

Tab 1	SB 812 by Diaz de la Portilla; (Identical to H 0699) Reciprocal Insurers						
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Tab 2	SB 286 by Brandes; (Identical to H 0817) Mergers and Acquisitions Brokers						
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Tab 3	CS/SB 540 by JU, Hukill; (Similar to CS/H 0393) Estates						
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Tab 4	SB 458 by Richter; (Similar to H 0379) Transfers of Structured Settlement Payment Rights						
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The Florida Senate
COMMITTEE MEETING EXPANDED AGENDA

BANKING AND INSURANCE
Senator Benacquisto, Chair
Senator Richter, Vice Chair

MEETING DATE: Tuesday, December 1, 2015

TIME: 1:00—3:00 p.m.

PLACE: *Toni Jennings Committee Room, 110 Senate Office Building*

MEMBERS: Senator Benacquisto, Chair; Senator Richter, Vice Chair; Senators Clemens, Detert, Hukill, Lee, Margolis, Montford, Negron, Simmons, and Smith

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	SB 812 Diaz de la Portilla (Identical H 699)	Reciprocal Insurers; Authorizing domestic reciprocal insurers to pay a portion of unassigned funds to their subscribers, etc. BI 12/01/2015 Favorable CM RC	Favorable Yeas 11 Nays 0
2	SB 286 Brandes (Identical H 817)	Mergers and Acquisitions Brokers; Providing an exemption from specified registration requirements for a specified offer or sale of securities; providing that a mergers and acquisitions broker is exempt from registration with the Office of Financial Regulation of the Financial Services Commission, etc. BI 12/01/2015 Fav/CS AGG FP	Fav/CS Yeas 11 Nays 0
3	CS/SB 540 Judiciary / Hukill (Similar CS/H 393)	Estates; Providing that the validity and the effect of a specified disposition of real property be determined by Florida law; authorizing a trustee to pay attorney fees and costs from the assets of the trust without specified approval or court authorization in certain circumstances; providing that specified qualified beneficiaries may be entitled to an order compelling the refund of a specified payment to the trust, etc. JU 11/17/2015 Fav/CS BI 12/01/2015 Fav/CS RC	Fav/CS Yeas 11 Nays 0
4	SB 458 Richter (Similar H 379)	Transfers of Structured Settlement Payment Rights; Eliminating a required disclosure that must be made to the claimant or the claimant's legal representative in a structured settlement; authorizing the structured settlement obligor and annuity issuer to rely on the court order in redirecting future settlement payments to the transferee or assignee, etc. JU 11/17/2015 Favorable BI 12/01/2015 Fav/CS RC	Fav/CS Yeas 11 Nays 0

COMMITTEE MEETING EXPANDED AGENDA

Banking and Insurance

Tuesday, December 1, 2015, 1:00—3:00 p.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
	Other Related Meeting Documents		

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 Banking and Insurance

BILL: SB 812

INTRODUCER: Senator Diaz de la Portilla

SUBJECT: Reciprocal Insurers

DATE: December 1, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	Favorable
2.	_____	_____	CM	_____
3.	_____	_____	RC	_____

I. Summary:

SB 812 creates an additional process for a domestic reciprocal insurer to distribute to policyholders unassigned funds such as unused premiums, savings, and credits. The process created by the bill differs from current law primarily by not requiring the reciprocal insurer to create subscriber accounts to make distributions to policyholders. Distributions using this method may not exceed 50 percent of the insurer's net income from the previous calendar year and may be up to 10 percent of the insurer's surplus.

II. Present Situation:

A reciprocal insurance company is an unincorporated group of subscribers who exchange risk, with each member serving both as the insurer and insured.¹ The subscribers operate through an attorney in fact to provide reciprocal insurance among themselves.² Reciprocal insurers may transact any line of insurance other than life or title.³ Reciprocal insurers are not common and primarily write motor vehicle insurance. Two of the larger reciprocal insurance companies are Farmers Insurance and United Services Automobile Association (USAA). In Florida, authorized reciprocal insurers are governed by the provisions of ch. 629 of the Florida Statutes.

A domestic reciprocal insurer may be organized by 25 or more persons domiciled in Florida, provided the reciprocal is formed in accordance with the requirements of ch. 629, Florida Statutes, and is approved by the Office of Insurance Regulation.⁴ The reciprocal insurer must have a subscribers' advisory committee with powers set forth in the subscribers' agreement. These powers must include supervising the finances of the insurer, supervising the insurer's

¹ Robert W. Klein, *A Regulator's Introduction to the Insurance Industry*, 5-4 (National Association of Insurance Commissioners 1999).

² Section 629.021, F.S.

³ Section 629.041, F.S.

⁴ Section 629.081, F.S.

operations to assure conformity with the subscribers' agreement and power of attorney, and procuring the audit of the accounts and records of the insurer and the attorney in fact.⁵ Section 629.274, F.S., governs the distribution of savings from reciprocal insurers to their subscribers. Reciprocal insurers may distribute to subscribers unused premiums, savings, or credits accruing to their subscriber savings accounts. Distributions may not unfairly discriminate between classes of risks, or policies, or between subscribers but may vary as to classes of subscribers based up on the experience of such subscriber classes.

The Internal Revenue Code provides that a reciprocal insurer may claim a deduction from taxable income for amounts that are added to subscriber savings accounts.⁶ For an insurer to claim the deduction, the amounts in subscriber savings accounts must be immediately payable to the subscriber at the end of the taxable year if the subscriber ends his or her account. The credits to the subscriber accounts are considered a paid or declared dividend by the subscriber.

III. Effect of Proposed Changes:

SB 812 amends s. 629.271, F.S., to create an additional process for a domestic reciprocal insurer to distribute to policyholders unassigned funds such as unused premiums, savings, and credits. The process created by the bill differs from current law primarily by not requiring the reciprocal insurer to create subscriber accounts to make distributions to policyholders. Only domestic reciprocal insurers may use the distribution process created by the bill.

The new policyholder distribution process created by the bill instead creates limits on the total amount of distributions if subscriber accounts are not used and also subjects such distributions to Office of Insurance Regulation approval. The distribution may not exceed 50 percent of the insurer's net income from the previous calendar year and may be up to 10 percent of the insurer's surplus. As under current law for distributions using subscriber accounts, distributions using this method may not unfairly discriminate between classes of risks, policies, or subscribers.

The effective date of the bill is July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁵ Section 629.201, F.S.

⁶ 26 U.S.C. 832(f).

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

None.

B. Private Sector Impact:

A domestic reciprocal reinsurer may save administrative costs by using the distribution method created by this bill rather than establishing and maintaining subscriber savings accounts. The method created by this bill will create savings for those domestic reciprocal insurers for whom the federal tax deduction for monies placed in subscriber accounts is exceeded by the administrative savings of using the procedure created by the bill.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 629.271 of the Florida Statutes:

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.

By Senator Diaz de la Portilla

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1 A bill to be entitled
2 An act relating to reciprocal insurers; amending s.
3 629.271, F.S.; authorizing domestic reciprocal
4 insurers to pay a portion of unassigned funds to their
5 subscribers; providing limitations; providing an
6 effective date.

7
8 Be It Enacted by the Legislature of the State of Florida:

9
10 Section 1. Section 629.271, Florida Statutes, is amended to
11 read:

12 629.271 Distribution of savings.—

13 (1) A reciprocal insurer may ~~from time to time~~ return to
14 its subscribers any unused premiums, savings, or credits
15 accruing to their accounts. ~~Any~~ Such distribution may ~~shall~~ not
16 unfairly discriminate between classes of risks, or policies, or
17 between subscribers, but ~~such distribution~~ may vary as to
18 classes of subscribers based on ~~upon~~ the experience of the ~~such~~
19 classes.

20 (2) In addition to the option provided in subsection (1), a
21 domestic reciprocal insurer may, upon the prior written approval
22 of the office, pay to its subscribers a portion of unassigned
23 funds of up to 10 percent of surplus, with distribution limited
24 to 50 percent of net income from the previous calendar year.
25 Such distribution may not unfairly discriminate between classes
26 of risks or policies, or between subscribers, but may vary as to
27 classes of subscribers based on the experience of the classes.

28 Section 2. This act shall take effect July 1, 2016.



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:

Judiciary, *Chair*
Appropriations Subcommittee on Transportation,
Tourism, and Economic Development
Community Affairs
Finance and Tax
Regulated Industries
Rules

SENATOR MIGUEL DIAZ de la PORTILLA

40th District

November 19, 2015

The Honorable Lizbeth Benacquisto
Chair
Banking and Insurance

Via email

Dear Chair Benacquisto:

SB 812, Reciprocal Insurers, has been referenced to Banking and Insurance. I would greatly appreciate it if you would agenda the bill at your next opportunity.

Thank you for your consideration.

Sincerely,

Miguel Diaz de la Portilla
State Senator, District 40

Cc: Mr. James Knudson, Staff Director; Ms. Sheri Green, Committee Staff Assistant

REPLY TO:

- 2100 Coral Way, Suite 505, Miami, Florida 33145 (305) 643-7200
- 406 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5040

Senate's Website: www.flsenate.gov

ANDY GARDINER
President of the Senate

GARRETT RICHTER
President Pro Tempore

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 Banking and Insurance

BILL: CS/SB 286

INTRODUCER: Banking and Insurance Committee and Senator Brandes

SUBJECT: Merger and Acquisition Brokers

DATE: December 3, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	Fav/CS
2.			AGG	
3.			FP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 286 creates an exemption from registration with the Office of Financial Regulation (OFR) for a merger and acquisition (M&A) broker facilitating the offer or sale of securities in connection with the transfer of ownership of an eligible privately held company. Generally, an M&A broker, acting as an intermediary, engages in the business of transferring the ownership and control of a privately-held company through the sale of the business, which may be structured as an asset or securities transaction. The bill also provides an exemption for the securities transactions that are conducted through an M&A broker if certain conditions are met.

Under current law, mergers where two corporations have \$500,000 or more in assets and where the sale price is \$50,000 or more, are transactions that qualify for a securities registration exemption. Similarly, mergers approved by the vote of the security holders are transactions that qualify for a securities registration exemption. Brokers who facilitate transactions through one of these two exemptions are currently exempt from registration. Failure to meet the requirements of statutory exemptions can subject entities to civil, criminal, and administrative liability for the sale of unregistered securities.

II. Present Situation:

Federal Regulation of Securities

Securities Act of 1933

The federal Securities Act of 1933 (Securities Act) requires every offer or sale of securities using the means and instrumentalities of interstate commerce to be registered with the U.S. Securities and Exchange Commission (SEC), unless an exemption is available. The Securities Act's emphasis on disclosure of important financial information through the registration of securities enables investors to make informed judgments about whether to purchase a company's securities. Investors who purchase securities and suffer losses have recovery rights if they can prove that there was incomplete or inaccurate disclosure of important information.

Securities Exchange Act of 1934

With the enactment of the Securities Exchange Act of 1934 (act), Congress created the Securities and Exchange Commission (SEC). The act provides the SEC with broad authority over all aspects of the securities industry. This includes the power to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's securities self-regulatory organizations (SROs).

The act also identifies and prohibits certain types of conduct in the markets and provides the SEC with disciplinary powers over regulated entities and persons associated with them. The act also authorizes the SEC to require periodic reporting of information by companies with publicly traded securities. Generally, any person acting as a "broker" or "dealer" as defined by Section 3(4), and 3(a)(5) of the Securities Exchange Act of 1934, respectively, must be registered with the SEC and join a SRO, the Financial Industry Regulatory Authority (FINRA), a national securities exchange, or both. Broker dealers must also comply with state laws relating to registration requirements.

In 2014, SEC staff issued a no-action letter stating that it would not recommend enforcement action to the SEC if an individual or firm meeting the definition of an "M&A Broker" were to effect transactions in connection with the transfer of ownership of a privately held company.¹ The no-action letter outlines the permissible activities and transactions that could be effected without requiring registration with the SEC as a broker dealer. In particular, the no-action letter permits an M&A broker to participate in the negotiations of the M&A transaction; advise the parties to issue securities, or otherwise to effect the transfer of the business by means of securities; or assess the value of any securities sold; and receive transaction-based or other compensation without registering as a dealer with the SEC." Prior to the release of this no-action letter, it was unclear when an M&A Broker had to be registered with the SEC. The SEC no-action letter is applicable to federal registration requirements.

¹ M&A Broker Letter, SEC (January 31, 2014, revised February 4, 2014). For purposes of the letter, an "M&A Broker" is a person engaged in the business of effecting securities transactions solely in connection with the transfer of ownership and control of a privately-held company through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the company, to a buyer that will actively operate the company or the business conducted with the assets of the company.

Florida Regulation of Securities

In addition to federal securities laws, “Blue Sky Laws” are state laws that protect the investing public through registration requirements for both broker dealers and securities offerings, merit review of offerings, and various investor remedies for fraudulent sales practices and activities.² In Florida, the Securities and Investor Protection Act, ch. 517, F.S. (act), regulates securities issued, offered, and sold in the state of Florida. The OFR regulates and registers the offer and sale of securities in, to, or from Florida by firms, branch offices, and individuals affiliated with these firms in accordance with the act.³

The act prohibits dealers, associated persons, and issuers from offering or selling securities in this state unless registered with the OFR or specifically exempted.⁴ Additionally, all securities in Florida must be registered with the OFR unless they meet one of the exemptions in s. 517.051 or s. 517.061, F.S., or are federally covered (i.e., under the exclusive jurisdiction of the SEC). Currently, mergers where two corporations have \$500,000 or more in assets and where the sale price is \$50,000 or more, are transactions that qualify for a securities registration exemption under s. 517.061(8), F.S. Similarly, mergers approved by the vote of the security holders are transactions that qualify for a securities registration exemption under s. 517.061(9), F.S. Brokers who facilitate transactions through one of these two exemptions are currently exempt from registration by s. 517.12(3), F.S.

