, Eric C. Boughman, American Bar Association, *The Uniform Voidable Transactions Act: An Overview of Refinements to the Uniform Fraudulent Transfer Act*, 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 Feb. 2, 2018).

The UFTA also specifies the remedies available to a creditor harmed by a wrongful transfer or obligation. The chief remedy is the recovery of the transferred item or its value. Other remedies provided by the law are designed to facilitate this recovery and to cease further fraudulent transfers.⁴

These remedies are generally subject to a 4-year statute of limitations, unless otherwise specified. The UFTA contains some exceptions to the remedy of recovering an asset that was fraudulently transferred, primarily for any “person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.”⁵

In 2014, National Conference of Commissioners on Uniform State Laws amended the model version of 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.”⁶ The UVTA has been adopted in 16 states and is under consideration in 2018 in five other states, including Florida.⁷

III. Effect of Proposed Changes:

The bill conforms this state’s Uniform Fraudulent Transfer Act (UFTA) to the updated version of the model legislation on which it is based, which is now called the Uniform Voidable Transactions Act (UVTA).

Changes in Title and Style (Sections 1, 2, 5, and 7)

The changes made in **sections 1, 2, 5, and 7** change the name of the “Uniform Fraudulent Transfer Act” to the “Uniform Voidable Transactions Act,” change the chapter title in s. 726.101, F.S., from “Fraudulent Transfers” to “Voidable Transactions,” and replace the word “fraudulent” with “voidable” where applicable in the act.

Definitions (Section 3 and 8)

Section 3 amends s. 726.102, F.S., regarding definitions for the UVTA. 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.

⁴ Section 726.108, F.S.

⁵ Section 726.109(1), F.S.

⁶ 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.

⁷ [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 February 2, 2018).

- “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.

Also, 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.

Section 8 amends s. 726.107, F.S., to provide that an obligation is incurred is 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 sets forth what constitutes “insolvency” under the UVTA and under what circumstances a debtor will be presumed to be insolvent. 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 a fair valuation.⁸ A debtor is presumed to be insolvent if the debtor generally is not paying his or her debts as they become due.⁹ The bill excepts persons who are not paying their debts as a result of a bona fide dispute from this presumption. The bill specifies that the party against whom the presumption of insolvency is directed has the burden to prove that its solvency is more probable than its insolvency.

Under current law, s. 726.103(3), F.S., requires a different analysis to be used to determine whether a partnership is insolvent than it does to determine whether other persons are insolvent. A partnership is considered insolvent if the sum of the partnership’s debts is greater than the combined value 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 treat a partnership like any other person for the purposes of determining insolvency. 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 partnership’s assets.

Burden and Standard of Proof (Sections 5 and 7)

Sections 5 and 7 amend ss. 726.105 and 726.106, F.S., to expressly state that a creditor has the burden to prove, by preponderance of the evidence, that a transfer is voidable.

Legislative Intent (Section 6)

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

⁸ Section 726.103(1), F.S.

⁹ Section 726.103(2), F.S.

comments from uniform acts as interpretative aids.¹⁰ **Section 6** of the bill provides that it is the intent of the Legislature that the Uniform Law Commission's comments two and eight to section four of the Uniform Voidable Transactions Act, as amended in 2014, may not be persuasive authority in interpreting s. 726.105, F.S. The Legislature intends that the courts look to all relevant and applicable law when interpreting s. 726.105, F.S.

Remedies of Creditors (Section 9)

Section 9 amends s. 726.108, F.S., to provide that s. 605.0503, F.S., does not limit a creditor's ability to obtain relief under the UVTA.

Section 605.0503, F.S., allows judgment creditors of a member or transferee of a transferrable interest of a limited liability company (LLC) to petition the court for a charging order against the transferable interest for payment of the unsatisfied amount of the judgment with interest. The section is generally the exclusive remedy for a judgment creditor a LLC member or member's transferee to satisfy a judgment from the judgment debtor's interest in an LLC or rights to distributions from an LLC. Section 605.0503(7)(b), F.S., provides that the section does not limit principles of law and equity which affect fraudulent transfers.

Defenses and Burdens of Proof (Section 10)

Section 10 amends s. 726.109, F.S., which sets forth defenses for persons who engage in an allegedly voidable transfer and specifies from whom certain voidable transfer judgments may be recovered. Current law states that an allegedly fraudulent transfer cannot be undone if the transferee took what it received in good faith and in exchange for something of a reasonably equivalent value. For this protection to apply, the bill specifies that the item of reasonably equivalent value must be given to the debtor.

