The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Rules

BILL:	CS/SB 978
INTRODUCER:	Community Affairs Committee and Senator Bradley
SUBJECT:	Secured Transactions
DATE:	April 10, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Baird	McKay	CM	**Favorable**
2.	Hackett	Ryon	CA	**Fav/CS**
3.	Baird	Twogood	RC	**Favorable**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 978 provides that language referring only to the type of collateral is insufficient to waive constitutional and statutory protections that prevent creditors from obtaining a judgment against certain assets, allowing the individual to pledge such assets as collateral.

These changes are in response to a recent federal court case which held that mere contractual reference to "all assets" included certain property previously understood to be excluded from such an agreement. Assets unexpectedly put at risk include retirement accounts, pension payments, and education savings accounts. The bill does not affect state or local revenue.

The bill takes effect upon becoming a law.

II. Present Situation:

Asset Protection from Legal Process

A creditor can collect money owed by filing an action for a judgment in state court. A judgment is an order of the court creating an obligation, typically a debt when creditors are involved. The creditor may then use that judgment to collect assets from the debtor. Chapter 222, F.S., contains exemptions that protect certain assets from legal process under Florida law, absent a waiver. Florida exempts the following assets against creditor claims in most situations:

- Homestead property (ss. 222.01-222.05, F.S.).

- Certain items of personal property (s. 222.061, F.S.).
- The proceeds of a life insurance policy (s. 222.13, F.S.).
- The cash surrender value of a life insurance policy and the proceeds of an annuity contract (s. 222.14, F.S.).
- Disability benefits payable from any insurance (s. 222.18, F.S.).

- Certain pension, retirement, or profit sharing benefits (s. 222.21, F.S.).
- Prepaid College Trust Fund moneys and Medical Savings Account funds (s. 222.22, F.S.).
- A debtor's interest in a motor vehicle, up to $1,000 in value (s. 222.25, F.S.).
- A debtor's interest in any professionally prescribed health aids (s. 222.25, F.S.).
- Social security benefits, unemployment compensation, or public assistance benefits; veterans' benefits; disability, illness, or unemployment benefits; alimony, support, or separate maintenance; and stock or pension plans under specified circumstances (s. 222.201, F.S.).

These exemptions have historically been construed liberally in favor of the consumer against creditors' claims to exempt property.[1] When a consumer enters a security agreement – a contract in which a debtor offers assets as collateral ("security") to guarantee repayment – the contract describes what assets are offered as security. Historically, a contract's blanket offering of "all assets" as security has not been interpreted to include assets subject to these exemptions.[2]

An individual must take additional steps in order to offer certain exempt assets as collateral. For example, in the case of a Floridian's homestead exemption, which protects homestead property from bankruptcy proceedings, a contractual waiver of those rights must be "knowing, voluntary, and intelligent" to have any effect.[3] As another example, certain wages are exempt from legal process.[4] The wages exemption may only be waived in writing, in a separate document attached to the security agreement, which must contain mandatory waiver language in at least 14-point font.[5]

Sufficiency of Description for Collateral in Security Agreements

An effective description of collateral 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]

[1] See e.g. Patten Package Co. v. Houser, 102 Fla. 603, 607, 136 So. 353, 355 (1931); *Killian v. Lawson*, 387 So.2d 960, 962 (Fla. 1980); *Havoco of Am. Ltd. v. Hill*, 790 So.2d 1018, 1021 (Fla. 2001); *Connor v. Seaside National Bank*, 135 So.3d 508, 509 (Fla. 5th DCA 2014).
[2] Section 679.1081(3), F.S., Official Comment 2 to U.C.C. s. 9-110 (s. 679.1081(3), F.S.).
[3] *See e.g. Chames v. DeMayo*, 972 So.2d 850, 861 (Fla. 2007) (citing *State v. Upton*, 658 So.2d 86, 87 (Fla. 1995)).
[4] Section 222.11, F.S.
[5] Section 222.11(2), F.S.
[6] Section 679.1081(2), F.S. Chapter 679, F.S., adopts Article 9 of the Universal Commercial Code (U.C.C.), dealing with secured transactions. Every state in the United States has adopted the U.C.C. *See* https://www.uniformlaws.org/acts/ucc (last visited March 24, 2023).