Failure to meet the requirements of these exemptions, can subject entities to civil, criminal, and administrative liability for the sale of unregistered securities, which is a third-degree felony in Florida.⁵ Civil remedies under the act include rescission and damages.⁶ In addition, issuers must comply with disclosure requirements in state and federal laws that provide potential investors with full and fair disclosures regarding the security.

Merger and Acquisition Brokers

An M&A broker may introduce buyers and sellers, help value the business, recommend terms and structure of the sale, and assist with negotiations in the closing sales of privately held businesses. Smaller transactions may involve the sale of the assets of the business in exchange for cash. However, the ownership of a business may be transferred by means of the purchase, sale, exchange, issuance, merger, repurchase, or redemption of, or other business combinations involving securities. If a transaction involves securities, then state and federal securities laws may apply to the parties and the transactions. The costs of complying with SEC and FINRA broker-dealer regulatory requirements can be substantial, an estimated \$150,000 initially and

² U.S. Securities and Exchange Commission, *Blue Sky Laws*, <http://www.sec.gov/answers/bluesky.htm> (last visited November 22, 2015).

³ Pursuant to s. 20.121(3)(a), F.S., the Financial Services Commission (the Governor and Cabinet) serves as the OFR’s agency head for purposes of rulemaking and appoints the OFR’s commissioner, who serves as the agency head for purposes of final agency action for all areas within the OFR’s regulatory authority.

⁴ Section 517.12, F.S.

⁵ Section 517.302(1), F.S.

⁶ Section 517.211(3-5), F.S.

more than \$75,000 annually. These regulatory costs are included in the final costs incurred by the small business sellers and buyers using services of an M&A broker.⁷

Prior to the adoption of the North American Securities Administrators Association, Inc. (NAASA) model rule, California, South Dakota, Texas, and Utah adopted limited broker-dealer or transaction-based exemptions. In September 2015, the NAASA adopted a model rule, which provides a uniform approach to state-level securities regulation and provides an exemption for M&A brokers if certain conditions are met.⁸

III. Effect of Proposed Changes:

The bill provides that the offer or sale of securities solely in connection with the transfer of ownership of an eligible privately held company through an M&A broker is an exempt transaction under ch. 517, F.S., if certain conditions are met. However, these exempt transactions are subject to the prohibited practices and remedies under ss. 517.301, 517.311, and 517.312, F.S. The bill also exempts the M&A broker from registration with the OFR as a dealer if certain conditions are met.

An eligible privately held company is a company that meets certain requirements:

- The company does not have any securities that require registration with the SEC or the OFR, or for which the company must submit filings with the SEC.
- In the fiscal year immediately preceding the fiscal year during which the M&A broker begins to provide services for the securities transaction, the company has earnings before interest, taxes, depreciation, and amortization of less than \$25 million or has gross revenues of less than \$250 million.

The bill provides that an M&A Broker is any broker and any person associated with a broker engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of eligible privately held companies. Further, the bill provides that prior to the completion of the securities transaction, the M&A broker must receive written assurances from the control person with the largest percentage of ownership for both the buyer and seller that:

- After the completion of the transaction, any person who acquires securities or assets of the eligible privately held company will be a control person of the eligible privately held company or will be a control person for the business conducted with the assets of the eligible privately held company. The bill defines the term, “control person.”
- Any person that is offered securities in exchange for securities or assets of the eligible, privately held company will receive financial statements of the issuer of the securities offered in the exchange prior to becoming legally bound to complete the transaction.

An M&A broker is exempt from registration *unless* the M&A broker engages in certain activities or has engaged in disqualifying events, delineated below:

⁷ Alliance of Merger and Acquisition Advisors and International Business Brokers Associations, M&A White Paper (April 29, 2015).

⁸ The NASAA is a voluntary association whose membership consists of 67 state, provincial, and territorial securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico. The NASAA’s Model Rule, Exempting Certain Merger & Acquisition Brokers from Registration, was adopted September 29, 2015.

- Holds, transmits, or has custody of the funds or securities to be exchanged by the parties;
- Engages on behalf of an issuer in a public offering of securities which are required to be registered with the SEC or the OFR;
- Engages on behalf of an issuer in a public offering of securities for which the issuer is required to file certain documents pursuant to 15 U.S.C. s. 78o(d);
- Engages on behalf of any party in a transaction involving a public shell company;
- Is subject to a suspension or revocation of registration under 15 U.S.C. s. 78o(b)(4);
- Is subject to a disqualification under 15 U.S.C. s. 78c(a)(39);
- Is subject to a disqualification under 15 U.S.C. s. 230.506(d); or
- Is subject to a final order described under 15 U.S.C. s. 78o(b) (4)(H).

The bill takes effect July 1, 2016.

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 would exempt the sale of securities in connection with the transfer of ownership of a privately held eligible company and the registration of M&A brokers with the OFR if certain conditions are met, thereby reducing the regulatory burden and the costs of such transactions incurred by the buyers and sellers of such small businesses.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 517.061 and 517.12.

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 Banking and Insurance on December 1, 2015:

The CS provides technical, conforming changes to make the bill consistent with the provisions of the model act of the North American Securities Administrators Association and chapter 517, F.S.

- B. **Amendments:**

None.



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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
12/01/2015	.	
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	.	

The Committee on Banking and Insurance (Negron) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Subsection (22) is added to section 517.061,
Florida Statutes, to read:

517.061 Exempt transactions.—Except as otherwise provided
in s. 517.0611 for a transaction listed in subsection (21), the
exemption for each transaction listed below is self-executing
and does not require any filing with the office before claiming



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11 the exemption. Any person who claims entitlement to any of the
12 exemptions bears the burden of proving such entitlement in any
13 proceeding brought under this chapter. The registration
14 provisions of s. 517.07 do not apply to any of the following
15 transactions; however, such transactions are subject to the
16 provisions of ss. 517.301, 517.311, and 517.312:

17 (22) The offer or sale of securities, solely in connection
18 with the transfer of ownership of an eligible privately held
19 company, through a merger and acquisition broker in accordance
20 with s. 517.12(22).

21 Section 2. Subsection (22) is added to section 517.12,
22 Florida Statutes, to read:

23 517.12 Registration of dealers, associated persons,
24 intermediaries, and investment advisers.—

25 (22) (a) As used in this subsection, the term:

26 1. "Broker" has the same meaning as "dealer" as defined in
27 s. 517.021.

28 2. "Control person" means an individual or entity that
29 possesses the power, directly or indirectly, to direct the
30 management or policies of a company through ownership of
31 securities, by contract, or otherwise. A person is presumed to
32 be a control person of a company if, with respect to a
33 particular company, the person:

34 a. Is a director, a general partner, a member, or a manager
35 of a limited liability company, or is an officer who exercises
36 executive responsibility or has a similar status or function;

37 b. Has the power to vote 20 percent or more of a class of
38 voting securities or has the power to sell or direct the sale of
39 20 percent or more of a class of voting securities; or



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40 c. In the case of a partnership or limited liability
41 company, may receive upon dissolution, or has contributed, 20
42 percent or more of the capital.

43 3. "Eligible privately held company" means a company that
44 meets all of the following conditions:

45 a. The company does not have any class of securities which
46 is registered, or which is required to be registered, with the
47 United States Securities and Exchange Commission under the
48 Securities Exchange Act of 1934, 15 U.S.C. ss. 78a et seq., or
49 with the office under s. 517.07, or for which the company files,
50 or is required to file, summary and periodic information,
51 documents, and reports under Section 15(d) of the Securities
52 Exchange Act of 1934, 15 U.S.C. s. 78o(d).

53 b. In the fiscal year immediately preceding the fiscal year
54 during which the merger and acquisition broker begins to provide
55 services for the securities transaction, the company, in
56 accordance with its historical financial accounting records, has
57 earnings before interest, taxes, depreciation, and amortization
58 of less than \$25 million or has gross revenues of less than \$250
59 million. On July 1, 2016, and every 5 years thereafter, each
60 dollar amount in this sub-subparagraph shall be adjusted by
61 dividing the annual value of the Employment Cost Index for wages
62 and salaries for private industry workers, or any successor
63 index, as published by the Bureau of Labor Statistics, for the
64 calendar year preceding the calendar year in which the
65 adjustment is being made, by the annual value of such index or
66 successor index for the calendar year ending December 31, 2012,
67 and multiplying such dollar amount by the quotient obtained.
68 Each dollar amount determined under this sub-subparagraph shall



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69 be rounded to the nearest multiple of \$100,000.

70 4. "Merger and acquisition broker" means any broker and any
71 person associated with a broker engaged in the business of
72 effecting securities transactions solely in connection with the
73 transfer of ownership of an eligible privately held company,
74 regardless of whether that broker acts on behalf of a seller or
75 buyer, through the purchase, sale, exchange, issuance,
76 repurchase, or redemption of, or a business combination
77 involving, securities or assets of the eligible privately held
78 company.

79 5. "Public shell company" means a company that at the time
80 of a transaction with an eligible privately held company:

81 a. Has any class of securities which is registered, or
82 which is required to be registered, with the United States
83 Securities and Exchange Commission under the Securities Exchange
84 Act of 1934, 15 U.S.C. ss. 78a et seq., or with the office under
85 s. 517.07, or for which the company files, or is required to
86 file, summary and periodic information, documents, and reports
87 under Section 15(d) of the Securities Exchange Act of 1934, 15
88 U.S.C. s. 78o(d);

89 b. Has nominal or no operations; and

90 c. Has nominal assets or no assets, assets consisting
91 solely of cash and cash equivalents, or assets consisting of any
92 amount of cash and cash equivalents and nominal other assets.

93 (b) Prior to the completion of any securities transaction
94 described in s. 517.061(22), a merger and acquisition broker
95 must receive written assurances from the control person with the
96 largest percentage of ownership for both the buyer and seller
97 engaged in the transaction that:



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98 a. After the transaction is completed, any person who
99 acquires securities or assets of the eligible privately held
100 company, acting alone or in concert, will be a control person of
101 the eligible privately held company or will be a control person
102 for the business conducted with the assets of the eligible
103 privately held company; and

104 b. If any person is offered securities in exchange for
105 securities or assets of the eligible privately held company,
106 such person will, before becoming legally bound to complete the
107 transaction, receive or be given reasonable access to the most
108 recent year-end financial statements of the issuer of the
109 securities offered in exchange. The most recent year-end
110 financial statements shall be customarily prepared by the
111 issuer's management in the normal course of operations. If the
112 financial statements of the issuer are audited, reviewed, or
113 compiled, the most recent year-end financial statements must
114 include any related statement by the independent certified
115 public accountant; a balance sheet dated not more than 120 days
116 before the date of the exchange offer; and information
117 pertaining to the management, business, results of operations
118 for the period covered by the foregoing financial statements,
119 and material loss contingencies of the issuer.

120 (c) A merger and acquisition broker engaged in a
121 transaction exempt under s. 517.061(22) is exempt from
122 registration under this section unless the merger and
123 acquisition broker:

124 1. Directly or indirectly, in connection with the transfer
125 of ownership of an eligible privately held company, receives,
126 holds, transmits, or has custody of the funds or securities to



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- 127 be exchanged by the parties to the transaction;
128 2. Engages on behalf of an issuer in a public offering of
129 any class of securities which is registered, or which is
130 required to be registered, with the United States Securities and
131 Exchange Commission under the Securities Exchange Act of 1934,
132 15 U.S.C. ss. 78a et seq., or with the office under s. 517.07;
133 or for which the issuer files, or is required to file, periodic
134 information, documents, and reports under Section 15(d) of the
135 Securities Exchange Act of 1934, 15 U.S.C. s. 78o(d);
136 3. Engages on behalf of any party in a transaction
137 involving a public shell company;
138 4. Is subject to a suspension or revocation of registration
139 under Section 15(b) (4) of the Securities Exchange Act of 1934,
140 15 U.S.C. s. 78o(b) (4);
141 5. Is subject to a statutory disqualification described in
142 Section 3(a) (39) of the Securities Exchange Act of 1934, 15
143 U.S.C. s. 78c(a) (39);
144 6. Is subject to a disqualification under U.S. Securities
145 and Exchange Commission Rule 506(d), 17 C.F.R. s. 230.506(d); or
146 7. Is subject to a final order described in Section
147 15(b) (4) (H) of the Securities Exchange Act of 1934, 15 U.S.C. s.
148 78o(b) (4) (H).

149 Section 3. This act shall take effect July 1, 2016.

150
151 ===== T I T L E A M E N D M E N T =====

152 And the title is amended as follows:

153 Delete everything before the enacting clause
154 and insert:

155 A bill to be entitled



461312

156 An act relating to merger and acquisition brokers;
157 amending s. 517.061, F.S.; providing an exemption from
158 certain registration requirements with the Office of
159 Financial Regulation for a specified offer or sale of
160 securities; amending s. 517.12, F.S.; defining terms;
161 requiring a merger and acquisition broker to receive
162 certain written assurances from a specified person
163 prior to the completion of specified securities
164 transactions; providing an exemption from certain
165 registration requirements with the office for a merger
166 and acquisition broker under certain circumstances;
167 specifying disqualifying conditions for the exemption;
168 providing an effective date.