Current law provides that a creditor's recovery pursuant to a judgment for the asset transferred or the amount necessary to satisfy the creditor's claim is available against:

- The first transferee of the asset or the person for whose benefit the transfer was made; or
- Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

Under the bill, a judgment may be entered against:

- The first transferee of the asset or the person for whose benefit the transfer was made; or
- Any subsequent transferee other than a good faith transferee that took for value or any good faith transferee that is subsequent to the good faith transferee that took for value.

As such, the bill broadens the possibilities for recovery upon a judgement by authorizing recovery from bad faith transferees, no matter how remote they are from the first transfer. At the same time, the bill specifies that the persons specified are the only ones against whom recovery may be made.

¹⁰ See *Winner v. Cataldo*, 559 So.2d 696 (Fla. 3d DCA 1990)(using commentary to the Model Business Corporation Act to interpret s. 607.147, F.S.).

Another defense provided in chapter 726, F.S., is that a transfer is not voidable if it results from enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code (UCC). The bill revises the 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 set forth in the UVTA has the burden of proving the applicability of that defense. A creditor has the burden of proving all the elements of its claim including proving the amount of its claim and the value of assets transferred at the time of their transfer. 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 for all matters in this section is preponderance of the evidence.

Statutes of Limitations (Section 11)

Currently, under s. 726.110, F.S., a claim based on a transaction that was allegedly done with the actual intent to hinder, delay, or defraud any creditor of the debtor must be filed within 4 years after the transaction, or if later, within 1 year after the transaction was or could reasonably have been discovered by the claimant. **Section 11** amends s. 726.110, F.S., to provide that this 1-year period does not begin to run until the wrongfulness of the transaction is or reasonably could have been discovered.

Sections 12 and 13 make technical changes to s. 726.111, F.S., and s. 726.112, F.S.

Governing Law for a Voidable Transaction Claim (Section 14)

Section 14 creates s. 726.113, F.S., to specify that a claim for relief is governed by the law of the jurisdiction where the debtor is located when the transaction occurs. Furthermore, the bill provides criteria for determining a debtor's location for purposes of determining which jurisdiction's law governs the claim:

- 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.

The bill does not affect a debtor's entitlement to homestead protections under the Florida Constitution.

Series Organizations (Section 15)

A series organization is a limited liability corporation that is divided into several series, or cells, which for many purposes are treated as distinct entities. A series mechanism "creates an elastic single vehicle for operating multiple businesses or owning multiple properties in a limited

liability environment.”¹¹ It allows, for example, a limited liability company to designate specific assets to 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.¹²

Section 15 creates s. 726.114, F.S., to specify how chapter 726, F.S., applies to 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 the UVTA.

Electronic Signatures (Section 16)

The Electronic Signatures in the Global and National Commerce Act of 2000 (E-Sign Act) “allows electronic signatures or documents to satisfy most existing legal requirements for written signatures, disclosures, or records” with respect to transactions of interstate or foreign commerce.¹³ Accordingly, its main provision states:

- Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II), with respect to any transaction in or affecting interstate or foreign commerce;
 - A signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
 - A contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

Section 16 creates s. 726.115, F.S., to provide that the UVTA modifies, limits, and supersedes the E-Sign Act as a general matter but does not modify, limit, or supersede the portion of the Act

¹¹ 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).

¹² *Id.* at 354-355.

¹³ Reed Smith LLP, *Reed Smith Client Alerts – Electronic Signatures in Global and National Commerce Act* (July 2000) <https://www.reedsmith.com/en/perspectives/2000/07/electronic-signatures-in-global-and-national-comm> (last visited February 3, 2018)

that, in general terms, requires a consumer to consent to the use of electronic records and permits a consumer to withdraw its consent.¹⁴

Effective Date (Section 17)

The effective date of the bill is July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

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 extends the timeframe for filing a lawsuit under the act to 1 year after the date on which the creditor knew or reasonably could have known of the wrongfulness of a transaction. As such, the bill could increase litigation and its associated costs. However, the bill may enable creditors to be made whole for their losses in more circumstances.

C. Government Sector Impact:

The bill extends the timeframe for filing a lawsuit under the act to 1 year after the date on which the creditor knew or reasonably could have known of the wrongfulness of a transaction. As such, the bill could increase litigation, thus increasing costs to the state court system.

VI. Technical Deficiencies:

None.

¹⁴ See 15 U.S.C. § 7003(c)

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 Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Rules on February 15, 2018:

The CS provides legislative intent that certain comments by the Uniform Law Commission relating to interpretation of the Uniform Voidable Transactions Act are not to be used as persuasive authority in interpreting s. 726.105, F.S.

- B. **Amendments:**

None.