SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1042

SPONSOR: Commerce and Economic Opportunities Committee and Senator Bronson

SUBJECT: Fraudulent Transfers

DATE: March 25, 1999   REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Olafson	Maclure	CM	Favorable/CS
2.				
3.				
4.				
5.				

I. Summary:

The committee substitute amends Florida's Uniform Fraudulent Transfer Act, expanding the definition of a fraudulent transfer to include a debtor who fails to give unsecured creditors notice of the sale of 51 percent or more of the fair market value of assets, inventory, supplies, merchandise, materials, or other property, not in the ordinary course of business.

This committee substitute amends section 726.105, Florida Statutes. The committee substitute creates the following sections of the Florida Statutes: 726.202 and 726.203.

II. Present Situation:

Fraudulent Transfers

Florida's Uniform Fraudulent Transfer Act, ch. 726, F.S., creates a right of action for any creditor against any debtor and any other person who has received property from the debtor in a fraudulent transfer. A fraudulent transfer occurs when a debtor intends to hinder, delay, or defraud a creditor, or transfers property under certain conditions to another person without receiving reasonably equivalent value in return. However, not all such transfers are fraudulent to every creditor.

Section 726,105, F.S., distinguishes between present and future creditors, and specifies the kinds of transfers that are fraudulent to each of the two categories of creditors. Both present and future creditors may recover property when there is a transfer with intent to defraud.

The fundamental relief for a creditor when there is a fraudulent transfer is recovery of the property from the person to whom it has been transferred. Section 726.108, F.S., provides for the avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim. This section provides for the attachment, injunctive relief, appointment of a receiver, or "any other relief the circumstances may require." If the creditor has reduced the claim to a judgment, the

court may levy execution against the recovered assets. This means that the property can be sold to satisfy the amount of the judgment.

Bulk Sales

Florida does not address bulk sales transactions as an article of the state Uniform Commercial Code (UCC). Chapter 679, F.S., relates to secured transactions under UCC Article 9, providing rules governing transactions that couple a debt with a creditor's interest in a debtor's personal property. If the debtor defaults, the creditor may repossess and sell the property, called collateral, to satisfy the debt. The creditor's interest is called a "security interest." Perfection occurs when the creditor establishes his or her "priority" in relation to other creditors of the debtor in the same collateral. The creditor with "priority" may use the collateral to satisfy the debtor's obligation when the debtor defaults before other creditors subsequent in priority may do so. Perfection occurs when a "financing statement" is filed with the Department of State or the clerk of circuit court. Generally, the first to file has the first priority, and the second to file, second in priority, and so on. Every secured creditor has a priority over any unsecured creditor, and all secured interests are public record. Part III of ch. 559, F.S., establishes guidelines for conducting going-out-of-business sales, including a requirement that the sale be conducted without fraud or deception.

In 1993, the Florida Legislature passed ch. 93-77, Laws of Florida, repealing ch. 676, F.S., UCC Article 6, relating to bulk sales. Prior to the repeal, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) recommended the repeal or revision of UCC Article 6 in those states which had adopted it. The Financial Institutions Committee and the Bankruptcy/Uniform Commercial Code Committee of the Florida Bar Business Law Section established a committee to study and report on UCC Article 6. The committee noted that UCC Article 6 had its genesis around the turn of the century in an effort to protect the creditors of a seller of goods who might be predisposed to transfer the entire inventory and abscond with the proceeds without making adequate provision for the seller's creditors. UCC Article 6 imposed upon the buyer-in-bulk a duty to notify the creditors of the seller of the proposed sale. The committee reported that compliance with UCC Article 6 had substantially decreased for a number of stated reasons. Among these reasons was the criticism that the remedy that UCC Article 6 provided (i.e., nullifying the sale or transfer) was not consistent with the practicalities of today's transactions. The committee, therefore, recommended repeal of UCC Article 6 in its then-present form, and to dispense with further bulk sales legislation in the form of a revised UCC Article 6 as approved as an alternative by the NCCUSL and the ALI *(Committee Report on the Status of Article 6 -- Bulk Transfers of Florida's Uniform Commercial Code,* The Florida Bar UCC Article 6 Study Group, undated). At present, 38 states have repealed UCC Article 6 and five states have adopted the revised UCC Article 6.

III. **Effect of Proposed Changes:**

The committee substitute amends Florida's fraudulent transfer law to include the sale, without proper notice to unsecured creditors, of more than 51 percent of the assets, inventory, supplies, merchandise, materials, or other property, outside of the seller's ordinary course of business.

Section 1 amends s. 726.105, F.S., to make the sale of certain property, without notice to unsecured creditors, a fraudulent transfer.

Section 2 creates s. 726.202, F.S., providing that the debtor's sale of 51 percent or more of the fair market value of assets, inventory, supplies, merchandise, materials, or other property, not in the ordinary course of business, is a fraudulent transfer pursuant to ch. 726, F.S., unless the seller gives unsecured creditors proper notice of the proposed transfer. The committee substitute provides specific procedures for notice, requiring that such notice be given 15 days prior to the proposed transfer and mandating that such notice be given by personal delivery or certified mail, and by publication in a local paper. The committee substitute exempts debtors who have provided a security agreement to creditors pursuant to the provisions of ch. 679, F.S., Florida's UCC Article 9.

Section 3 creates s. 726.203, F.S., providing that affiliates or insiders who knowingly participate in a fraudulent transfer are personally liable to secured and unsecured creditors alike. This section includes provisions for the recovery of costs and attorney's fees relating to the claim.

Section 4 provides for an effective date of October 1, 1999.

IV.   Constitutional Issues:

A.   Municipality/County Mandates Restrictions:

None.

B.   Public Records/Open Meetings Issues:

None.

C.   Trust Funds Restrictions:

None.

V.   Economic Impact and Fiscal Note:

A.   Tax/Fee Issues:

None.

B.   Private Sector Impact:

Certain debtors will be required to provide notice, which will entail publication and delivery or mailing expenses. Affiliates and insiders may be subject to personal liability for participating in certain transfers.

C.   Government Sector Impact:

None.

VI.   Technical Deficiencies:

None.

VII.   Related Issues:

Florida's Uniform Fraudulent Transfer Act limits the cause of action to sales in which the seller intended to defraud and to certain sales in which a reasonably equivalent value was not secured. By including the failure to give proper notice as an additional basis for designating a transfer fraudulent, this committee substitute broadens significantly the scope of the existing fraudulent transfer law.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.