By Senator Brandes

22-00001A-16

2016286__

A bill to be entitled

An act relating to mergers and acquisitions brokers; amending s. 517.061, F.S.; providing an exemption from specified registration requirements for a specified offer or sale of securities; amending s. 517.12, F.S.; defining terms; providing that a mergers and acquisitions broker is exempt from registration with the Office of Financial Regulation of the Financial Services Commission; providing exceptions to the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (22) is added to section 517.061, Florida Statutes, to read:

517.061 Exempt transactions.—Except as otherwise provided in s. 517.0611 for a transaction listed in subsection (21), the exemption for each transaction listed below is self-executing and does not require any filing with the office before claiming the exemption. Any person who claims entitlement to any of the exemptions bears the burden of proving such entitlement in any proceeding brought under this chapter. The registration provisions of s. 517.07 do not apply to any of the following transactions; however, such transactions are subject to the provisions of ss. 517.301, 517.311, and 517.312:

(22) The offer or sale of securities of an eligible privately held company, as defined in s. 517.12(22) (a), through a dealer registered under s. 517.12 or through a mergers and acquisitions broker, as defined in s. 517.12(22) (a), if the

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CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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mergers and acquisitions broker is exempt from registration as a dealer under s. 517.12(22).

Section 2. Subsection (22) is added to section 517.12, Florida Statutes, to read:

517.12 Registration of dealers, associated persons, intermediaries, and investment advisers.—

(22) (a) As used in this subsection, the term:

1. "Control person" means an individual, a partnership, a trust, or other organization that possesses the power, directly or indirectly, to direct the management or policies of a company through ownership of securities, by contract, or otherwise. A person is presumed to control a company if, with respect to a particular company, such person:

a. Is a director, a general partner, a member, or a manager of a limited liability company, or is an officer who exercises executive responsibility;

b. Has the power to vote at least 20 percent of a class of voting securities or has the power to sell or direct the sale of at least 20 percent of a class of voting securities; or

c. In the case of a partnership or limited liability company, may receive upon dissolution, or has contributed, at least 20 percent of the capital.

2. "Eligible privately held company" means a privately held company that is a going concern and meets all of the following conditions:

a. The company does not have any class of securities which is registered, or which is required to be registered, with the Securities and Exchange Commission under the Securities Exchange Act of 1934, 15 U.S.C. s. 781, or for which the company files,

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59 or is required to file, summary and periodic information,
 60 documents, and reports under the Securities Exchange Act of
 61 1934, 15 U.S.C. s. 78o(d).

62 b. In the fiscal year immediately preceding the fiscal year
 63 during which the mergers and acquisitions broker begins to
 64 provide services for the securities transaction, the company, in
 65 accordance with its historical financial accounting records, has
 66 earnings before interest, taxes, depreciation, and amortization
 67 of less than \$25 million or has gross revenues of less than \$250
 68 million. On July 1, 2016, and every 5 years thereafter, each
 69 dollar amount in this sub-subparagraph shall be adjusted by
 70 dividing the annual value of the Employment Cost Index for wages
 71 and salaries for private industry workers, or any successor
 72 index, as published by the Bureau of Labor Statistics, for the
 73 calendar year preceding the calendar year in which the
 74 adjustment is being made, by the annual value of such index or
 75 successor index for the calendar year ending December 31, 2012,
 76 and multiplying such dollar amount by the quotient obtained.
 77 Each dollar amount determined under this sub-subparagraph shall
 78 be rounded to the nearest multiple of \$100,000.

79
 80 The term includes a company in bankruptcy proceedings which
 81 solicits, engages in research and development activities, or
 82 carries out business transactions.

83 3. "Mergers and acquisitions broker" means a person that
 84 acts, directly or indirectly, as a broker in carrying out
 85 securities transactions solely in connection with the transfer
 86 of ownership of eligible privately held companies. A mergers and
 87 acquisitions broker may act on behalf of a seller or buyer

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88 through the purchase, sale, exchange, issuance, repurchase, or
 89 redemption of securities or assets of the eligible privately
 90 held company. The broker must reasonably believe that:

91 a. After the transaction is completed, any person who
 92 acquires securities or assets of the eligible privately held
 93 company, acting alone or in concert, will be the control person
 94 of the eligible privately held company or will be the control
 95 person for the business conducted with the assets of the
 96 eligible privately held company; and

97 b. If any person is offered securities in exchange for
 98 securities or assets of the eligible privately held company,
 99 such person will, before becoming legally bound to complete the
 100 transaction, receive or be given reasonable access to the most
 101 recent year-end financial statements of the issuer of the
 102 securities offered in exchange. The most recent year-end
 103 financial statements shall be customarily prepared by the
 104 issuer's management in the normal course of operations. If the
 105 financial statements of the issuer are audited, reviewed, or
 106 compiled, the most recent year-end financial statements must
 107 include any related statement by the independent accountant; a
 108 balance sheet dated not more than 120 days before the date of
 109 the offer; and information pertaining to the management,
 110 business, results of operations for the period covered by the
 111 foregoing financial statements, and material loss contingencies
 112 of the issuer.

113 4. "Public shell company" means a company, in concert with
 114 an eligible privately held company and at the time of a
 115 transaction, which:

116 a. Has any class of securities which is registered, or

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117 which is required to be registered, with the Securities and
 118 Exchange Commission under the Securities Exchange Act of 1934,
 119 15 U.S.C. s. 781, or for which the company files, or is required
 120 to file, summary and periodic information, documents, and
 121 reports under the Securities Exchange Act of 1934, 15 U.S.C. s.
 122 78o(d);

123 b. Does not have any operations or has only nominal
 124 operations; and

125 c. Does not have any assets; or has only nominal assets,
 126 assets consisting only of cash, or assets consisting of cash
 127 equivalents.

128 (b) A mergers and acquisitions broker is exempt from
 129 registration under this section unless the mergers and
 130 acquisitions broker:

131 1. Directly or indirectly, in connection with the transfer
 132 of ownership of an eligible privately held company, receives,
 133 holds, transmits, or has custody of the funds or securities to
 134 be exchanged by the parties to the transaction;

135 2. Engages on behalf of an issuer in a public offering of
 136 any class of securities which is registered, or which is
 137 required to be registered, with the Securities and Exchange
 138 Commission under the Securities Exchange Act of 1934, 15 U.S.C.
 139 s. 781;

140 3. Engages on behalf of an issuer in a public offering of
 141 any class of securities for which the issuer files, or is
 142 required to file, summary and periodic information, documents,
 143 and reports under the Securities Exchange Act of 1934, 15 U.S.C.
 144 s. 78o(d);

145 4. Engages on behalf of any party in a transaction

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146 involving a public shell company;

147 5. Is subject to a suspension or revocation of registration
 148 under the Securities Exchange Act of 1934, 15 U.S.C. s.
 149 78o(b)(4);

150 6. Is subject to a statutory disqualification described in
 151 the Securities Exchange Act of 1934, 15 U.S.C. s. 78c(a)(39);

152 7. Is subject to a disqualification under the rules adopted
 153 by the Securities and Exchange Commission under s. 926 of the
 154 Investor Protection and Securities Reform Act of 2010, Pub. L.
 155 No. 111-203; or

156 8. Is subject to a final order described in the Securities
 157 Exchange Act of 1934, 15 U.S.C. s. 78o(b)(4)(H).

158 Section 3. This act shall take effect July 1, 2016.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

12/01/15

Meeting Date

S 286

Bill Number (if applicable)

461312

Amendment Barcode (if applicable)

Topic Mergers & Acquisitions Brokers Bill

Name J. Michael Ertel

Job Title Managing Director, Legacy M&A Advisors, LLC

Address 970 Lake Carillon Parkway, Suite 300

Street

Phone 888-864-6610

St Petersburg

FL

33716

Email mertel@lmaallc.com

City

State

Zip

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Business Brokers of Florida - Tampa District

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.



The Florida Senate

Committee Agenda Request

To: Senator Lizbeth Benacquisto, Chair
Committee on Banking and Insurance

Subject: Committee Agenda Request

Date: November 4, 2015

I respectfully request that **Senate Bill #286**, relating to **Mergers and Acquisitions Brokers**, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

A handwritten signature in black ink, appearing to read "Jeff Brandes", with a long horizontal flourish extending to the right.

Senator Jeff Brandes
Florida Senate, District 22

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 Banking and Insurance

BILL: CS/CS/SB 540

INTRODUCER: Banking and Insurance Committee; Judiciary Committee; and Senator Hukill

SUBJECT: Estates

DATE: December 1, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Caldwell	Cibula	JU	Fav/CS
2.	Billmeier	Knudson	BI	Fav/CS
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 540 specifies when a trustee may use trust assets to pay attorney fees and costs and establishes a procedure when a trustee seeks to use trust assets to pay attorney fees and costs incurred when defending a breach of trust claim. The bill also provides that Florida law determines the validity and effect of the disposition of real property located in the state. Lastly, the bill also provides criteria for the nonjudicial modification of an irrevocable trust.

II. Present Situation:

The Florida Trust Code¹ provides the duties and powers of the trustee, including the duty of loyalty.² A trustee is required to administer a trust in good faith, in accordance with the terms and purposes of the trust, in accordance with the Florida Trust Code, and solely in the interests of the beneficiaries of the trust.³

¹ Chapter 736, F.S.

² Section 736.0802, F.S.

³ Sections 736.0801 and 736.0802, F.S.

Payment of Costs and Attorney Fees from Assets of a Trust

A trustee may pay costs and attorney fees that have incurred in any proceeding, including a claim or defense based upon breach of trust,⁴ from the assets of the trust without the approval of any person and without court authorization unless the court orders otherwise.⁵

Currently, if a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee must provide written notice to each qualified beneficiary of the trust whose share of the trust may be affected by the intention to pay costs or attorney fees before making such payment. The written notice must be delivered by a method requiring a signed receipt and inform each qualified beneficiary of the right to apply to the court for an order prohibiting the trustee from paying attorney fees or costs from trust assets. A trustee who has been served the motion and pays attorney fees or costs, and the attorney who receives such fees or costs, before an order on the motion is issued by the court, are subject to certain remedies.⁶

A party must obtain a court order to prohibit a trustee from paying costs or attorney fees from trust assets if a claim or defense based upon breach of trust is made against a trustee in a proceeding. To obtain such court order, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence. The court may defer ruling on the motion to allow for discovery to be taken by the parties. The court is required to enter an order prohibiting the payment of further attorney fees and costs from the assets of the trust and order attorney fees or costs previously paid from assets of the trust to be refunded if it finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court otherwise finds good cause. Such order does not limit a trustee's right to seek an order permitting the payment of some or all of the attorney fees or costs incurred in the proceeding from trust assets, including any fees required to be refunded, after the claim or defense is finally determined by the court.⁷

If a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney fees and costs, the trustee may pay costs or attorney fees incurred in the proceeding from the assets of the trust without further court authorization.⁸

If the court orders a refund, it may enter such sanctions as are appropriate if a refund is not made as directed by the court, including but not limited to, striking defenses or pleadings filed by the trustee.⁹

⁴ Section 736.0802(10)(b), F.S.

⁵ Section 736.0802(10), F.S.

⁶ Section 736.0802(10)(a), F.S. See paragraphs (b) and (c) for remedies.

⁷ Section 736.0802(10)(b), F.S.

⁸ Section 736.0802(10)(b), F.S.

⁹ Section 736.0802(10)(c), F.S.

The court's power to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting, or after conclusion of the litigation is not limited.¹⁰

A trustee is not required to provide written notice if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination of the court that the trustee committed a breach of trust.¹¹

According to the Real Property Probate and Trust Law Section, "the current statute lacks clarity, and thus fails to provide direction to lawyers and the court" on certain issues.¹² The paper identifies the following issues stating s. 736.0802(10), F.S. [lacks clarity regarding]:

- The circumstance under which the limitations imposed by the statute are triggered.
- Which categories of attorney's fees and costs are subject to the limitations.
- The circumstances under which the trustee must serve notice of an intention to pay attorney's fees and costs from trust assets and the consequences, if any, of paying such attorney's fees and costs from trust assets prior to serving notice.
- [Mandates that literally and unconditionally] require qualified beneficiaries to seek a court order to prohibit a trustee from using trust assets to pay attorney's fees and costs even when a trustee has no intention of doing so.
- Whether a trustee may use trust assets to pay its attorney's fees and costs upon a final determination in its favor by the trial court or whether the trustee must wait until a final determination by the appellate court.
- What type of showing is required to preclude a trustee from using trust assets to pay its attorney's fees and costs, and regarding the type of evidence that may be used to make or to rebut such a showing.¹³

Section 736.0816, F.S., provides for the specific powers of a trustee and allows a trustee to employ certain persons, including attorneys and pay reasonable compensation and costs incurred in connection with such employment from assets of the trust.

Section 736.1007, F.S., provides for a trustee's attorney fees if a trustee of a revocable trust retains an attorney to render legal services in connection with the initial administration of the trust. The trustee may pay the attorney without a court order.

Nonjudicial Modification of an Irrevocable Trust

After the settlor's death, a trust may be modified at any time pursuant to s. 736.04113(2), F.S., if all the trustees and qualified beneficiaries agree unanimously.¹⁴ Trusts modified pursuant to s. 736.0412, F.S., may be modified notwithstanding a spendthrift clause or a provision in the trust instrument that prohibits amendment or revocation of the trust. A beneficiary whose interest

¹⁰ Section 736.0802(10)(d), F.S.