Current law specifically provides that a description of collateral as "all the debtor's assets" or "all the debtor's personal property" does not reasonably identify collateral.[7]

Finally, current law provides that a description defined by "type" of collateral alone for a commercial tort claim or, in a consumer transaction, for a security entitlement, securities account, or commodity account, is not sufficient.[8] For example, "all existing and after-acquired investment property" or "all existing and after-acquired security entitlements," without more, would be insufficient in a consumer transaction to describe a security entitlement, securities account, or commodity account.[9]

Kearney Construction Co, LLC v. Travelers Casualty & Surety Company of America

A recent federal court case held that general, broad pledges of "all assets" waives ch. 222, F.S., protections. In *Kearney Construction Company, LLC v. Travelers Casualty and Surety Company of America*[10] the debtor obtained a line of credit and pledged collateral in the contract as follows:

> Grant of Security Interest. As security for any and all Indebtedness (as defined below), the Pledgor hereby irrevocably and unconditionally grants a security interest in the collateral described in the following properties[:] all 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], any contract or contract rights or rights to the payment of money, insurance claims, and proceeds, and general intangibles (the "Collateral").[11]

The Eleventh Circuit considered whether this language included assets held in the debtor's Individual Retirement Account (IRA). The debtor argued that the IRA should not have been included in all assets and was never intended to have been offered as collateral.[12] The court found that the security agreement's language constituted an "unambiguous pledge" of all assets, which includes those exempt under ch. 222, F.S.[13] Kearney's IRA was not specifically listed in the agreement, but the court concluded that the broad language of the contract "encompassed potential retirement accounts or funds, such as the [IRA] at issue here."[14]

The courts did not address whether ch. 222, F.S., exemptions or ch. 679, F.S., description requirements should have any weight in interpreting the contract. The courts also did not explain what part of the security agreement encompassed the IRA. It is unclear if it was part of a specific

[7] Section 679.1081(3), F.S.
[8] Section 679.1081(5), F.S.
[9] Section 679.1081(5), F.S.; Official Comment 5 to U.C.C. s. 9-108 (s. 679.1081(5), F.S.).
[10] 795 Fed.Appx. 671 (Fla. 11th Cir. Nov. 13, 2019).
[11] *Id*. at 673
[12] *Id*.
[13] *Id*.
[14] Magistrate Judge's Report and Recommendation, Case 8:09-cv-01850-JSM-TBM, Docket 865, at 28.

collateral category such as a deposit account, investment property, general intangible, or another category,[15] each of which could have different treatment.[16]

Federal law treats the use of any funds inside a tax-advantaged retirement account as a taxable distribution from that account.[17] Therefore, any such funds used unexpectedly for a pledge of "all assets" towards a debt risk losing their tax-advantaged status, subject to back taxes and penalties.

In the 2022, the Legislature passed SB 406 to address this issue by providing that language referring only to the type of collateral is insufficient to waive constitutional and statutory protections that prevent creditors from obtaining a judgment against certain assets, allowing the individual to pledge such assets as collateral. The provision was intended to apply retroactively. The bill was vetoed by the Governor.[18]

III. Effect of Proposed Changes:

The bill provides that a general description only by type of collateral is an insufficient description to pledge as collateral, for the purposes of a security agreement, accounts and other entitlements set forth in ss. 222.13-222.16, 222.18, and 222.201-222.22, F.S. These include:

- Funds held in an IRA and other tax-exempt accounts.
- A life insurance policy's proceeds or cash surrender value.
- An annuity contract's proceeds.
- Funds held in qualified tuition programs, medical savings accounts, Coverdell education accounts, and hurricane savings accounts.
- Disability income benefits.
- A deceased person's wages, travel expenses, and reemployment assistance or unemployment compensation payments.
- Social security benefits; unemployment compensation; public assistance benefits; veterans' benefits; alimony, support, or separate maintenance; and stock or pension plans under specified circumstances.

In order to include such an asset in a security agreement, the asset must be described by specific reference to the individual asset as provided in s. 679.1081, F.S.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, s. 18, of the State Constitution requires a two-thirds vote of the membership of each house of the Legislature to pass legislation requiring counties and municipalities to spend funds, limit their ability to raise revenue, or reduce the percentage of a state tax

[15] *Id.*
[16] Sections 679.1021, 679.1031, 679.1041, 679.1051, 679.1061, 679.1071, 679.1081 and 679.1091, F.S.
[17] I.R.C. s. 408(e)(4).
[18] Ron DeSantis, letter, Jun. 24, 2022, available at https://www.flgov.com/wp-content/uploads/2022/06/6.24.22-SB-406-Veto-Letter.pdf (last visited March 24, 2023).

shared with them. The bill does not require counties and municipalities to spend funds, limit their ability to raise revenue, or reduce the percentage of a shared state tax. Therefore, the provisions of Art. VII, s. 18 of the State Constitution do not apply.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The bill does not affect state or local revenue.

B. Private Sector Impact:

The bill protects consumers from unknowingly pledging otherwise exempt assets.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 679.1081 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on March 29, 2023:
The CS removes language providing that the bill is intended to clarify existing law.

B. Amendments:

None.