

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: Judiciary 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	Fav/CS
2.			CM	
3.				
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I. Summary:

This bill revises the law related to assignments for the benefit of creditors. The bill 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 bill:

- 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 bill 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 section 727.104, all creditors except for lien holders are required to file proofs of claim pursuant to section 727.112. Claims, whether contingent, liquidated, unliquidated, or disputed, must be filed within 120 days from the date that the chapter 727 petition is filed or the claim will be barred “unless for cause shown.” Section 727.114 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 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.¹

III. Effect of Proposed Changes:

This bill revises the law related to assignments for the benefit of creditors. The bill 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 bill are detailed below.

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

Property Exempt from Creditor Claims

The bill 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 Constitution.² However, the bill 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 five days per week in counties with a population of greater than 1 million residents. This bill allows foreclosure notices to be advertised in newspapers that publish at least five days per week. However, the bill expands the group of newspapers in which a foreclosure notice may be advertised to include newspapers that normally publish at least five days per week except for weeks with legal holidays.

Consensual Lienholder/Actions against the Estate

The bill 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 bill provides that consensual lienholders may enforce their rights in personal or real property collateral.

The bill clarifies that causes of action are assets within an assignor's estate. Moreover, the bill 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.³

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

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

² 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.

³ 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").

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

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

Continuation of Business

Current law requires an assignee to have authorization from a court to run an assignor's business. The bill 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.

Rejection of Leases and Termination of Employment Contracts

Existing law does not address whether an assignee may reject an unexpired lease. The bill, however, permits an assignee to reject an unexpired lease. Whether approval of a court is required is unclear under the bill. 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 one 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 bill, an employee's damages are limited to wages for one 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 bill, a court may establish a claims bar date that is at least 30 days after creditors receive notice of the claim deadline.

The bill 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.⁶ The bill clarifies that a creditor has standing to object to the claims of other creditors. The bill also requires assignees to create and make available a register of all claims against the assignor's estate.

⁶ 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).

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 bill 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 bill limits the claims under this priority level to those taxes which accrued within three years before the filing of an assignment for the benefit of creditors.

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 bill expands this period to 180 days before the assignment. The bill 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 bill 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.⁷ 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 bill will effectively reverse *Moecker*. Under the bill, 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 bill provides an effective date of July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

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

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill, 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.

VIII. Summary of Amendments:

None.

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