¹¹ Section 736.0802(10)(e), F.S.

¹² Real Property Probate and Trust Law Section of The Florida Bar, *White Paper Regarding a Trustee's Use of Trust Assets to Pay Attorney's Fees and Costs in Connection with Claim or Defense of Breach of Trust*, (on file with the Senate Committee on Judiciary).

¹³ *Id.*

¹⁴ Section 736.0412(1), F.S.

is represented by another person under Part III of chapter 736, F.S., is bound by an agreement to modify a trust pursuant to s. 736.0412, F.S. However, a nonjudicial modification of an irrevocable trust does not apply to:

- Any trust created before January 1, 2001.
- Any trust created after December 31, 2000, if under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities,¹⁵ unless the terms of the trust expressly authorize nonjudicial modification.
- Any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.

A revocable trust is treated as created when the right of revocation terminates. The statutory provisions are in addition to and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.¹⁶

¹⁵ Section 689.225(2), F.S., relating to the rule against perpetuities provides:

STATEMENT OF THE RULE.—

(a) A nonvested property interest in real or personal property is invalid unless:

1. When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
2. The interest either vests or terminates within 90 years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

1. When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or
2. The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

1. When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or
2. The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under subparagraph (a)1., subparagraph (b)1., or subparagraph (c)1., the possibility that a child will be born to an individual after the individual's death is disregarded.

(e) If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of:

1. The expiration of a period of time not exceeding 21 years after the death of a specified life or the survivor of specified lives, or upon the death of a specified life or the death of the survivor of specified lives in being at the creation of the trust or other property arrangement, or
2. The expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

(f) As to any trust created after December 31, 2000, this section shall apply to a nonvested property interest or power of appointment contained in a trust by substituting 360 years in place of "90 years" in each place such term appears in this section unless the terms of the trust require that all beneficial interests in the trust vest or terminate within a lesser period.

¹⁶ Section 736.0412(6), F.S.

Assets of Nondomiciliaries

Florida law determines the validity and effect of a testamentary disposition of tangible or intangible personal property or real property in this state.¹⁷

III. Effect of Proposed Changes:

Payment of Costs and Attorney Fees from Assets of a Trust

Section 5 of the bill amends s. 736.0802(10), F.S., relating to a trustee's duty of loyalty and the payment of costs and attorney fees from assets of a trust. According to the Real Property Probate and Trust Law Section, the introduction to s. 736.0802(10), F.S., is rewritten to specify that the authority granted to a trustee under ss. 736.0816(20) and 736.1007(1), F.S., to pay attorney fees and costs from assets of the trust remains the general rule, while the provisions of this section are the exception to that rule.¹⁸

Paragraph (a) defines the term "pleading" to mean the same as defined in rule 1.100 of the Florida Rules of Civil Procedure. Generally, these are claims of relief. Paragraph (b) authorizes a trustee to pay attorney fees or costs in connection with a claim or defense of breach of trust made in a filed pleading without the approval of any person and without court authorization. However, the trustee must first serve a written notice of intent upon each qualified beneficiary of the trust whose share of the trust may be affected by the payment before the payment is made. The written notice does not need to be served upon a qualified beneficiary whose identity or location is unknown to, and not reasonably ascertainable by, the trustee. According to the Real Property Probate and Trust Law Section, the clarification is the specific reference to attorney fees and costs incurred in connection with a claim or defense of breach of trust that is set forth in a filed pleading and not other instances where attorney fees or costs are incurred such as ordinary trust administration or other judicial proceedings not alleging breach of trust or allegations of breach of trust that have not been set forth in a filed pleading.¹⁹

Paragraph (c) provides for the content of the written notice of intent and the manner of service. The written notice must identify the judicial proceeding in which the claim or defense of breach of trust has been made in a filed pleading and inform the person served of the right to apply to the court for an order prohibiting the trustee from using trust assets to pay attorney fees or costs or compelling the return of the attorney fees and costs already paid to the trust. The written notice of intent must be served by any commercial delivery service or form of mail requiring a signed receipt, the manner provided in the Florida Rules of Civil Procedure for service of process;²⁰ or if the court has already acquired jurisdiction over any party in that judicial

¹⁷ Section 731.106(2), F.S.

¹⁸ Real Property Probate and Trust Law Section of The Florida Bar, *supra note 12*.

¹⁹ *Id.*

²⁰ Rule 1.070 of the Florida Rules of Civil Procedure states in part:

(a) Summons; Issuance. Upon the commencement of the action, summons or other process authorized by law shall be issued forthwith by the clerk or judge under the clerk's or the judge's signature and the seal of the court and delivered for service without praecipe.

(b) Service; By Whom Made. Service of process may be made by an officer authorized by law to serve process, but the court may appoint any competent person not interested in the action to serve the process. When so appointed, the person serving process shall make proof of service by affidavit promptly and in any

proceeding, in the manner provided for service of pleading and other documents by the Florida Rules of Civil Procedure.²¹

Paragraph (d) provides that in the event a trustee pays attorney fees and costs from trust assets before serving a notice of intent, any qualified beneficiary whose share of the trust may have been affected by such payment, who is not otherwise barred pursuant to the provisions of s. 736.1008, F.S., (that limits certain proceedings against a trustee), and who files a motion is entitled to an order compelling the return of such payment, together with statutory interest, to the trust. The court must award attorney fees and costs incurred in connection with the motion to compel as provided in s. 736.1004, F.S.

Paragraph (e) sets forth the process the court must follow. A qualified beneficiary must file a motion with the court and must have a share of the trust that is affected by the use of trust assets to pay attorney fees or costs and may not be barred under s. 736.1008, F.S. The court may prohibit the trustee from using trust assets to make a payment and, if a payment has been made from trust assets after service of a notice of intent, the court may enter an order compelling the return of the attorney fees and costs to the trust, with interest. If a hearing is held on a qualified beneficiary's motion, the court must deny the motion unless it finds a reasonable basis to conclude that there has been a breach of trust. However, the court may deny the motion if it finds good cause to do so. At the hearing, the movant may show that a reasonable basis exists that there has been a breach of trust, and the trustee may rebut such showing, by presenting affidavits, answers to interrogatories, admissions, depositions, and any evidence otherwise admissible under the Florida Evidence Code. According to the Real Property Probate and Trust Section, the types of evidence permitted are "summary judgement evidence" and also includes live witness testimony.²² This language clarifies that the qualified beneficiary needs to file a motion only if he or she wants to prohibit or compel the return of the payments and clarifies that the court may not prohibit or compel the return of such payments in the absence of making the requisite finding.²³

Paragraph (f) provides remedies. If a trustee fails to comply with a court order prohibiting the use of trust assets to pay attorney fees or costs or compelling such payment be refunded to the trust, the court may impose such remedies or sanctions as the court deems appropriate, including, without limitation, striking the defenses or pleadings filed by the trustee.

Paragraph (g) addresses the withdrawal, dismissal, or judicial resolution of a claim or defense of breach of trust. A trustee may use trust assets to pay attorney fees and costs without service of a notice of intent or order of the court if a claim or defense of breach of trust is withdrawn, dismissed, or judicially resolved in the trial court without a determination that the trustee has committed a breach of trust, notwithstanding an order prohibiting the use of trust assets to pay

event within the time during which the person served must respond to the process. Failure to make proof of service shall not affect the validity of the service. When any process is returned not executed or returned improperly executed for any defendant, the party causing its issuance shall be entitled to such additional process against the unserved party as is required to effect service.

²¹ Rule 1.080(a) of the Florida Rules of Civil Procedure states in part: "Every pleading subsequent to the initial pleading, all orders, and every other document filed in the action must be served in conformity with the requirements of Florida Rule of Judicial Administration 2.516."

²² Real Property Probate and Trust Law Section of The Florida Bar, *supra* note 12.

²³ *Id.*

attorney fees and costs or compelling the return of such attorney fees and costs. The payment of attorney fees and costs from trust assets include those payments that the trustee may have returned to the trust pursuant to court order.

Paragraph (h) provides that the statute does not operate to limit the right of any interested person to challenge or object to the payment of compensation or costs from the trust at any time, to seek review of compensation under s. 736.0206, F.S., or to seek remedies for breach of trust under s. 736.1001, F.S.

Sections 6 and 7 amend ss. 736.0816 and 736.1007, F.S., to make conforming references and alerts attorneys and the courts that the authority of a trustee to use trust assets to pay the trustee's attorney fees and costs are subject to the limitations of s. 736.0802(10), F.S.

Nonjudicial Modification of an Irrevocable Trust

Section 4 amends s. 736.0412(4), F.S., by adding a new paragraph (c) providing that a trust created on or after July 1, 2016, may not be modified without court approval during the first 90 years after it is created, unless the terms of the trust expressly authorize nonjudicial modification. Paragraph (b) is amended to limit its application to trusts created after December 31, 2000, and before July 1, 2016.

Assets of Nondomiciliaries

Section 1 creates s. 731.1055, F.S., to provide for the validity and effect of a disposition of all real property located in Florida. Such disposition, whether intestate or testate, is to be determined by Florida law.

Section 2 amends s. 731.106(2), F.S., to remove real property from the provisions addressing the disposition of property, both real and personal, in a will of a nonresident decedent. The disposition of real property is addressed separately in section 1.

Effective Date

Section 8 provides that the act takes effect July 1, 2016.

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:

Individuals may be less likely to incur attorney fees litigating statutes that were previously unclear.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 731.106, 736.0105, 736.0412, 736.0802, 736.0816, and 736.1007. The bill creates section 731.1055, F.S.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Banking and Insurance on December 1, 2014:

The committee substitute corrects an erroneous reference to the Florida Rules of Civil Procedure.

CS by Judiciary on November 17, 2015:

The committee substitute creates a new section providing that the validity and effect of a disposition of all real property located in Florida, whether intestate or testate, is to be determined by Florida law. The bill also removes the qualification “under this section” from s. 736.0412(4)(c), F.S., in the underlying bill. The phrase related to a provision authorizing the nonjudicial modification of a trust if permitted by the terms of the trust.

B. Amendments:

None.



698194

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
12/01/2015	.	
	.	
	.	
	.	

The Committee on Banking and Insurance (Hukill) recommended the following:

Senate Amendment

Delete line 119
and insert:
pleading as defined in Rule 1.100 of the Florida Rules of Civil

By the Committee on Judiciary; and Senator Hukill

590-01330-16

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1 A bill to be entitled
 2 An act relating to estates; creating s. 731.1055,
 3 F.S.; providing that the validity and the effect of a
 4 specified disposition of real property be determined
 5 by Florida law; amending ss. 731.106 and 736.0105,
 6 F.S.; conforming provisions to changes made by the
 7 act, amending s. 736.0412, F.S.; providing
 8 applicability for nonjudicial modification of
 9 irrevocable trust; amending s. 736.0802, F.S.;
 10 defining the term "pleading"; authorizing a trustee to
 11 pay attorney fees and costs from the assets of the
 12 trust without specified approval or court
 13 authorization in certain circumstances; requiring the
 14 trustee to serve a written notice of intent upon each
 15 qualified beneficiary of the trust before the payment
 16 is made; requiring the notice of intent to contain
 17 specified information and to be served in a specified
 18 manner; providing that specified qualified
 19 beneficiaries may be entitled to an order compelling
 20 the refund of a specified payment to the trust;
 21 requiring the court to award specified attorney fees
 22 and costs in certain circumstances; authorizing the
 23 court to prohibit a trustee from using trust assets to
 24 make a specified payment; authorizing the court to
 25 enter an order compelling the return of specified
 26 attorney fees and costs to the trust with interest at
 27 the statutory rate; requiring the court to deny a
 28 specified motion unless the court finds a reasonable
 29 basis to conclude that there has been a breach of the

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30 trust; authorizing a court to deny the motion if it
 31 finds good cause to do so; authorizing the movant to
 32 show that a reasonable basis exists, and a trustee to
 33 rebut the showing, through specified means;
 34 authorizing the court to impose such remedies or
 35 sanctions as it deems appropriate; providing that a
 36 trustee is authorized to use trust assets in a
 37 specified manner if a claim or defense of breach of
 38 trust is withdrawn, dismissed, or judicially resolved
 39 in a trial court without a determination that the
 40 trustee has committed a breach of trust; providing
 41 that specified proceedings, remedies, and rights are
 42 not limited; amending ss. 736.0816 and 736.1007, F.S.;
 43 conforming provisions to changes made by the act;
 44 providing an effective date.
 45
 46 Be It Enacted by the Legislature of the State of Florida:
 47
 48 Section 1. Section 731.1055, Florida Statutes, is created
 49 to read:
 50 731.1055 Disposition of real property.-The validity and
 51 effect of a disposition, whether intestate or testate, of real
 52 property in this state shall be determined by Florida law.
 53 Section 2. Subsection (2) of section 731.106, Florida
 54 Statutes, is amended to read:
 55 731.106 Assets of nondomiciliaries.-
 56 (2) When a nonresident decedent, whether or not a citizen
 57 of the United States, provides by will that the testamentary
 58 disposition of tangible or intangible personal property having a

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59 situs within this state, ~~or of real property in this state,~~
 60 shall be construed and regulated by the laws of this state, the
 61 validity and effect of the dispositions shall be determined by
 62 Florida law. The court may, and in the case of a decedent who
 63 was at the time of death a resident of a foreign country the
 64 court shall, direct the personal representative appointed in
 65 this state to make distribution directly to those designated by
 66 the decedent's will as beneficiaries of the tangible or
 67 intangible property or to the persons entitled to receive the
 68 decedent's personal estate under the laws of the decedent's
 69 domicile.

