

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 282

SPONSOR: Senator Posey

SUBJECT: Enforcement of Lost, Destroyed, or Stolen Negotiable Instruments

DATE: February 2, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Knudson</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable</u>
2.	<u>Lang</u>	<u>Lang</u>	<u>JU</u>	<u>Favorable</u>
3.	<u>Cibula</u>	<u>Maclure</u>	<u>CM</u>	<u>Favorable</u>
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 282 authorizes a person to transfer ownership of a negotiable instrument even if the person lost the physical document creating the instrument. Further, the bill permits a person who has acquired ownership of a lost negotiable instrument to transfer ownership of the instrument. Additionally, the bill permits a person with a security interest in a negotiable instrument who never had possession of the negotiable instrument to enforce a lost instrument if the secured person had the right to enforce the instrument when the instrument was lost. The bill conforms Florida law to changes made in 2002 to section 3-309 of the Uniform Commercial Code.

This bill amends section 673.3091, Florida Statutes.

II. Present Situation:

Uniform Commercial Code

The Uniform Commercial Code (U.C.C.) is a uniform act that was prepared by The American Law Institute and the National Conference of Commissioners on Uniform State Laws.¹ It was designed to provide uniformity of law across all states.² Provisions of the U.C.C. relate to commercial transactions, including sales, leases, negotiable instruments, bank deposits and collections, funds transfers, letters of credit, bulk sales, documents of title, investment securities, and secured transactions.³ Article 3 of the U.C.C. is the latest modernization of laws relating to negotiable instruments, which had their beginning with the English Bills of Exchange Act

¹ The American Law Institute and National Conference of Commissioners on Uniform State Laws, *Uniform Commercial Code*, III (2003).

² *Id.* at 20.

³ *Id.* at III.

enacted in 1882.⁴ Florida's version of Art. 3, U.C.C., is codified in ch. 673, F.S., Uniform Commercial Code: Negotiable Instruments.

Negotiable Instruments

Under s. 673.1041(1), F.S., a “negotiable instrument” is defined as:

- an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
- (a) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
 - (b) Is payable on demand or at a definite time; and
 - (c) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money

Examples of negotiable instruments may include notes, certificates of deposit, drafts, checks, money orders, cashier's checks, and travelers checks.⁵ A promissory note made in connection with a mortgage may also be a negotiable instrument.⁶ Negotiable instruments are subject to negotiation, meaning that negotiable instruments may be transferred from one person to another.⁷

Persons Authorized to Enforce Lost, Stolen, or Destroyed Negotiable Instruments

Section 3-309 of the U.C.C. (2001), codified in Florida as s. 673.3091, F.S., provides for the enforcement of lost, destroyed, or stolen negotiable instruments. To enforce a negotiable instrument is to compel payment of a promise or order to pay. Section 673.3091, F.S., states in part:

- (1) A person not in possession of an instrument is entitled to enforce the instrument if:
 - (a) The person was *in possession of the instrument and entitled to enforce it when loss of possession occurred*

Emphasis added.

The provision above was also adopted by the District of Columbia as D.C. Code s. 28:3-309 and was interpreted by a federal district court in *Dennis Joslin Co., LLC, v. Robinson Broadcasting Corp.*, 977 F. Supp. 491 (D.D.C. 1997). According to the court:

[T]he plain language of the provision mandates that the plaintiff suing [to enforce the lost] note must meet two tests, not just one: it must have been *both* in possession of the note when it was lost and entitled to enforce the note when it

⁴ *Id.* at 311-312.

⁵ *Supra* note 1, Official Comment to U.C.C. s. 3-104.

⁶ *State Street Bank and Trust Co. v. Lord*, 851 So. 2d 790, 792 (Fla. 4th DCA 2003).

⁷ Section 673.2011, F.S.

was lost. . . . Since plaintiff did not have possession of the note at the time it was lost it appears that the . . . provision . . . precludes recovery.⁸

Thus, according to the interpretation of U.C.C. s. 3-309, by the *Dennis Joslin* court, only the person who has lost an instrument may enforce it. As a result of this decision, the U.C.C. uniform act was amended to clearly authorize a person to transfer the right to enforce a lost instrument.⁹

Florida courts, however, have interpreted the same language at issue in *Dennis Joslin*, which is codified in s. 673.3091(1)(a), F.S., to authorize a person to transfer the right to enforce a lost negotiable instrument under some circumstances.¹⁰ In *Deakter* and *Slizyk*, the assignment of the right to enforce a lost negotiable instrument was permitted when the courts were able to determine that the most immediate assignor of the negotiable instrument was in possession of the negotiable instrument and entitled to enforce the instrument at the time it was lost. In *National Loan*, the court granted leave to amend a complaint to enforce a lost negotiable instrument to allege that a particular prior assignor had possession of loan documents and the right to enforce them at the time the documents were lost. In supporting the decision to permit the transfer of the right to enforce a lost note, the courts in *Deakter* and *National Loan* stated:

