

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 1042

INTRODUCER: Judiciary Committee and Senator Simmons

SUBJECT: Judgment Debts

DATE: January 19, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Davis</u>	<u>Phelps</u>	<u>RC</u>	Favorable

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1042 revises chapter 56, F.S., titled Final Process, which regulates how a creditor may collect a judgment against a debtor. The chapter also includes a statute governing proceedings supplementary which provides a judgment creditor a mechanism to investigate and discover assets that a judgment debtor may have improperly concealed to third parties.

This bill amends chapter 56, F.S., by:

- Providing a new definitions section at the beginning of the chapter for uniform usage throughout the chapter;
- Moving the discovery provisions in current law into a single section and providing that the discovery provisions are in addition to the discovery provisions found in the rules of civil procedure;
- Establishing a procedure for bringing non-parties to the original action into proceedings supplementary by a notice to appear that describes the property at issue, notifies the third-party of the right to a jury trial, and requires the third-party to serve an answer within a time set by the court;
- Providing that a claim under the Uniform Fraudulent Transfer Act which is raised during proceedings supplementary must be initiated by a supplemental complaint and that those claims are governed by the Uniform Fraudulent Transfer Act and the rules of civil procedure; and
- Providing that a person who asserts a claim or defense in proceedings supplementary for the purpose of delay may be subject to penalties imposed by the court.

II. Present Situation:

Chapter 56, Final Process

Chapter 56, F.S., titled “Final Process,” contains the framework for executing or enforcing the final judgment after a court determines that a creditor is entitled to recover from a debtor. Also contained in that chapter is a statute governing proceedings supplementary, which provides a judgment creditor a procedural mechanism to investigate assets of the judgment debtor that might be available to satisfy the judgment. These proceedings also permit the discovery of assets that may have been transferred improperly by a judgment debtor to third parties. Proceedings supplementary are separate and distinct from other actions under the Uniform Fraudulent Transfer Act (UFTA), codified in chapter 726, F.S. A defendant in an action under the UFTA is entitled to greater procedural protections and must be served with an actual complaint as opposed to a notice to appear in a supplementary proceeding.

Proceedings supplementary did not exist at common law. In order for a creditor to discover and execute on a judgment debtor’s assets, he or she had to institute a parallel proceeding, a creditor’s bill in chancery, to prevent the fraudulent disposal of the debtor’s property before the debt was reduced to judgment. In 1919, the Legislature passed the proceedings supplementary statute to streamline the process and avoid the step of requiring a judgment creditor to initiate the completely separate action.¹ In 1935, The Florida Supreme Court noted that the provisions were intended to provide the circuit court with broad discretionary powers to carry out the complete “intent and purpose of the proceedings supplementary to execution” and grant the circuit courts the authority to harness all of a defendant’s property or property rights “however fraudulently conveyed, covered up, or concealed,” even those held or possessed by third parties.² Under proceedings supplementary, a judgment creditor has the right to implead, or bring into the action, third parties in possession of property belonging to the judgment debtor, even though the third party was not involved in the original action.

One court more recently noted that proceedings supplementary afford “speedy and direct proceedings” to be held in the same court where the judgment was recovered to better afford the judgment creditor with the most complete relief possible to satisfy the judgment.³ Statutory proceedings supplementary are post-judgment proceedings. They allow a creditor to effectuate a judgment lien that already exists and are not separate, independent causes of action.⁴

Proceedings Supplementary Task Force

Recognizing that the proceedings supplementary section of the Florida Statutes remained virtually unchanged over the last decades, the Proceedings Supplementary Task Force was formed in 2013 by the Business Law Section of The Florida Bar to review and recommend

¹ Benjamin H. Brodsky, *Caught in the Web of Florida’s Statutory Proceedings Supplementary: Procedural and Constitutional Problems Facing Impleaded Third Parties*, The Florida Bar Journal, Dec. 1012, at 28, available at https://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/a29338fa50f7a88085257ac2007494de!OpenDocument&Highlight=0,brodsky*.

² *State ex rel. Phoenix Tax Title Corp. v. Viney*, 120 Fla 657, 663, 163 So. 57, 163 So. 57, 60 (1935). As noted in the Brodsky article above.