70 Section 3. Paragraph (k) of subsection (2) of section
 71 736.0105, Florida Statutes, is amended to read:

72 736.0105 Default and mandatory rules.—

73 (2) The terms of a trust prevail over any provision of this
 74 code except:

75 (k) The ability to modify a trust under s. 736.0412, except
 76 as provided in s. 736.0412(4) (b) or (c).

77 Section 4. Section 736.0412, Florida Statutes, is amended
 78 to read:

79 736.0412 Nonjudicial modification of irrevocable trust.—

80 (1) After the settlor's death, a trust may be modified at
 81 any time as provided in s. 736.04113(2) upon the unanimous
 82 agreement of the trustee and all qualified beneficiaries.

83 (2) Modification of a trust as authorized in this section
 84 is not prohibited by a spendthrift clause or by a provision in
 85 the trust instrument that prohibits amendment or revocation of
 86 the trust.

87 (3) An agreement to modify a trust under this section is

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88 binding on a beneficiary whose interest is represented by
 89 another person under part III of this code.

90 (4) This section ~~does shall~~ not apply to any trust:

91 (a) ~~Any trust~~ Created prior to January 1, 2001.

92 (b) ~~Any trust~~ Created after December 31, 2000, and before
 93 July 1, 2016, if, under the terms of the trust, all beneficial
 94 interests in the trust must vest or terminate within the period
 95 prescribed by the rule against perpetuities in s. 689.225(2),
 96 notwithstanding s. 689.225(2) (f), unless the terms of the trust
 97 expressly authorize nonjudicial modification.

98 (c) Created on or after July 1, 2016, during the first 90
 99 years after it is created, unless the terms of the trust
 100 expressly authorize nonjudicial modification.

101 (d) ~~Any trust~~ For which a charitable deduction is allowed
 102 or allowable under the Internal Revenue Code until the
 103 termination of all charitable interests in the trust.

104 (5) For purposes of subsection (4), a revocable trust shall
 105 be treated as created when the right of revocation terminates.

106 (6) The provisions of this section are in addition to, and
 107 not in derogation of, rights under the common law to modify,
 108 amend, terminate, or revoke trusts.

109 Section 5. Subsection (10) of section 736.0802, Florida
 110 Statutes, is amended to read:

111 736.0802 Duty of loyalty.—

112 (10) Unless otherwise provided in this subsection, payment
 113 of costs or attorney ~~attorney's~~ fees incurred in any proceeding
 114 ~~from the assets of the trust~~ may be made by a the trustee from
 115 assets of the trust without the approval of any person and
 116 without court authorization, ~~unless the court orders otherwise~~

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117 as provided in ss. 736.0816(20) and 736.1007(1) ~~paragraph (b)~~.

118 (a) As used in this subsection, the term "pleading" means a
 119 pleading as defined in Rule 1.110 of the Florida Rules of Civil
 120 Procedure.

121 (b) If a trustee incurs attorney fees or costs in
 122 connection with a claim or defense of breach of trust which is
 123 made in a filed pleading, the trustee may pay such attorney fees
 124 or costs from trust assets without the approval of any person
 125 and without any court authorization. However, the trustee must
 126 serve a written notice of intent upon each qualified beneficiary
 127 of the trust whose share of the trust may be affected by the
 128 payment before such payment is made. The notice of intent does
 129 not need to be served upon a qualified beneficiary whose
 130 identity or location is unknown to, and not reasonably
 131 ascertainable by, the trustee.

132 (c) The notice of intent must identify the judicial
 133 proceeding in which the claim or defense of breach of trust has
 134 been made in a filed pleading and must inform the person served
 135 of his or her right under paragraph (e) to apply to the court
 136 for an order prohibiting the trustee from using trust assets to
 137 pay attorney fees or costs as provided in paragraph (b) or
 138 compelling the return of such attorney fees and costs to the
 139 trust. The notice of intent must be served by any commercial
 140 delivery service or form of mail requiring a signed receipt; the
 141 manner provided in the Florida Rules of Civil Procedure for
 142 service of process; or, as to any party over whom the court has
 143 already acquired jurisdiction in that judicial proceeding, in
 144 the manner provided for service of pleadings and other documents
 145 by the Florida Rules of Civil Procedure.

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146 (d) If a trustee has used trust assets to pay attorney fees
 147 or costs described in paragraph (b) before service of a notice
 148 of intent, any qualified beneficiary who is not barred under s.
 149 736.1008 and whose share of the trust may have been affected by
 150 such payment is entitled, upon the filing of a motion to compel
 151 the return of such payment to the trust, to an order compelling
 152 the return of such payment, with interest at the statutory rate.
 153 The court shall award attorney fees and costs incurred in
 154 connection with the motion to compel as provided in s. 736.1004.

155 (e) Upon the motion of any qualified beneficiary who is not
 156 barred under s. 736.1008 and whose share of the trust may be
 157 affected by the use of trust assets to pay attorney fees or
 158 costs as provided in paragraph (b), the court may prohibit the
 159 trustee from using trust assets to make such payment and, if
 160 such payment has been made from trust assets after service of a
 161 notice of intent, the court may enter an order compelling the
 162 return of the attorney fees and costs to the trust, with
 163 interest at the statutory rate. In connection with any hearing
 164 on a motion brought under this paragraph:

165 1. The court shall deny the motion unless it finds a
 166 reasonable basis to conclude that there has been a breach of
 167 trust. If the court finds there is a reasonable basis to
 168 conclude there has been a breach of trust, the court may still
 169 deny the motion if it finds good cause to do so.

170 2. The movant may show that such reasonable basis exists,
 171 and the trustee may rebut any such showing by presenting
 172 affidavits, answers to interrogatories, admissions, depositions,
 173 and any evidence otherwise admissible under the Florida Evidence
 174 Code.

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175 (f) If a trustee fails to comply with an order of the court
 176 prohibiting the use of trust assets to pay attorney fees or
 177 costs described in paragraph (b) or fails to comply with an
 178 order compelling that such payment be refunded to the trust, the
 179 court may impose such remedies or sanctions as the court deems
 180 appropriate, including, without limitation, striking the
 181 defenses or pleadings filed by the trustee.

182 (g) Notwithstanding the entry of an order prohibiting the
 183 use of trust assets to pay attorney fees and costs as provided
 184 in paragraph (b), or compelling the return of such attorney fees
 185 or costs, if a claim or defense of breach of trust is withdrawn,
 186 dismissed, or judicially resolved in the trial court without a
 187 determination that the trustee has committed a breach of trust,
 188 the trustee is authorized to use trust assets to pay attorney
 189 fees and costs as provided in paragraph (b) and may do so
 190 without service of a notice of intent or order of the court. The
 191 attorney fees and costs may include fees and costs that were
 192 refunded to the trust pursuant to an order of the court.

193 (h) This subsection does not limit proceedings under s.
 194 736.0206 or remedies for breach of trust under s. 736.1001, or
 195 the right of any interested person to challenge or object to the
 196 payment of compensation or costs from the trust.

197 ~~(a) If a claim or defense based upon a breach of trust is~~
 198 ~~made against a trustee in a proceeding, the trustee shall~~
 199 ~~provide written notice to each qualified beneficiary of the~~
 200 ~~trust whose share of the trust may be affected by the payment of~~
 201 ~~attorney's fees and costs of the intention to pay costs or~~
 202 ~~attorney's fees incurred in the proceeding from the trust prior~~
 203 ~~to making payment. The written notice shall be delivered by~~

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204 ~~sending a copy by any commercial delivery service requiring a~~
 205 ~~signed receipt, by any form of mail requiring a signed receipt,~~
 206 ~~or as provided in the Florida Rules of Civil Procedure for~~
 207 ~~service of process. The written notice shall inform each~~
 208 ~~qualified beneficiary of the trust whose share of the trust may~~
 209 ~~be affected by the payment of attorney's fees and costs of the~~
 210 ~~right to apply to the court for an order prohibiting the trustee~~
 211 ~~from paying attorney's fees or costs from trust assets. If a~~
 212 ~~trustee is served with a motion for an order prohibiting the~~
 213 ~~trustee from paying attorney's fees or costs in the proceeding~~
 214 ~~and the trustee pays attorney's fees or costs before an order is~~
 215 ~~entered on the motion, the trustee and the trustee's attorneys~~
 216 ~~who have been paid attorney's fees or costs from trust assets to~~
 217 ~~defend against the claim or defense are subject to the remedies~~
 218 ~~in paragraphs (b) and (c).~~

219 ~~(b) If a claim or defense based upon breach of trust is~~
 220 ~~made against a trustee in a proceeding, a party must obtain a~~
 221 ~~court order to prohibit the trustee from paying costs or~~
 222 ~~attorney's fees from trust assets. To obtain an order~~
 223 ~~prohibiting payment of costs or attorney's fees from trust~~
 224 ~~assets, a party must make a reasonable showing by evidence in~~
 225 ~~the record or by proffering evidence that provides a reasonable~~
 226 ~~basis for a court to conclude that there has been a breach of~~
 227 ~~trust. The trustee may proffer evidence to rebut the evidence~~
 228 ~~submitted by a party. The court in its discretion may defer~~
 229 ~~ruling on the motion, pending discovery to be taken by the~~
 230 ~~parties. If the court finds that there is a reasonable basis to~~
 231 ~~conclude that there has been a breach of trust, unless the court~~
 232 ~~finds good cause, the court shall enter an order prohibiting the~~

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233 ~~payment of further attorney's fees and costs from the assets of~~
 234 ~~the trust and shall order attorney's fees or costs previously~~
 235 ~~paid from assets of the trust to be refunded. An order entered~~
 236 ~~under this paragraph shall not limit a trustee's right to seek~~
 237 ~~an order permitting the payment of some or all of the attorney's~~
 238 ~~fees or costs incurred in the proceeding from trust assets,~~
 239 ~~including any fees required to be refunded, after the claim or~~
 240 ~~defense is finally determined by the court. If a claim or~~
 241 ~~defense based upon a breach of trust is withdrawn, dismissed, or~~
 242 ~~resolved without a determination by the court that the trustee~~
 243 ~~committed a breach of trust after the entry of an order~~
 244 ~~prohibiting payment of attorney's fees and costs pursuant to~~
 245 ~~this paragraph, the trustee may pay costs or attorney's fees~~
 246 ~~incurred in the proceeding from the assets of the trust without~~
 247 ~~further court authorization.~~

248 ~~(c) If the court orders a refund under paragraph (b), the~~
 249 ~~court may enter such sanctions as are appropriate if a refund is~~
 250 ~~not made as directed by the court, including, but not limited~~
 251 ~~to, striking defenses or pleadings filed by the trustee. Nothing~~
 252 ~~in this subsection limits other remedies and sanctions the court~~
 253 ~~may employ for the failure to refund timely.~~

254 ~~(d) Nothing in this subsection limits the power of the~~
 255 ~~court to review fees and costs or the right of any interested~~
 256 ~~persons to challenge fees and costs after payment, after an~~
 257 ~~accounting, or after conclusion of the litigation.~~

258 ~~(e) Notice under paragraph (a) is not required if the~~
 259 ~~action or defense is later withdrawn or dismissed by the party~~
 260 ~~that is alleging a breach of trust or resolved without a~~
 261 ~~determination by the court that the trustee has committed a~~

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262 ~~breach of trust.~~

263 Section 6. Subsection (20) of section 736.0816, Florida
 264 Statutes, is amended to read:

265 736.0816 Specific powers of trustee.—Except as limited or
 266 restricted by this code, a trustee may:

267 (20) Employ persons, including, but not limited to,
 268 attorneys, accountants, investment advisers, or agents, even if
 269 they are the trustee, an affiliate of the trustee, or otherwise
 270 associated with the trustee, to advise or assist the trustee in
 271 the exercise of any of the trustee's powers and pay reasonable
 272 compensation and costs incurred in connection with such
 273 employment from the assets of the trust, subject to s.
 274 736.0802(10) with respect to attorney fees and costs, and act
 275 without independent investigation on the recommendations of such
 276 persons.

277 Section 7. Subsection (1) of section 736.1007, Florida
 278 Statutes, is amended to read:

279 736.1007 Trustee's attorney's fees.—

280 (1) If the trustee of a revocable trust retains an attorney
 281 to render legal services in connection with the initial
 282 administration of the trust, the attorney is entitled to
 283 reasonable compensation for those legal services, payable from
 284 the assets of the trust, subject to s. 736.0802(10), without
 285 court order. The trustee and the attorney may agree to
 286 compensation that is determined in a manner or amount other than
 287 the manner or amount provided in this section. The agreement is
 288 not binding on a person who bears the impact of the compensation
 289 unless that person is a party to or otherwise consents to be
 290 bound by the agreement. The agreement may provide that the

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291 trustee is not individually liable for the attorney ~~attorney's~~
292 fees and costs.

