

**The Florida Senate**  
**PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT**

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

Prepared By: Commerce Committee

BILL: CS/SB 2118

INTRODUCER: Judiciary Committee and Senator Joyner

SUBJECT: Debts and Debtors

DATE: April 19, 2007                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	<b>Fav/CS</b>
2.	Gordon	Cooper	CM	<b>Favorable</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

This Committee Substitute (CS) revises the law related to assignments for the benefit of creditors. The CS also increases the amount of personal property exempt from creditor claims, for persons without homestead property. A number of the changes are clarifying in nature. However, some changes were designed to reverse case law.

Specifically, this CS:

- Increases to \$4,000 the amount of personal property exempt from creditor claims for natural persons without homestead property;
- Provides that a person's personal property that is exempt from creditor claims is not exempt from claims for spousal or child support;
- Expands the group of newspapers in which foreclosure notices may be advertised to include certain newspapers that publish at least five days per week except during weeks with a legal holiday;
- Permits the assignment of otherwise unassignable legal claims in certain circumstances;
- Permits an assignee to operate an assignor's business for up to 14 days without court approval;
- Permits an assignee to reject unexpired leases;
- Permits courts to set deadlines for claims against an assignor's estate;
- Clarifies and modernizes the payment priority of claims against an assignor's estate;
- Clarifies that creditors have standing to object to the claims of other creditors; and
- Prohibits a person from increasing his or her priority for payment of claims from an assignor's estate by rescinding the purchase of securities.

This CS substantially amends the following sections of the Florida Statutes: 222.25, 702.035, 727.103, 727.104, 727.105, 727.108, 727.109, 727.110, 727.111, 727.112, 727.113, and 727.114.

## **II. Present Situation:**

The Business Law Section of The Florida Bar has recommended a number of revisions to the laws relating to assignments for the benefit of creditors. Most of these laws are contained in ch. 727, F.S., which can be described as follows.

The stated intent of chapter 727 “is to provide a uniform procedure for the administration of insolvent estates, and to ensure full reporting to creditors and equal distribution of assets according to priorities as established under this chapter.” An assignment for the benefit of creditors is an alternative to bankruptcy and allows a debtor to voluntarily assign its assets to a third party in order to liquidate the assets to fully or partially satisfy creditors’ claims against the debtor.

Section 727.104 describes the required contents of an assignment for the benefit of creditors, including a description of the efforts to be undertaken by the assignee to administer the insolvent estate. . . .

Once an assignment is made under s. 727.104, F.S., all creditors except for lien holders are required to file proofs of claim pursuant to s. 727.112, F.S. Claims, whether contingent, liquidated, unliquidated, or disputed, must be filed within 120 days from the date that the ch.727, F.S., petition is filed or the claim will be barred “unless for cause shown.” Section 727.114, F.S., establishes the priority for payment of claims. Creditors with perfected liens on assets of the estate have the highest priority; unsecured claims have the lowest priority; and if all of the described claims are paid in full, “any residue shall be paid to the assignor.” Section 727.108, F.S., also requires an assignee to abandon assets to duly perfected secured or lien creditors after the assignee determines the estate has no equity in such assets or that the assets are burdensome or of inconsequential value and benefit to the estate.<sup>1</sup>

## **III. Effect of Proposed Changes:**

This CS revises the law related to assignments for the benefit of creditors. The CS also increases the amount of personal property exempt from creditor claims, which is owned by persons without homestead property. A number of the changes are clarifying in nature. However, some changes were designed to reverse case law. The specific changes by the CS are detailed below.

### **Property Exempt from Creditor Claims**

The CS amends s. 222.25, F.S., to increase to \$4,000 from \$1,000 the amount of personal property exempt from creditor claims for persons who do not own homestead property. The exemption for persons with homestead property will remain at \$1,000 as provided in the Florida

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<sup>1</sup> Hillsborough County v. Lanier, 898 So. 2d 141, 143 (Fla. 2d DCA 2005) (citations omitted).

Constitution.<sup>2</sup> However, the CS provides that this exemption does not apply to debts for child or spousal support.

### **Publication of Foreclosure Notices**

Under existing law, foreclosure notices may be advertised in newspapers that publish at least 5 days per week in counties with a population of greater than 1 million residents. This CS allows foreclosure notices to be advertised in newspapers that publish at least 5 days per week. However, the CS expands the group of newspapers in which a foreclosure notice may be advertised to include newspapers that normally publish at least 5 days per week except for weeks with legal holidays.

### **Consensual Lienholder/Actions against the Estate**

The CS prohibits the levy, execution, or attachment by a judgment holder against any assets of the assignor's estate in the possession, custody, or control of the assignee, including real property. However, the CS provides that consensual lienholders may enforce their rights in personal or real property collateral.