³ *Zureikat v. Shaibani*, 944 So. 2d 1019 (Fla. 5th DCA 2006).

⁴ *Id.* at 1022.

changes to the statute governing proceedings supplementary and other provisions of chapter 56, F.S.⁵ After 2 years of work, the task force has recommended the changes that constitute SB 1042. According to the Business Law Section, these changes are procedural and do not represent substantive changes to any part of chapter 56, F.S.⁶

III. Effect of Proposed Changes:

The bill makes organizational changes to chapter 56, F.S., governing final process, while updating and clarifying several definitions for uniformity. The chapter currently does not contain a definitions section, but the bill provides a new section of definitions.

Definitions and Terms

Section 1 creates a new and separate definitions section to establish uniform definitions of terms and terms used in chapter 56, F.S. This section identifies each party involved in the proceedings supplementary according to terms currently used in case law, and promotes a better understanding of the application of chapter 56.⁷ Relevant changes in terminology include:

- When appropriate, “judgment debtor” replaces the terms “defendant” and “defendant in execution.” Judgment debtor is defined as a person who is liable for a judgment, an order, or a decree subject to execution in chapter 56, F.S.
- The term “judgment creditor” replaces the terms “plaintiff,” and “plaintiff in execution.” A judgment creditor is defined as the holder of an unsatisfied judgment, order, or decree for the payment of money, including a transferee or surety, who has the right to control and collect the judgment.
- “Corporate judgment debtor” replaces the term “corporation.” The term is defined as a person who is a judgment debtor, not including an individual, an estate, or a trust other than a business trust.
- A “levying creditor” is defined as a judgment creditor who levies on property.
- A definition of “person” is added to include an individual, partnership, corporation, association, or one of several other entities, all of which mirror verbatim the definition of person in s. 726.102(1), F.S. dealing with fraudulent transfers.

Discovery in Proceedings Supplementary

Under current law, the discovery tools available to a judgment creditor in proceedings supplementary, such as requiring a judgment debtor to be examined before the court, are spread around in s. 56.29, F.S., making it confusing as to whether they are generally available or whether they are a prerequisite to proceedings supplementary.⁸ The bill moves the discovery provisions currently in s. 56.29, F.S., to a newly created s. 56.30, F.S., which bears the catch line “Discovery in proceedings supplementary.” The new provisions in s. 56.30, F.S., provide clearly

⁵ Some provisions were amended in 2014.

⁶ Business Law Section of The Florida Bar, *White Paper: Analysis of Proposed Amendments to Chapter 56* (2015) (on file with the Senate Committee on Judiciary). According to this white paper, the task force was formed after the publication of Benjamin Brodsky’s article published in *The Florida Bar Journal* and referenced in footnote 1 above.

⁷ *Id.* at 3.

⁸ Business Law Section of The Florida Bar, *supra* note 6, at 7.

identifiable discovery procedures for proceedings supplementary. They are the same as current law with the following additions:

- The discovery provisions in s. 56.30, F.S., are in addition to any other discovery allowed under the rules of civil procedure.
- A judgment debtor may be required to appear for examination before the court in the county of the judgment debtor's residence or principal place of business.
- A court's examination of a judgment debtor may occur before a notice to appear is issued to third parties.
- A corporate judgment debtor may send a designee having knowledge of the property subject to execution to be examined by the court.

Notification and Examination of Third-Parties

As discussed earlier, proceeding supplementary permit the discovery of assets that may have been transferred or concealed by a judgment debtor in an attempt to prevent creditors from satisfying a final judgment. These efforts to conceal assets generally involve third-parties who were not involved in the initial underlying case. The current process for bringing these third-parties into the proceeding in s. 56.29(2), F.S., has caused confusion and raised due process concerns among participants.