293 Section 8. This act shall take effect July 1, 2016.



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:

Finance and Tax, *Chair*
Communications, Energy, and Public Utilities,
Vice Chair
Appropriations
Appropriations Subcommittee on Transportation,
Tourism, and Economic Development
Banking and Insurance
Fiscal Policy

JOINT COMMITTEE:

Joint Committee on Public Counsel Oversight

SENATOR DOROTHY L. HUKILL
8th District

November 18, 2015

The Honorable Lizbeth Benacquisto
320 Knott Building
404 S. Monroe Street
Tallahassee, FL 32399

Re: Senate Bill 540 – Estates

Dear Chairwoman Benacquisto:

Senate Bill 540, relating Estates has been referred to the Banking and Insurance Committee. I am requesting your consideration on placing SB 540 on your next agenda. Should you need any additional information please do not hesitate to contact my office.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink that reads "Dorothy L. Hukill".

Dorothy L. Hukill, District 8

cc: James Knudson, Staff Director of the Banking and Insurance Committee
Sheri Green, Administrative Assistant of the Banking and Insurance Committee

REPLY TO:

- 209 Dunlawton Avenue, Unit 17, Port Orange, Florida 32127 (386) 304-7630 FAX: (888) 263-3818
- Ocala City Hall, 110 SE Watula Avenue, 3rd Floor, Ocala, Florida 34471 (352) 694-0160

Senate's Website: www.flsenate.gov

ANDY GARDINER
President of the Senate

GARRETT RICHTER
President Pro Tempore

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

12-1-15

Meeting Date

SB 540

Bill Number (if applicable)

Topic Estates

Amendment Barcode (if applicable)

Name Kenneth Pratt

Job Title Senior VP of Govt. Affairs

Address 1001 Thomasville Rd, Ste 201

Phone 850-509-8020

Street

Tallahassee

FL

32303

City

State

Zip

Email kpratt@floridabankers.com

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Florida Bankers Association

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

12.1.15

Meeting Date

SB 540

Bill Number (if applicable)

Topic Estates

Amendment Barcode (if applicable)

Name Martha Edenfield

Job Title Attorney

Address 215 So. Monroe Street # 815
Street

Phone 850.999.4100

Tallahassee
City

FL
State

32301
Zip

Email m.edenfield@deannread.com

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing The Real Property, Probate + Trust LAW Section of the Florida Bar

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

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 Banking and Insurance

BILL: CS/SB 458

INTRODUCER: Committee on Banking and Insurance and Senator Richter

SUBJECT: Transfers of Structured Settlement Payment Rights

DATE: December 1, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Maida</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Matiyow</u>	<u>Knudson</u>	<u>BI</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 458 revises the law governing the sale or transfer of the right to receive payments under a structured settlement agreement. A structured settlement agreement is an arrangement for the periodic payment of damages for personal injuries in connection with a tort claim or personal injury lawsuit. The purpose of existing law is to protect the recipients of structured settlements, and the law provides procedures for courts to approve the transfer of the right to receive payments under a structured settlement agreement.

The changes made by the bill:

- Specify that the court having jurisdiction over an application to transfer structured settlement payment rights is the court where the payee resides or, if the payee does not reside in this state, the court that approved the structured settlement agreement or the court in which a claim was pending which led to the structured settlement agreement.
- Require an applicant seeking to receive the payments under a structured settlement agreement to provide additional information about the payee in its application to the court.
- Require the payee to appear in court for the hearing on the application unless good cause exists to excuse the payee's attendance.
- Grant immunity to structured settlement obligors and annuity issuers that act in reliance on court orders approving the transfer of a structured settlement agreement.
- Make structured settlement obligors and annuity issuers immune from liability for a transferee's failure to provide required disclosures to the payee or to provide all the required information in its application to the court.

- Allow the transfer of structured settlement payments notwithstanding the terms of a structured settlement agreement prohibiting those transfers.

II. Present Situation:

A structured settlement is an agreement for the periodic payment of damages for personal injuries, the payments of which are established by a settlement or judgment in resolution of a tort claim.¹ This arrangement typically involves one party paying a lump-sum premium to an insurance company to purchase an annuity in the name of the injured victim (the payee). Once the annuity is purchased, the insurance company begins to make periodic payments to the payee for a negotiated period of time. In addition to the long-term financial stability this may provide the payee, structured settlement payments confer tax benefits on their beneficiaries² and annuity issuers.³

Instead of making the payments itself, the insurance company may instead decide to assign its payment obligations to a structured settlement company. In exchange for accepting its new payment obligations, the structured settlement company typically receives from the insurance company a lump-sum payment equivalent to the present value of all future payments owed to the payee.⁴ In order to obtain the necessary liquidity to make its newly-obligated periodic payments, the structured settlement company may use this lump-sum to purchase an annuity from a life insurance company.⁵

The payee's financial circumstances may change. For example, the payee's periodic payments may be insufficient to pay for an immediate, large financial need. As such, instead of receiving payments under a structured settlement plan, the payee may wish to transfer his or her rights to payments to another organization—known as a transferee—in exchange for a lump sum.⁶ In 2001, the Legislature created s. 626.99296, F.S., to protect recipients of structured settlements during the transfer process.⁷ Fundamentally, the statute requires such transfers to receive prior court approval.⁸ This approval must be conditioned upon statutorily-enumerated factors, including an explicit finding by the court that the transfer is “in the best interests of the” individual opting to sell his or her settlement rights in order to receive a lump sum.⁹ Under existing law, an entity contracting to receive structured settlement rights must file an application with the court at least 20 days before the application hearing¹⁰ and make a series of disclosures to

¹ See s. 626.99296(m), F.S.

² 26 U.S.C. § 104 (providing that, for taxation purposes, gross income does not include the amount of damages received on account of personal physical injuries or physical sickness); s. 626.99296(2)(j), F.S. (defining “payee” as an individual receiving tax-free damage payments under a structured settlement).

³ See 26 U.S.C. § 130; *First Providian, LLC v. Evans*, 852 So. 2d 908 (Fla. 4th DCA 2003).

⁴ Gregg D. Polksy and Brant J. Hellwig, *Taxing Structured Settlements*, 51 B.C. L. REV. 39, 41-2 (January 2010).

⁵ *Id.*

⁶ See, e.g., *First Providian, LLC v. Evans*, 852 So. 2d 908 (Fla. 4th DCA 2003).

⁷ Section 626.99296, F.S.

⁸ *Id.* at subsection (3); *Rapid Settlements, Ltd. v. Dickerson*, 941 So. 2d 1275, 1276-77 (Fla. 4th DCA 2006) (affirming lower court decision to deny petition, noting that “[t]ransfers of structured settlement rights are regulated by statute and court approval is required before a transfer may go forward.”).

⁹ Section 626.99296(3), F.S.

¹⁰ *Id.* at subsection (4).

the would-be payee.¹¹ One of the required disclosures is the “quotient” of the transaction.¹² The “quotient” is described by statute as “a percentage, obtained by dividing the net payment amount by the discounted present value of the payments.”¹³

Despite the requirement that a structured settlement transfer occur or not occur under the supervision of a court, forum shopping¹⁴ is not expressly prohibited by Florida’s structured settlement transfer law.¹⁵ This could result in a transferee obtaining a settlement transfer venue with greater ties to the transferee, as opposed to the payee.

III. Effect of Proposed Changes:

This bill makes the following changes to the laws governing the transfer of a structured settlement agreement:

- Eliminates the requirement that the transferee disclose to the payee the “quotient” of the transaction.
- Provides venue certainty and prevents “forum shopping” by requiring structured settlement transfer applications to be made in the circuit court of the county where the payee is located. If the payee is not domiciled in Florida, the application may be filed in the Florida court that approved the initial structured settlement agreement, or the court where the original claim was pending when the parties entered into their settlement.
- Provides additional information to the court by requiring the payee to appear personally in court during the application hearing. Further, the bill requires that additional information be provided on the transferee’s application. This includes the payee’s age, number and ages of the payee’s dependents, and additional financial history of the payee.
- Provides that, upon a court order approving the settlement transfer, both settlement obligors and annuity issuers may rely on the court’s order in redirecting future structured settlement payments and are released from liability as to all parties to the settlement except for the transferee and the transferee’s potential future assignee.¹⁶
- Confirms that, regardless of any anti-assignment language in the original structured settlement agreement, the parties to the agreement may waive or assert their rights, and the court can safely construe the anti-assignment language and apply the law to such situations.
- Eliminates the requirement that the transferee provide written notice of its name and Tax ID number to other parties to the transaction as the federal tax code does not require the submission of this information to the Internal Revenue Service.¹⁷

¹¹ *Id.* at subsection (3).

¹² *Id.*

¹³ *Id.*

¹⁴ *See, e.g., Kelly McGann, It’s My Money and I Want it Now, Your Honor*, 48 MD. B.J. 36, 39-40 (May/June 2015).

¹⁵ Section 626.99296, F.S., is silent as to which court—or venue—the initial settlement transfer petition must be filed.

¹⁶ *Compare Fla R. Civ. P 1.1540(b)* which states that a judgment may be set aside for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application.

¹⁷ 26 U.S.C. Sec. 5891(d).

The bill takes effect upon becoming a law.

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 may result in more favorable terms for payees who seek to sell the right to payments under their structured settlement agreements. This result may occur because courts will have more information about payees and because payees will generally be required to attend court hearings on applications to transfer structured settlement payment rights.

The bill will also increase the marketability of structured settlement payment rights by ensuring that structured settlement obligors and annuity issuers have no liability for acting in reliance on court orders approving the transfer of a structured settlement.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 626.99296 of the Florida Statutes.

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 Banking and Insurance on December 1, 2015:

- Makes stylistic changes to the underlying bill.
- Deletes a requirement that the transferee provide written notice of its name and Tax ID number to other parties to the transaction as the federal tax code no longer requires the submission of this information to the Internal Revenue Service.

- B. **Amendments:**

None.



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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
12/01/2015	.	
	.	
	.	
	.	

The Committee on Banking and Insurance (Richter) recommended the following:

Senate Amendment (with title amendment)

Delete lines 212 - 366

and insert:

~~5. The transferee has given written notice of the transferee's name, address, and taxpayer identification number to the annuity issuer and the structured settlement obligor and has filed a copy of the notice with the court;~~

~~5.6.~~ The transfer agreement provides that if the payee is domiciled in this state, any disputes between the parties will



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11 be governed in accordance with the laws of this state and that
12 the domicile state of the payee is the proper venue to bring any
13 cause of action arising out of a breach of the agreement; and

14 ~~6.7.~~ The court has determined that the net amount payable
15 to the payee is fair, just, and reasonable under the
16 circumstances then existing.

17 (b) If a proposed transfer would contravene the terms of
18 the structured settlement, upon the filing of a written
19 objection by any interested party and after considering the
20 objection and any response to it, the court may grant, deny, or
21 impose conditions upon the proposed transfer which the court
22 deems just and proper given the facts and circumstances and in
23 accordance with established principles of law. Any order
24 approving a transfer must require that the transferee indemnify
25 the annuity issuer and the structured settlement obligor for any
26 liability, including reasonable costs and attorney ~~attorney's~~
27 fees, which arises from compliance by the issuer or obligor with
28 the order of the court.

29 (c) Any provision in a transfer agreement which gives a
30 transferee power to confess judgment against a payee is
31 unenforceable to the extent that the amount of the judgment
32 would exceed the amount paid by the transferee to the payee,
33 less any payments received from the structured settlement
34 obligor or payee.

35 (d) In negotiating a structured settlement of claims
36 brought by or on behalf of a claimant who is domiciled in this
37 state, the structured settlement obligor must disclose in
38 writing to the claimant or the claimant's legal representative
39 all of the following information that is not otherwise specified



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40 in the structured settlement agreement:

41 1. The amounts and due dates of the periodic payments to be
42 made under the structured settlement agreement. In the case of
43 payments that will be subject to periodic percentage increases,
44 the amounts of future payments may be disclosed by identifying
45 the base payment amount, the amount and timing of scheduled
46 increases, and the manner in which increases will be compounded;

47 2. The amount of the premium payable to the annuity issuer;

48 3. The discounted present value of all periodic payments
49 that are not life-contingent, together with the discount rate
50 used in determining the discounted present value;

51 4. The nature and amount of any costs that may be deducted
52 from any of the periodic payments; and

53 5. Where applicable, that any transfer of the periodic
54 payments is prohibited by the terms of the structured settlement
55 and may otherwise be prohibited or restricted under applicable
56 law; ~~and~~

57 ~~6. That any transfer of the periodic payments by the~~
58 ~~claimant may subject the claimant to serious adverse tax~~
59 ~~consequences.~~

60 (4) VENUE JURISDICTION; PROCEDURE FOR APPROVAL OF
61 TRANSFERS; CONTENTS OF APPLICATION.—

62 (a) At least 20 days before the scheduled hearing on an
63 application for authorizing a transfer of structured settlement
64 payment rights under this section, the transferee must file with
65 the court and provide to all interested parties a notice of the
66 proposed transfer and the application for its authorization. The
67 notice must include:

68 1.(a) A copy of the transferee's application to the court;



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69 ~~2.(b)~~ A copy of the transfer agreement;

70 ~~3.(e)~~ A copy of the disclosure statement required under
71 subsection (3);

72 ~~4.(d)~~ Notification that an interested party may support,
73 oppose, or otherwise respond to the transferee's application, in
74 person or by counsel, by submitting written comments to the
75 court or by participating in the hearing; and

76 ~~5.(e)~~ Notification of the time and place of the hearing and
77 notification of the manner in which and the time by which any
78 written response to the application must be filed in order to be
79 considered by the court. A written response to an application
80 must be filed no later than 5 ~~within 15~~ days before the date
81 after service of the scheduled hearing in order to be considered
82 by the court transferee's notice.