The CS clarifies that causes of action are assets within an assignor's estate. Moreover, the CS clarifies that these causes of action may be assigned by the assignor to the assignee even if other law provides that they are not assignable. Under existing case law, some tort claims are not assignable.<sup>3</sup>

Additionally, the CS provides that an assignee can further assign or sell the assignor's claims to others for enforcement. This provision of the CS appears to reverse *Champaign National Bank v. SOS Industries, Inc.*, which held that an assignee may not make a secondary assignment of claims.<sup>4</sup>

Lastly, the CS prohibits those sued by an assignee or secondary assignee from asserting the assignor's misconduct as a defense. This provision of the CS codifies case law applicable to receivers.<sup>5</sup>

### **Continuation of Business**

Current law requires an assignee to have authorization from a court to run an assignor's business. The CS authorizes an assignee to operate an assignor's business for up to 14 days without authorization from a court. However, court authorization and notice to creditors is required to run the business for more than 14 days.

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<sup>2</sup> FLA. CONST. art. X, § 4(a)(2). The \$1,000 exemption from creditor claims was carried over from the Florida Constitution of 1868. According to the Office of Economic and Demographic Research, \$1,000 in 1868 is approximately \$15,000 today.

<sup>3</sup> See, e.g., *Cowan Liebowitz and Latman, P.C., v. Kaplan*, 902 So. 2d 755 (Fla. 2005); *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557, 559 (Fla. 1997) (stating that "purely personal tort claims cannot be assigned under Florida law").

<sup>4</sup> *Champaign National Bank v. SOS Industries, Inc.*, 815 So. 2d 725 (Fla. 5th DCA 2002).

<sup>5</sup> See *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995).

## **Rejection of Leases and Termination of Employment Contracts**

Existing law does not address whether an assignee may reject an unexpired lease. The CS, however, permits an assignee to reject an unexpired lease. Whether approval of a court is required is unclear under the CS. Proposed s. 727.108(5), F.S., permits an assignee to reject an unexpired lease and proposed s. 727.109(6), F.S., authorizes a court to approve the rejection of a lease. The Legislature may wish to clarify whether court approval is required.

If an assignee rejects a lease, damages are limited to the greater of 1 year of rent or 15 percent of the remaining rental payments and the landlord's attorney's fees, plus costs for reletting the property.

Currently, ch. 727, F.S., does not limit the damages resulting from the termination of an employment contract. Under the CS, an employee's damages are limited to wages for 1 year under his or her employment contract.

## **Filing of Claims**

Under existing law, a court has no express authority to set a date after which claims against an assignor's estate are barred. Under the CS, a court may establish a claims bar date that is at least 30 days after creditors receive notice of the claim deadline.

The CS also establishes a deadline by which secured creditors may file deficiency claims if the disposition of the secured property fails to satisfy their claims.

## **Objection to Claims**

According to the Business Law Section of The Florida Bar, many parties have litigated whether one creditor has standing to challenge the claims on an assignor's estate by another creditor.<sup>6</sup> The CS clarifies that a creditor has standing to object to the claims of other creditors. The CS also requires assignees to create and make available a register of all claims against the assignor's estate.

## **Priority of Claims**

Under existing law, secured creditors have the highest priority for the payment of claims by an assignor's estate. The expenses for the administration of the estate have the next highest priority for payment. The CS clarifies that rent for the premises occupied by an assignment estate is an administration expense.

After administration expenses, the next highest priority under existing law is unsecured claims for taxes. The CS limits the claims under this priority level to those taxes which accrued within 3 years before the filing of an assignment for the benefit of creditors.

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<sup>6</sup> The Business Law Section of The Florida Bar, Executive Summary of Proposed Revisions to Chapter 727, Florida Statutes, 7 (August 11, 2006) (unpublished manuscript, on file with the staff of the Committee on Judiciary).

Following the claims for taxes, the next highest priority is unpaid wages and benefits of the assignor's employees. Current law limits these claims to wages and benefits that accrued within 90 days before the filing of the assignment for the benefit of creditors. The CS expands this period to 180 days before the assignment. The CS also increases to \$10,000 from \$2,000 per employee, the amount of claims that may qualify at this priority level.

The next priority level following the claims for wages and benefits are claims for deposits paid to the assignor for an interest in property. The CS increases the amount available at this priority level to \$2,225 from \$900 per person.

### **Claims Arising Out of the Purchase of a Security**

In *Moecker v. Antoine*, purchasers bought unregistered securities in a corporation that became insolvent and assigned its assets for the benefit of creditors.<sup>7</sup> These purchasers sought to increase their priority for payment of claims against the corporation's estate. As stockholders, their payment would come after the satisfaction of all creditor claims. However, the stockholders were able to rescind their stock purchases and assert claims as unsecured creditors. This CS will effectively reverse *Moecker*. Under the CS, a person will not be able to become a creditor and thereby increase his or her priority for payment by rescinding a purchase of securities.

### **Effective Date**

The CS provides an effective date of July 1, 2007.

## **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.

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<sup>7</sup> *Moecker v. Antoine*, 845 So. 2d 904 (Fla. 1st DCA 2003).

**B. Private Sector Impact:**

This CS, through its clarifying changes, may reduce litigation surrounding assignments for the benefit of creditors. As a result, more funds may be available to pay creditors.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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## **VIII. Summary of Amendments:**

None.

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