This bill amends s. 56.29(2), F.S., to create a uniform procedure for bringing non-parties into proceedings supplementary. A judgment creditor, in its motion to initiate proceedings supplementary, must describe any property of the judgment debtor, not exempt from execution, which may be applied toward satisfaction of the judgment. After proceedings supplementary have been initiated, the court then must issue a notice to appear to third-parties informing them that property in their possession or control may be subject to execution and applied to satisfy a judgment. Service of the notice to appear makes them parties to the proceedings supplementary. The new notice to appear must be served by a process server. The notice must describe with reasonable specificity the property at issue, require the third-party to serve an answering affidavit within a specified time to be determined by the court which is not less than 7 business days, unless reduced by the court for good cause, and require the third-party to assert any defenses in the responding affidavit. The notice to appear must also inform the third-party that penalties may be imposed for failure to timely file an affidavit and that he or she has the right to a jury trial.⁹

Uniform Fraudulent Transfer Act Claims

Current s. 56.29(5), F.S., permits judgment creditors to file claims under the Uniform Fraudulent Transfers Act¹⁰ (UFTA) in proceedings supplementary. The bill moves this provision from s. 56.29(5), F.S., to the newly-created s. 56.29(9), F.S. To underscore that UFTA claims are distinct from proceedings supplementary, the bill provides that UFTA claims must be initiated by a supplemental complaint and served as provided by the rules of civil procedure. The claims under the supplemental complaint are subject to chapter 726, F.S., and the rules of civil procedure. The bill also requires the clerk of court to provide the parties with a parallel case number that the parties will use for the UFTA action.

⁹ See s. 56.29(2), F.S. and note 6 *supra*.

¹⁰ Chapter 726, F.S.

Defenses or Claims Raised Solely for Delay

Current section 56.16, F.S., provides that a person, referred to as a claimant, other than the judgment debtor, who claims any property levied on by the judgment creditor, may file an affidavit stating the claim. Under sections 56.16 and 56.18, F.S., if the court determines that the claimant's asserted claim on the property was brought for the purpose of delay, the judgment creditor may be awarded damages not to exceed 20 percent of the value of the property claimed. Consistently, the bill amends ss. 56.16, 56.18, and 56.29, F.S., to provide that a person served with a notice to appear in proceedings supplementary and who asserts a claim or defense in proceedings supplementary for the purpose of delay may be subject to the penalties provided in ss. 56.16 and 56.18, F.S.

Other Effects of the Bill

The bill amends s. 56.021, F.S., to provide that an execution may be issued upon an "order," in addition to a judgment or decree. This is a codification of existing case law¹¹ and practice.

Newly renumbered s. 56.29(6), F.S., is amended to provide that the procedures and remedies available under ss. 56.16-56.20, F.S., related to third-party claims and executions against third-parties, also apply to orders, judgments, and writs issued pursuant to the proceedings supplementary process.

The bill also makes technical and conforming corrections.

Effective Date

The bill takes effect July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

¹¹ See *Davidson v. Seegar*, 15 Fla. 671 (Fla. 1876).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator stated that the fiscal impact of this legislation cannot be accurately determined because data is unavailable to quantify the effect it will have on judicial time and workload resulting from the changes to chapter 56, F.S. The Office did note that the clarifying language in the bill might assist the courts handling proceedings supplementary and may contribute to a reduction in the expenditure of judicial time.¹²

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 56.011, 56.021, 56.041, 56.071, 56.09, 56.10, 56.12, 56.15, 56.16, 56.18, 56.19, 56.20, 56.22, 56.26, 56.27, 56.28, 56.29, and 56.30.

This bill creates section 56.001 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 Judiciary on January 12, 2016:

The committee substitute adds a definition of “person” in section 1, the new definitions section for chapter 56, F.S. Language is also added in section 18, s. 56.29(9), F.S., to provide that UFTA claims initiated in a supplemental complaint must be served as provided by the rules of civil procedure and that the UFTA claims are subject to chapter 726, F.S., and the rules of civil procedure.

¹² Office of the State Courts Administrator, *2016 Judicial Impact Statement for SB 1042*, (Jan 11, 2016) (on file with the Senate Committee on Judiciary).

The majority of the differences between the committee substitute and the original bill are generally stylistic changes that represent the different drafting styles and rules between House and Senate Bill Drafting. The committee substitute, except for several minor grammatical differences, conforms the Senate bill to CS/HB 503.

B. Amendments:

None.

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