83 (b) An application must be made by the transferee and filed
84 in the circuit court of the county where the payee is domiciled.
85 However, if the payee is not domiciled in this state, the
86 application may be filed in the court in this state which
87 approved the structured settlement agreement or in the court
88 where the settled claim was pending when the parties entered
89 into the structured settlement.

90 (c) The court shall hold a hearing on the application. The
91 payee shall appear in person at the hearing unless the court
92 determines that good cause exists to excuse the payee from
93 appearing.

94 (d) In addition to complying with the other requirements of
95 this section, the application must include:

96 1. The payee's name, age, and county of domicile and the
97 number and ages of the payee's dependents;



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98 2. A copy of the transfer agreement;

99 3. A copy of the disclosure statement required under
100 subsection (3);

101 4. An explanation of reasons as to why the payee is seeking
102 approval of the proposed transfer; and

103 5. A summary of each of the following:

104 a. Any transfers by the payee to the transferee or an
105 affiliate, or through the transferee or an affiliate to an
106 assignee, within the 4 years preceding the date of the transfer
107 agreement.

108 b. Any transfers within the 3 years preceding the date of
109 the transfer agreement made by the payee to any person or entity
110 other than the transferee or an affiliate, or an assignee of a
111 transferee or an affiliate, to the extent such transfers were
112 disclosed to the transferee by the payee in writing or are
113 otherwise actually known by the transferee.

114 c. Any proposed transfers by the payee to the transferee or
115 an affiliate, or through the transferee or an affiliate to an
116 assignee, for which an application was denied within the 2 years
117 preceding the date of the transfer agreement.

118 d. Any proposed transfers by the payee to any person or
119 entity other than the transferee, or an assignee of a transferee
120 or an affiliate, to the extent such proposed transfers were
121 disclosed to the transferee by the payee in writing or are
122 otherwise actually known by the transferee, for which
123 applications were denied within the year preceding the date of
124 the transfer agreement.

125 (5) WAIVER PROHIBITED; NO PENALTIES INCURRED BY PAYEE;
126 RELIANCE ON COURT ORDER; COMPLIANCE; RELEASE FROM LIABILITY;



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127 CONSTRUCTION.—

128 (a) The provisions of this section may not be waived by the
129 payee.

130 (b) If a transfer of structured settlement payment rights
131 fails to satisfy the conditions of subsection (3), the payee who
132 proposed the transfer does not incur any penalty, forfeit any
133 application fee or other payment, or otherwise incur any
134 liability to the proposed transferee.

135 (c) In any transfer of structured settlement payment
136 rights, the transferee is solely responsible for compliance with
137 the requirements of paragraph (3)(a) and subsection (4), and
138 neither the structured settlement obligor nor the annuity issuer
139 shall incur any liability arising from noncompliance.

140 (d) Following issuance of a court order approving a
141 transfer of structured settlement payment rights under this
142 section, the structured settlement obligor and annuity issuer:

143 1. May rely on the court order in redirecting future
144 structured settlement payments to the transferee or an assignee
145 in accordance with the order; and

146 2. Are released and discharged from any liability for the
147 transferred payments to any party except the transferee or an
148 assignee, notwithstanding the failure of any party to the
149 transfer to comply with this section or with the orders of the
150 court approving the transfer.

151 (e) If the terms of the structured settlement prohibit
152 transfer of payment rights:

153 1. A court is not precluded from hearing an application for
154 approval of a transfer of such payment rights or ruling on the
155 merits of the application and any objections to the application;



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156 and

157 2. The parties to such structured settlement are not
158 precluded from waiving or asserting their rights under such
159 terms.

160 ===== T I T L E A M E N D M E N T =====

161 And the title is amended as follows:

162 Delete lines 4 - 26

163 and insert:

164 definitions; revising specified disclosures and
165 notices that are or may be required to be given in
166 order to effect transfers of structured settlement
167 payment rights and payments under such rights;
168 revising the time limit by which a written response to
169 an application for transferring such rights must be
170 filed; specifying requirements for the filing and
171 contents of the application; requiring the court to
172 hold a hearing on the application; requiring a payee
173 to appear in person unless the court determines that
174 good cause exists to excuse the payee; providing that
175 the transferee is solely responsible for compliance
176 with certain requirements; providing that following
177 issuance of a court order approving the transfer, the
178 structured settlement obligor and annuity issuer may
179 rely on the order in redirecting certain payments and
180 are released and discharged from certain liability;
181 providing for construction if the terms of the
182 structured settlement prohibit transfer for payment
183 rights; conforming

By Senator Richter

23-00532-16

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1 A bill to be entitled
 2 An act relating to transfers of structured settlement
 3 payment rights; amending s. 626.99296, F.S.; revising
 4 definitions; deleting a requirement that specified
 5 written findings include a statement regarding net
 6 receipts; eliminating a required disclosure that must
 7 be made to the claimant or the claimant's legal
 8 representative in a structured settlement; requiring
 9 that a written response to an application be filed by
 10 the transferee within a specified timeframe before a
 11 scheduled hearing; requiring an application to be
 12 filed in the circuit court of the county where the
 13 payee is domiciled; providing an exception; specifying
 14 requirements for a transferee's application to the
 15 court; providing that the transferee is solely
 16 responsible for compliance with certain requirements;
 17 authorizing the structured settlement obligor and
 18 annuity issuer to rely on the court order in
 19 redirecting future settlement payments to the
 20 transferee or assignee; providing that the structured
 21 settlement obligor and annuity issuer are released
 22 from any liability following a court order; specifying
 23 that a structured settlement the terms of which
 24 prohibit the sale, assignment, or encumbrance of
 25 payment rights does not prohibit certain actions on
 26 the part of the parties or the court; conforming
 27 provisions to changes made by the act; making
 28 technical changes; providing an effective date.
 29

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30 Be It Enacted by the Legislature of the State of Florida:
 31
 32 Section 1. Section 626.99296, Florida Statutes, is amended
 33 to read:
 34 626.99296 Transfers of structured settlement payment
 35 rights.—
 36 (1) PURPOSE.—The purpose of this section is to protect
 37 recipients of structured settlements who are involved in the
 38 process of transferring structured settlement payment rights.
 39 (2) DEFINITIONS.—As used in this section, the term:
 40 (a) "Annuity issuer" means an insurer that has issued an
 41 annuity contract to be used to fund periodic payments under a
 42 structured settlement.
 43 (c) ~~(b)~~ "Applicable law" means any of the following, as
 44 applicable in interpreting the terms of a structured settlement:
 45 1. The laws of the United States;
 46 2. The laws of this state, including principles of equity
 47 applied in the courts of this state; and
 48 3. The laws of any other jurisdiction:
 49 a. That is the domicile of the payee ~~or any other~~
 50 ~~interested party~~;
 51 b. Under whose laws a structured settlement agreement was
 52 approved by a court; or
 53 c. In whose courts a settled claim was pending when the
 54 parties entered into a structured settlement agreement.
 55 (b) ~~(e)~~ "Applicable federal rate" means the most recently
 56 published applicable rate for determining the present value of
 57 an annuity, as issued by the United States Internal Revenue
 58 Service pursuant to s. 7520 of the United States Internal

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59 Revenue Code, as amended.

60 (d) "Assignee" means any party that acquires structured
61 settlement payment rights directly or indirectly from a
62 transferee of such rights.

63 (e) "Dependents" means a payee's spouse and minor children
64 and all other family members and other persons for whom the
65 payee is legally obligated to provide support, including spousal
66 maintenance.

67 (f) "Discount and finance charge" means the sum of all
68 charges that are payable directly or indirectly from assigned
69 structured settlement payments and imposed directly or
70 indirectly by the transferee and that are incident to a transfer
71 of structured settlement payment rights, including:

72 1. Interest charges, discounts, or other compensation for
73 the time value of money;

74 2. All application, origination, processing, underwriting,
75 closing, filing, and notary fees and all similar charges,
76 however denominated; and

77 3. All charges for commissions or brokerage, regardless of
78 the identity of the party to whom such charges are paid or
79 payable.

80
81 The term does not include any fee or other obligation incurred
82 by a payee in obtaining independent professional advice
83 concerning a transfer of structured settlement payment rights.

84 (g) "Discounted present value" means, with respect to a
85 proposed transfer of structured settlement payment rights, the
86 fair present value of future payments, as determined by
87 discounting the payments to the present using the most recently

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88 published applicable federal rate as the discount rate.

89 (h) "Independent professional advice" means advice of an
90 attorney, certified public accountant, actuary, or other
91 licensed professional adviser:

92 1. Who is engaged by a payee to render advice concerning
93 the legal, tax, and financial implications of a transfer of
94 structured settlement payment rights;

95 2. Who is not in any manner affiliated with or compensated
96 by the transferee of the transfer; and

97 3. Whose compensation for providing the advice is not
98 affected by whether a transfer occurs or does not occur.

99 (i) "Interested parties" means:

100 1. The payee;

101 2. Any beneficiary irrevocably designated under the annuity
102 contract to receive payments following the payee's death or, if
103 such designated beneficiary is a minor, the designated
104 beneficiary's parent or guardian;

105 3. The annuity issuer;

106 4. The structured settlement obligor; or

107 5. Any other party to the structured settlement who has
108 continuing rights or obligations to receive or make payments
109 under the structured settlement.

110 (j) "Payee" means an individual who is receiving tax-free
111 damage payments under a structured settlement and proposes to
112 make a transfer of payment rights under the structured
113 settlement.

114 (k) "Qualified assignment agreement" means an agreement
115 providing for a qualified assignment, as authorized by 26 U.S.C.
116 s. 130 of the United States Internal Revenue Code, as amended.

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- 117 (l) "Settled claim" means the original tort claim resolved
 118 by a structured settlement.
- 119 (m) "Structured settlement" means an arrangement for
 120 periodic payment of damages for personal injuries established by
 121 settlement or judgment in resolution of a tort claim.
- 122 (n) "Structured settlement agreement" means the agreement,
 123 judgment, stipulation, or release embodying the terms of a
 124 structured settlement, including the rights of the payee to
 125 receive periodic payments.
- 126 (o) "Structured settlement obligor" means the party who is
 127 obligated to make continuing periodic payments to the payee
 128 under a structured settlement agreement or a qualified
 129 assignment agreement.
- 130 (p) "Structured settlement payment rights" means rights to
 131 receive periodic payments, including lump-sum payments under a
 132 structured settlement, whether from the structured settlement
 133 obligor or the annuity issuer, if:
- 134 1. The payee ~~or any other interested party~~ is domiciled in
 135 this state;
 - 136 2. The structured settlement agreement was approved by a
 137 court of this state; or
 - 138 3. The settled claim was pending before the courts of this
 139 state when the parties entered into the structured settlement
 140 agreement.
- 141 (q) "Terms of the structured settlement" means the terms of
 142 the structured settlement agreement; the annuity contract; a
 143 qualified assignment agreement; or an order or approval of a
 144 court or other government authority authorizing or approving the
 145 structured settlement.

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- 146 (r) "Transfer" means a sale, assignment, pledge,
 147 hypothecation, or other form of alienation or encumbrance made
 148 by a payee for consideration.
- 149 (s) "Transfer agreement" means the agreement providing for
 150 transfer of structured settlement payment rights from a payee to
 151 a transferee.
- 152 (t) "Transferee" means a person who is receiving or who
 153 will receive structured settlement payment rights resulting from
 154 a transfer.
- 155 (3) CONDITIONS TO TRANSFERS OF STRUCTURED SETTLEMENT
 156 PAYMENT RIGHTS AND STRUCTURED SETTLEMENT AGREEMENTS.—
- 157 (a) A direct or indirect transfer of structured settlement
 158 payment rights is not effective and a structured settlement
 159 obligor or annuity issuer is not required to make a payment
 160 directly or indirectly to a transferee or assignee of structured
 161 settlement payment rights unless the transfer is authorized in
 162 advance in a final order by a court of competent jurisdiction
 163 which is based on the written express findings by the court
 164 that:
- 165 1. The transfer complies with this section and does not
 166 contravene other applicable law;
 - 167 2. At least 10 days before the date on which the payee
 168 first incurred an obligation with respect to the transfer, the
 169 transferee provided to the payee a disclosure statement in bold
 170 type, no smaller than 14 points in size, which specifies:
- 171 a. The amounts and due dates of the structured settlement
 172 payments to be transferred;
 - 173 b. The aggregate amount of the payments;
 - 174 c. The discounted present value of the payments, together

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175 with the discount rate used in determining the discounted
 176 present value;

177 d. The gross amount payable to the payee in exchange for
 178 the payments;

179 e. An itemized listing of all brokers' commissions, service
 180 charges, application fees, processing fees, closing costs,
 181 filing fees, referral fees, administrative fees, legal fees, and
 182 notary fees and other commissions, fees, costs, expenses, and
 183 charges payable by the payee or deductible from the gross amount
 184 otherwise payable to the payee;

185 f. The net amount payable to the payee after deducting all
 186 commissions, fees, costs, expenses, and charges described in
 187 sub-subparagraph e.;

188 g. ~~The quotient, expressed as a percentage, obtained by~~
 189 ~~dividing the net payment amount by the discounted present value~~
 190 ~~of the payments, which must be disclosed in the following~~
 191 ~~statement: "The net amount that you will receive from us in~~
 192 ~~exchange for your future structured settlement payments~~
 193 ~~represent . . . percent of the estimated current value of the~~
 194 ~~payments based upon the discounted value using the applicable~~
 195 ~~federal rate";~~

196 ~~h.~~ The effective annual interest rate, which must be
 197 disclosed in the following statement: "Based on the net amount
 198 that you will receive from us and the amounts and timing of the
 199 structured settlement payments that you are turning over to us,
 200 you will, in effect, be paying interest to us at a rate of . . .
 201 percent per year"; and

202 ~~h.i.~~ The amount of any penalty and the aggregate amount of
 203 any liquidated damages, including penalties, payable by the

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204 payee in the event of a breach of the transfer agreement by the
 205 payee;

206 3. The payee has established that the transfer is in the
 207 best interests of the payee, taking into account the welfare and
 208 support of the payee's dependents;

209 4. The payee has received, or waived in writing his or her
 210 right to receive, independent professional advice regarding the
 211 legal, tax, and financial implications of the transfer;

212 5. The transferee or assignee, if any, has given written
 213 notice of his or her ~~the transferee's~~ name, address, and
 214 taxpayer identification number to the annuity issuer and the
 215 structured settlement obligor and has filed a copy of the notice
 216 with the court;

217 6. The transfer agreement provides that if the payee is
 218 domiciled in this state, any disputes between the parties will
 219 be governed in accordance with the laws of this state and that
 220 the domicile state of the payee is the proper venue to bring any
 221 cause of action arising out of a breach of the agreement; and

222 7. The court has determined that the net amount payable to
 223 the payee is fair, just, and reasonable under the circumstances
 224 then existing.

225 (b) If a proposed transfer would contravene the terms of
 226 the structured settlement, upon the filing of a written
 227 objection by any interested party and after considering the
 228 objection and any response to it, the court may grant, deny, or
 229 impose conditions upon the proposed transfer which the court
 230 deems just and proper given the facts and circumstances and in
 231 accordance with established principles of law. Any order
 232 approving a transfer must require that the transferee indemnify

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 233 the annuity issuer and the structured settlement obligor for any
 234 liability, including reasonable costs and ~~attorney~~ attorney's
 235 fees, which arises from compliance by the issuer or obligor with
 236 the order of the court.

237 (c) Any provision in a transfer agreement which gives a
 238 transferee power to confess judgment against a payee is
 239 unenforceable to the extent that the amount of the judgment
 240 would exceed the amount paid by the transferee to the payee,
 241 less any payments received from the structured settlement
 242 obligor or payee.

243 (d) In negotiating a structured settlement of claims
 244 brought by or on behalf of a claimant who is domiciled in this
 245 state, the structured settlement obligor must disclose in
 246 writing to the claimant or the claimant's legal representative
 247 all of the following information that is not otherwise specified
 248 in the structured settlement agreement:

249 1. The amounts and due dates of the periodic payments to be
 250 made under the structured settlement agreement. In the case of
 251 payments that will be subject to periodic percentage increases,
 252 the amounts of future payments may be disclosed by identifying
 253 the base payment amount, the amount and timing of scheduled
 254 increases, and the manner in which increases will be compounded;

255 2. The amount of the premium payable to the annuity issuer;

256 3. The discounted present value of all periodic payments
 257 that are not life-contingent, together with the discount rate
 258 used in determining the discounted present value;

259 4. The nature and amount of any costs that may be deducted
 260 from any of the periodic payments; and

261 5. Where applicable, that any transfer of the periodic

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 262 payments is prohibited by the terms of the structured settlement
 263 and may otherwise be prohibited or restricted under applicable
 264 law; ~~and~~

265 ~~6. That any transfer of the periodic payments by the~~
 266 ~~claimant may subject the claimant to serious adverse tax~~
 267 ~~consequences.~~

268 (4) VENUE JURISDICTION; PROCEDURE FOR APPROVAL OF
 269 TRANSFERS; CONTENTS OF APPLICATION.—

270 (a) At least 20 days before the scheduled hearing on an
 271 application for authorizing a transfer of structured settlement
 272 payment rights under this section, the transferee must file with
 273 the court and provide to all interested parties a notice of the
 274 proposed transfer and the application for its authorization. The
 275 notice must include:

276 1. ~~(a)~~ A copy of the transferee's application to the court;

277 2. ~~(b)~~ A copy of the transfer agreement;

278 3. ~~(c)~~ A copy of the disclosure statement required under
 279 subsection (3);

280 4. ~~(d)~~ Notification that an interested party may support,
 281 oppose, or otherwise respond to the transferee's application, in
 282 person or by counsel, by submitting written comments to the
 283 court or by participating in the hearing; and

284 5. ~~(e)~~ Notification of the time and place of the hearing and
 285 notification of the manner in which and the time by which any
 286 written response to the application must be filed in order to be
 287 considered by the court. A written response to an application
 288 must be filed no later than 5 within 15 days before the date
 289 after service of the scheduled hearing in order to be considered
 290 by the court ~~transferee's notice.~~

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291 (b) An application must be made by the transferee and filed
 292 in the circuit court of the county where the payee is domiciled.
 293 However, if the payee is not domiciled in this state, the
 294 application may be filed in the court in this state which
 295 approved the structured settlement agreement or in the court
 296 where the settled claim was pending when the parties entered
 297 into the structured settlement.

298 (c) The court shall hold a hearing on the application. The
 299 payee shall appear in person at the hearing unless the court
 300 determines that good cause exists to excuse the payee from
 301 appearing.

302 (d) In addition to complying with the other requirements of
 303 this section, the application must include:

304 1. The payee's name, age, and county of domicile and the
 305 number and ages of the payee's dependents;

306 2. A copy of the transfer agreement;

307 3. A copy of the disclosure statement required under
 308 subsection (3);

309 4. An explanation of reasons as to why the payee is seeking
 310 approval of the proposed transfer; and

311 5. A summary of each of the following:

312 a. Any transfers by the payee to the transferee or an
 313 affiliate, or through the transferee or an affiliate to an
 314 assignee, within the 4 years preceding the date of the transfer
 315 agreement.

316 b. Any transfers within the 3 years preceding the date of
 317 the transfer agreement made by the payee to any person or entity
 318 other than the transferee or an affiliate, or an assignee of a
 319 transferee or an affiliate, to the extent such transfers were

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320 disclosed to the transferee by the payee in writing or are
 321 otherwise actually known by the transferee.

322 c. Any proposed transfers by the payee to the transferee or
 323 an affiliate, or through the transferee or an affiliate to an
 324 assignee, for which an application was denied within the 2 years
 325 preceding the date of the transfer agreement.

326 d. Any proposed transfers by the payee to any person or
 327 entity other than the transferee, or an assignee of a transferee
 328 or an affiliate, to the extent such proposed transfers were
 329 disclosed to the transferee by the payee in writing or are
 330 otherwise actually known by the transferee, for which
 331 applications were denied within the year preceding the date of
 332 the current transfer agreement.

333 (5) WAIVER PROHIBITED; NO PENALTIES INCURRED BY PAYEE;
 334 RELIANCE ON COURT ORDER; COMPLIANCE; RELEASE FROM LIABILITY;
 335 CONSTRUCTION.-

336 (a) The provisions of this section may not be waived by the
 337 payee.

338 (b) If a transfer of structured settlement payment rights
 339 fails to satisfy the conditions of subsection (3), the payee who
 340 proposed the transfer does not incur any penalty, forfeit any
 341 application fee or other payment, or otherwise incur any
 342 liability to the proposed transferee.

343 (c) In any transfer of structured settlement payment
 344 rights, the transferee is solely responsible for compliance with
 345 the requirements of paragraph (3) (a) and subsection (4), and
 346 neither the structured settlement obligor nor the annuity issuer
 347 is liable for noncompliance.

348 (d) Following issuance of a court order approving a

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CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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349 transfer of structured settlement payment rights under this
 350 section, the structured settlement obligor and annuity issuer:

351 1. May rely on the court order in redirecting future
 352 structured settlement payments to the transferee or an assignee
 353 in accordance with the order; and

354 2. Are released from any liability for the transferred
 355 payments to all of the parties to the settlement except the
 356 transferee or an assignee, notwithstanding the failure of any
 357 party to the transfer to comply with this section or with the
 358 orders of the court approving the transfer.

359 (e) A structured settlement the terms of which prohibit the
 360 sale, assignment, or encumbrance of payment rights may not be
 361 construed to prohibit:

362 1. The parties to the settlement from waiving or asserting
 363 their rights under such terms; or

364 2. A court from hearing an application for approval of a
 365 transfer of such rights or ruling on the merits of the
 366 application and any objections.

367 (6) NONCOMPLIANCE.—

368 (a) If a transferee violates the requirements for
 369 stipulating the discount and finance charge provided for in
 370 subsection (3), neither the transferee nor any assignee may
 371 collect from the transferred payments, or from the payee, any
 372 amount in excess of the net advance amount, and the payee may
 373 recover from the transferee or any assignee:

374 1. A refund of any excess amounts previously received by
 375 the transferee or any assignee;

376 2. A penalty in an amount determined by the court, but not
 377 in excess of three times the aggregate amount of the discount

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378 and finance charge; and

379 3. Reasonable costs and attorney ~~attorney's~~ fees.

380 (b) If the transferee violates the disclosure requirements
 381 in subsection (3), the transferee and any assignee are liable to
 382 the payee for:

383 1. A penalty in an amount determined by the court, but not
 384 in excess of three times the amount of the discount and finance
 385 charge; and

386 2. Reasonable costs and attorney ~~attorney's~~ fees.

387 (c) A transferee or assignee is not liable for any penalty
 388 in any action brought under this section if the transferee or
 389 assignee establishes by a preponderance of evidence that the
 390 violation was not intentional and resulted from a bona fide
 391 error, notwithstanding the transferee's maintenance of
 392 procedures reasonably designed to avoid such errors.

393 (d) Notwithstanding any other law, an action may not be
 394 brought under this section more than 1 year after the due date
 395 of:

396 1. The last transferred structured settlement payment, in
 397 the case of a violation of the requirements for stipulating the
 398 discount and finance charge provided for in subsection (3).

399 2. The first transferred structured settlement payment, in
 400 the case of a violation of the disclosure requirements of
 401 subsection (3).

402 (e) When any interested party has reason to believe that
 403 any transferee has violated this section, any interested party
 404 may bring a civil action for injunctive relief, penalties, and
 405 any other relief that is appropriate to secure compliance with
 406 this section.

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407

Section 2. This act shall take effect upon becoming a law.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

12-1-15

Meeting Date

458

Bill Number (if applicable)

597-01700-16

Amendment Barcode (if applicable)

Topic Structured Settlement Transfers

Name Andrew SAUVSKY

Job Title President, Structured Asset Funding

Address 3025 W. Broward Blvd.

Street

At Landale FL 33312

City

State

Zip

Phone 954 455-6060 x1900

Email ASAUVSKY@SASFUND.COM

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Structured Asset Funding, LLC

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

12-1-2015

Meeting Date

458

Bill Number (if applicable)

597-01700-16

Amendment Barcode (if applicable)

Topic Structured Settlements

Name Earl S. Nesbitt

Job Title General Counsel

Address 15851 Dallas Parkway, Suite 800

Street

Addison

City

TX

State

75001

Zip

Phone 972-371-2411

Email enesbitt@numlaw.com

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing National Association of Settlement Purchasers

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

01 DEC 2015
Meeting Date

458
Bill Number (if applicable)

Topic STRUCTURED SETTLEMENT

Amendment Barcode (if applicable)

Name PAUL JESS

Job Title _____

Address 218 S MONROE ST
Street

Phone 224-9403

TALLAHASSEE FL 32301
City State Zip

Email PJESS@FLORIDAJUSTICE ASSOCIATION.ORG

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing FLORIDA JUSTICE ASSOCIATION

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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The Florida Senate

Committee Agenda Request

To: Senator Lizbeth Benacquisto, Chair
Committee on Banking and Insurance

Subject: Committee Agenda Request

Date: November 19, 2015

I respectfully request that **Senate Bill #458**, relating to Transfers of Structured Settlement Payment Rights, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

A handwritten signature in blue ink, appearing to read "Garrett Richter".

Senator Garrett Richter
Florida Senate, District 23

CourtSmart Tag Report

Room: EL 110

Case No.:

Type:

Caption: Senate Banking and Insurance Committee

Judge:

Started: 12/1/2015 1:02:11 PM

Ends: 12/1/2015 1:24:38 PM

Length: 00:22:28

1:02:25 PM Meeting called to order - quorum present
1:03:33 PM TAB 1 - SB 812 Reciprocal Insurers - roll call - favorable
1:04:35 PM TAB 4 - SB 458 by Sen. Richter - Structured Settlement Payment Rights
1:04:57 PM Amd. 870846 by Sen. Richter - adopted w/o objection
1:05:46 PM
1:05:47 PM Paul Jess, FL Justice Association
1:06:00 PM
1:07:00 PM Roll call on CS/SB 458 -- Favorable
1:07:32 PM TA B 3 - CS/SB 540 - Estates
1:07:50 PM Sen. Hukill recognized to explain the bill
1:08:32 PM
1:08:33 PM Amd. 698194 - technical amendment by Sen. Hukill -- fwo/adopted
1:09:28 PM Roll call on CS/ CS/SB 540 - Favorable
1:10:02 PM TAB 2 -SB 286 by Sen. Brandes - Mergers and Acquisitions Brokers
1:11:05 PM Sen. Brandes' aide presents the bill
1:12:10 PM
1:18:47 PM Amd. 461312 delete all by Sen. Negron- Favorable w/o objection
1:22:02 PM Roll call on CS/SB 286 - Favorable
1:23:31 PM Meeting adjourned.