

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 715 Waivers of Exemptions of Applicable Assets

SPONSOR(S): Robinson, W.

TIED BILLS: **IDEN./SIM. BILLS:** SB 688

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	15 Y, 0 N	Mawn	Jones
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

A security interest arises when, in exchange for a loan, a borrower agrees in a security agreement that the lender may take specified assets owned by the borrower if he or she defaults on the loan. A security interest also assures the lender that, if the borrower enters bankruptcy, the lender may be able to recover the loan's value by taking possession of the asset. Under Florida law, a property description, whether or not it is specific, is sufficient for the purposes of a security agreement if it reasonably identifies what is described. However, a description of collateral as "all the debtor's assets," "all the debtor's personal property," or similar phrasing, does not sufficiently identify the collateral for purposes of a security interest.

Florida Law protects certain assets from legal process so that they remain out of a creditor's reach, including:

- Funds held in individual retirement accounts ("IRA") and other tax-exempt accounts.
- The cash surrender value of a life insurance policy and the proceeds of an annuity contract.
- Funds held in qualified tuition programs and medical, Coverdell education, and hurricane savings accounts.
- Disability income benefits.
- Wages, unless the debtor agrees to waive the exemption in writing.
- Homestead property and certain personal property items.
- Social security benefits; unemployment compensation, or public assistance benefits; veterans' benefits; alimony, support, or separate maintenance; and stock or pension plans under specified circumstances.

Historically, exempt assets not specifically pledged in a security agreement remained exempt from a creditor's reach. However, a recent Eleventh Circuit Court of Appeals decision changed this rule by finding that a security agreement granting a security interest in "all assets and rights of the Pledgor" pledged the debtor's IRA as security for a loan even though such IRA was not specifically identified in the agreement. This decision, in turn, may have significant federal tax consequences for Floridians, as the use of certain tax-exempt accounts as security for a loan is considered distribution of the funds to the owner, who then owes federal income tax on the money and may owe a tax penalty for early distribution.

HB 715 requires that a security agreement purporting to pledge a specified exempt asset must specifically identify the asset for the pledge to be valid, provides that certain specified language in a security agreement does not sufficiently identify an asset, and provides that the exempt assets identified in the bill are not adequately described by general reference to the type of collateral. The bill applies to security interests created on or after October 1, 2021.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of October 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Security Interests

A security interest arises when, in exchange for a loan, a borrower agrees in a security agreement¹ that the lender may take specified assets owned by the borrower if he or she should default on the loan.² A security interest also assures the lender that, if the borrower enters bankruptcy, the lender may be able to recover the loan's value by taking possession of the asset.³

Under Florida law, a description of personal or real property, whether or not it is specific, is sufficient for the purposes of a security agreement if it reasonably identifies what is described.⁴ An effective description of collateral⁵ in a security agreement identifies the asset by:

- Specific listing;
- Category;
- Type of collateral;
- Quantity, computational, or allocational formula; or
- Any method under which the identity of the collateral is objectively determinable.⁶

However, a description of collateral as "all the debtor's assets," "all the debtor's personal property," or similar phraseology, does not sufficiently identify the collateral for purposes of a security interest.⁷ A description only by type of collateral is an insufficient description of:

- A commercial tort claim;
- In a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account; or
- An account consisting of a right to payment of a monetary obligation for the sale of real property that is the debtor's homestead under Florida law.⁸

Asset Exemptions

Florida law protects certain assets from legal process so that they remain out of a creditor's reach, including:

- Funds held in an individual retirement account ("IRA") and other tax-exempt accounts.⁹
- A life insurance policy's proceeds.¹⁰
- A life insurance policy's cash surrender value and an annuity contract's proceeds.¹¹
- Funds held in qualified tuition programs and medical, Coverdell education, and hurricane savings accounts.¹²
- Disability income benefits.¹³
- Wages, unless the debtor agrees to waive the exemption in writing.¹⁴

¹ "Security agreement" means an agreement that creates or provides for a security interest. S. 679.1021(1)(uuu), F.S.

² Legal Information Institute, *Secured Transactions*, https://www.law.cornell.edu/wex/secured_transactions (last visited Mar. 7, 2021).

³ *Id.*

⁴ S. 679.1081(1), F.S.

⁵ "Collateral" means the property subject to a security interest. The term includes proceeds to which a security interest attaches; accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and goods that are the subject of consignment. S. 679.1021(1)(l), F.S.

⁶ S. 679.1081(2), F.S.

⁷ S. 679.1081(3), F.S.

⁸ S. 649.1081(5), F.S.

⁹ S. 222.21, F.S.

¹⁰ S. 222.13, F.S.

¹¹ S. 222.14, F.S.

¹² S. 222.22, F.S.

¹³ S. 222.18, F.S.