We see no reason why this right of enforcement [on a lost note] cannot be assigned when recognizing such a right would prevent defendants . . . from receiving a windfall.¹¹

In *State Street Bank and Trust Co. v. Lord*, 851 So. 2d 790 (Fla. 4th DCA 2003), the assignee of the rights to a lost negotiable instrument was not permitted to enforce the lost instrument. According to the facts of the case, Hartley Lord executed a note and mortgage that after multiple assignments was assigned to EMC Mortgage Corporation (EMC) and then to State Street.¹² The court determined that neither EMC nor State Street ever possessed the note and that there was no evidence as to who possessed the note when it was lost.¹³ Further, the court expressly declined to determine whether proof of an earlier assignor's possession would entitle State Street to enforce the note.¹⁴

Thus, it appears that under Florida law a person who loses a negotiable instrument may transfer the right to enforce the instrument to another person. Florida courts, however, might not permit the person who acquires the right to enforce the lost negotiable instrument from the person who lost the instrument to *further* transfer the right to enforce the instrument.

⁸ *Dennis Joslin Co.*, 977 F. Supp. at 495.

⁹ *Supra* note 1, Official Comment to the changes in text in 2002 to U.C.C. s. 3-309.

¹⁰ *State Street Bank and Trust Co. v. Lord*, 851 So. 2d 790, 792 (Fla. 4th DCA 2003); *Deakter v. Menendez*, 830 So. 2d 124, 129 (Fla. 3rd DCA 2002); *Slizyk v. Smilack*, 825 So. 2d 428, 430 (Fla. 4th DCA 2002); *National Loan Investors, L.P., v. Joymar Assoc.*, 767 So. 2d 549, 551 (Fla. 3rd DCA 2000); and *Mason v. Rubin*, 727 So. 2d 283, 284 (Fla. 4th DCA 1999).

¹¹ *Deakter*, 830 So. 2d at 129 (quoting *National Loan*, 767 So. 2d at 551).

¹² *State Street*, 851 So. 2d at 791.

¹³ *Id.* at 792.

¹⁴ *Id.*

Proving the Terms of an Instrument and the Right to Enforce an Instrument

In the event that a person is permitted by law to enforce a lost negotiable instrument, s. 673.3091(2), F.S., applies. Section 673.3091(2), F.S., requires a person seeking to enforce a lost negotiable instrument to: 1) prove the terms of the instrument; 2) prove the right to enforce the instrument; and 3) protect the person who has to make payment from other claims to pay the instrument.

III. Effect of Proposed Changes:

Under the bill, ownership of a lost negotiable instrument may be transferred without transferring the physical document creating the instrument. “Ownership” is the right to have or hold as property.¹⁵ Accordingly, ownership of a negotiable instrument must include the right to enforce the instrument. Further, the bill allows the enforcement of a lost negotiable instrument by a person who has “directly or indirectly” acquired ownership of the lost negotiable instrument from a person who was entitled to enforce the instrument when the instrument was lost. As such, a person who has acquired ownership of a lost negotiable instrument may enforce the instrument even if the person must trace his or her ownership of the instrument back through prior owners to the person who was entitled to enforce the instrument when it was lost.

The bill also eliminates the requirement in existing s. 673.3091(1)(a), F.S., that a person who seeks to enforce a lost instrument prove that he or she possessed the instrument when the instrument was lost. Under the bill, a person need only prove that he or she was entitled to enforce the instrument when the instrument was lost. As such, a person with a security interest in a negotiable instrument who never had possession of the negotiable instrument may enforce a lost instrument if he or she had the right to enforce the instrument when the loss occurred.¹⁶

Lastly, the bill conforms Florida law to changes made in 2002 to the Uniform Commercial Code s. 3-309.

The bill, however, may not reject the result in *State Street Bank and Trust Co. v. Lord*, 851 So. 2d 790 (Fla. 4th DCA 2003). A person seeking to enforce a lost negotiable instrument will still have to prove that the person has acquired the right to enforce the lost instrument. In order to prove that a person has acquired ownership of a lost negotiable instrument, including the right to enforce the lost instrument, the person will likely have to prove who owned the instrument when the instrument was lost. According to *State Street*, the assignee of a lost note did not produce evidence showing which prior assignor lost the note.¹⁷

The bill takes effect upon becoming a law.

¹⁵ See definition of “ownership” and “own” in *Merriam-Webster’s Collegiate Dictionary* 829 (10th ed. 2001).

¹⁶ *Supra* note 1, Official Comment to the changes in text in 2002 to U.C.C. s. 3-309.

¹⁷ *State Street*, 851 So. 2d at 792.

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:

The bill will permit a person who has acquired the rights to a lost negotiable instrument to enforce the instrument.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.