- Homestead property.¹⁵
- Certain personal property items.¹⁶
- A debtor's interest in a motor vehicle, up to \$1,000 in value, and any professionally prescribed health aides.¹⁷
- Social security benefits; unemployment compensation, or public assistance benefits; veterans' benefits; alimony, support, or separate maintenance; and stock or pension plans under specified circumstances.¹⁸

Historically, exempt assets have remained exempt from a creditor's reach unless specifically pledged in a security agreement.¹⁹

Recent Case Law

Recently, an Eleventh Circuit Court of Appeals decision, *Kearney Constr. Co., LLC v. Travelers Casualty & Surety Co. of America*, significantly altered the historic tradition of maintaining asset exemptions unless the asset is specifically pledged. In *Kearney*, the debtor obtained a line of credit and pledged the following collateral as a security interest:

[A]ll assets and rights of the Pledgor, wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof, all goods (including inventory, equipment and any accessories thereto), instruments (including promissory notes)[,] documents, accounts, chattel paper, deposit accounts, letters of credit, rights, securities and all other investment property, supporting obligation[s], and contract or contract rights or rights to the payment of money, insurance claims, and proceeds, and general intangibles.²⁰

The Court held that this language was an "unambiguous pledge" of the debtor's IRA as security for the loan even though the IRA was not specifically identified in the agreement and the borrower testified that he did not intend to pledge it.²¹

Practically speaking, the *Kearney* decision makes it possible for a borrower to inadvertently pledge as a security interest historically exempt assets.²² This may affect Florida consumers with security agreements containing general language similar to the language at issue in *Kearney*.

The decision could also have significant federal tax implications, as the use of certain tax-exempt accounts as security for a loan is considered a distribution of the funds in the account to the owner, who then may owe federal income tax on the distribution.²³ The Tax Code also imposes a ten percent tax penalty for early distributions from certain tax-exempt accounts.²⁴

Effect of Proposed Changes

HB 715 prevents a person's use of general language in a security agreement pledge from assigning, pledging, or waiving his or her rights to applicable exempt assets, including:

- Life insurance policies.

¹⁴ S. 225.15, F.S.

¹⁵ S. 222.01-222.05, F.S.; Art. X, Sec. 4, Fla. Const.

¹⁶ S. 222.061, F.S.

¹⁷ S. 222.25, F.S.

¹⁸ S. 222.201, F.S.

¹⁹ Real Property, Probate, and Trust Law Section of the Florida Bar ("RPPTL"), *White Paper* (Jan. 26, 2021); see, e.g., *Havoco of Am. Ltd. v. Hill*, 790 So. 2d 1018 (Fla. 2001); *Connor v. Seaside Nat'l Bank*, 135 So. 3d 508 (Fla. 5th DCA 2014); *Killian v. Lawson*, 387 So. 2d 960 (Fla. 1980).

²⁰ 795 Fed. Appx. 671 (11th Cir. 2019).

²¹ *Id.*

²² The exception is homestead property, as a waiver of such rights must be "knowing, voluntary, and intelligent" to have any effect. See RPPTL, *supra* note 19; see also *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007) (citing *State v. Upton*, 658 So. 2d 86 (Fla. 1995)).

²³ I.R.C. 408(e)(4) and (d)(1); I.R.C. 72(p)(1)(B).

²⁴ I.R.C. 72(t).

- A life insurance policy's cash surrender value and an annuity contract's proceeds.
- Wages, reemployment assistance, or unemployment compensation payments.
- Disability income benefits.
- Certain payments protected by the federal Bankruptcy Reform Act of 1978.
- Pension money and tax-exempt retirement accounts.
- Assets in qualified tuition programs and medical, Coverdell education, and hurricane savings accounts.

Specifically, the bill requires that a security agreement purporting to pledge any such asset must specifically identify the asset for the pledge to be valid and specifies that the following references purporting to pledge a security interest are insufficient to pledge exempt assets:

- All of a person's "assets and rights, wherever located, whether now owned or after acquired, and all proceeds thereof," or other words of similar import, including, but not limited to, those described in s. 679.1081(3), F.S., i.e., "all the debtor's assets" or "all the debtor's personal property."
- References only to the type of collateral.

The bill also provides that the applicable exempt assets identified in the bill are not adequately described by general reference to the type of collateral. Thus, the phrase "all existing and after-acquired retirement accounts," without more, would be insufficient to pledge an IRA as a security interest.

The bill provides an effective date of October 1, 2021, and applies to security interests created on or after that date.

B. SECTION DIRECTORY:

Section 1: Creates s. 222.105, F.S., relating to waiver of exemptions; requirements.

Section 2: Amends s. 679.1081, F.S., relating to sufficiency of description.

Section 3: Provides that the bill applies to security interests created on or after October 1, 2021.

Section 4: Provides an effective date of October 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may prevent Floridians from inadvertently pledging and waiving any rights to applicable exempt assets and suffering any related federal tax consequences.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES