

### SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: April 3, 1998 Revised: 4/22/98 \_\_\_\_\_

Subject: Debtors and Creditors

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Harkins</u>	<u>Moody</u>	<u>JU</u>	<u>Fav/1 amendment</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

#### I. Summary:

The bill relates to debtors and creditors. The bill does the following:

- Provides that a levy is considered made when any property or portion of property not listed in the instruction for levy is seized;
- Provides that seizure requires the taking of possession of property or steps to publicize that the property has been taken under the sheriff’s custody or control;
- Provides that the Comptroller of the State of Florida shall set a simple interest rate payable on judgments or decrees;
- Provides that the interest rate on a judgment accrues for the life of the judgment at the simple rate set for that year by the Comptroller;
- Provides that, after the effective date of the bill, when a contract specifies a rate of interest, any judgment must include the accrued interest at the contract rate at the time of judgment;
- After a judgment is entered, simple interest accrues on a judgment notwithstanding the simple interest rate;
- Provides for a method in which to acquire a “judgment lien” on judgment debtor’s interest in personal property;
- Provides for a time frame in which a lienholder must acknowledge full or partial satisfaction of the debtor’s obligation;
- Provides that liens created by a writ of execution which has been delivered to the sheriff in any county prior to the effective date of this legislation remains in effect for two years as to property located in the county, but as to property brought into the county after the date this bill goes into effect such, writs create no lien inchoate or otherwise;
- Provides that creditors who have delivered writs of execution to sheriffs prior to the effective date of this bill have 2 years in which to record a judgment certificate, after which their writs of execution become void and of no effect;
- Adds new requirements for the recognition of foreign judgments;

- Provides that multiple writs of execution may be docketed in different counties;
- Provides that a sheriff may return an unsatisfied writ of execution when the sheriff determines that reasonable time in which to collect the levy on the property has passed and that it serves no useful purpose for the sheriff to continue in possession of the writ;
- Provides that creditors may have writs of execution levied on an individual's money in excess of \$1,000;
- Provides that notice of an execution sale must be mailed to all judgment creditors or their attorneys in the same manner as notice is to be provided to the debtor;
- Provides that the first \$500 paid on an execution does not reduce the judgment, but is considered liquidated expenses;
- Provides that any money paid on the execution after the first \$500 must be paid to the lienholder or his attorney;
- Deletes the provision of s. 56.27, F.S., which requires that money in excess of the amount owed to the judgment creditor which is derived from the sale of property is to be paid to the judgment debtor immediately;
- Requires that when property sold under execution brings more than the amount of the earliest valid judgment lien plus sheriff's costs and the levying creditor's liquidated expenses, the surplus must first be paid to other judgment lienholders, then to the judgment creditor if not already completely satisfied, and then to the judgment debtor/defendant if there is an excess;
- Provides that the value of levied property may not be considered excessive unless its value is unreasonably higher than the value of all valid judgment liens against the judgment debtor;
- Provides that a person or entity is entitled to a writ of garnishment against a person or entity and may subject any debt owed to the judgment debtor by a third person with certain exceptions;
- Provides for a form notice to a judgment debtor of a judgment creditor's writ of garnishment which explains certain rights of the judgment debtor; and
- Provides that a judgment creditor who obtains writ of garnishment must mail a copy of the writ of garnishment (procedures for mailing are listed) and the required form of notice within 5 days of issuance of the writ or 3 days after the writ is served on the judgment garnishee.

This bill substantially amends the following sections of the Florida Statutes: 30.231, 55.03, 55.604, 56.031, 56.041, 56.09, 56.21, 56.27, 56.29, 77.01, 77.055, 77.06, 222.12, and 679.301. The bill also creates the following sections of the Florida Statutes: 55.105, 55.106, 55.107, and 77.05. Finally, the bill repeals section 30.17 of the Florida Statutes.

## **II. Present Situation:**

### **Sheriffs' Fees for Service of Summons, Subpoenas, and Executions**

Currently, a levy is considered made when any property or any portion of the property listed in the instructions for levy is seized, or upon demand of the sheriff the writ is satisfied by the defendant in lieu of seizure. s. 30.231, F.S.

### **Rate of Interest on Judgments**

Under s. 55.03 F.S., the Comptroller sets the rate of interests payable on judgments yearly. Nothing in the statute states that interest shall be *simple* interest. Also, under s. 55.03, F.S., the rate set by the Comptroller may not affect a rate of interest established by written contract or obligation. Whatever the rate, it is to be listed on the writ, judgment, or decree directed to the sheriff and the amount listed accrues from the date of judgment until payment.

### **Form of Executions**

Presently, all executions must be dated on the day on which they are issued, must be directed to all and singular sheriffs of the state, and are in full force throughout the state. s. 56.031, F.S. The statute does not provide for multiple writs of execution which can be docketed in different counties.

### **Collection and Return of Executions**

Under current law, all executions are returnable when satisfied. s. 56.041 F.S. The officers to whom executions are delivered must collect the amounts on the execution as soon as possible and must furnish the defendant with a satisfaction of judgment. *Id.* All receipts must be endorsed on the execution. *Id.* Unsatisfied executions in the hands of the sheriff may be returned to the court issuing the execution 20 years after the date of issuance of final judgment upon which the execution was issued. *Id.* Upon return, the clerk of the court of issuance must provide a receipt to the sheriff submitting the return acknowledging the return of the unsatisfied execution. *Id.* Under current law, the unsatisfied executions are not returned to the creditor.

### **Executions Against Corporations**

On any judgment *against a corporation*, a plaintiff may have an execution levied on the current money as well as on the goods and chattels, lands and tenements of the corporation. s. 56.09, F.S. This section does not apply to individuals.

Under current law, notice of all sales under execution must be given by advertisement once each week for 4 successive weeks in a newspaper published in the county in which the sale is to take place. s. 56.21 F.S. The time of notice may be shortened by the court from which the execution issued, if the property to be sold is subject to decay and will not sell for its full value if held until date of sale. *Id.* Before the date of the first publication of the notice of sale, a copy of the notice of must be furnished by certified mail to the attorney of record of the judgment debtor, or to the judgment debtor at the judgment debtor's last known address. *Id.* A copy of the notice of sale must be mailed even though a default judgment was entered. *Id.* When levying upon real property, notice of a levy and execution sale must be made to the property owner of record in the same manner as notice is made to any judgment debtor. *Id.* When selling real or personal property, the sale date may not be earlier than 30 days after the date of the first advertisement. *Id.*

### **Executions; Payment to Execution Creditor of Money Collected**

All money received under executions must be paid to the party in whose favor the execution was issued or his or her attorney. s. 56.27, F.S. The receipt of the attorney is a release of the officer paying the money to him or her. *Id.* When the name of more than one attorney appears in the court file, the money must be paid to the attorney who originally commenced the action or who made the original defense unless the file shows that another attorney has been substituted. *Id.* When property sold under execution brings more than the amount of the execution, the surplus must be paid to the defendant without delay. *Id.*

### **Proceedings Supplementary**

Currently, when a sheriff holds an unsatisfied execution, the plaintiff in execution may file an affidavit stating that the sheriff holds an unsatisfied execution and that the execution is valid and outstanding. s. 56.29, F.S. Thereupon, the plaintiff is entitled to proceedings supplementary to execution. *Id.*

On plaintiff's motion, the court must require the defendant in execution to appear before it or a master at a time and place specified by the order in the county of the defendant's residence to be examined concerning his or her property. *Id.* The order must be served a reasonable time before the date of the examination and in the manner provided for service of summons or may be served on such the defendant or his or her attorney as provided for service of papers. *Id.*

Testimony during such proceeding must be under oath and must be comprehensive, covering all matters and things pertaining to the business and financial interests of defendant which tend to show what property the defendant has and where the property is located. *Id.* Any testimony aiding in satisfying the execution is admissible. *Id.* A corporation must attend and answer by an officer, who can be specified in the order. *Id.* Examination of witnesses is taken as if at trial and any party may call witnesses. *Id.*

The judge may order any property of the judgment debtor, not exempt from execution, in the hands of any person or due to the judgment debtor to be applied toward the satisfaction of the judgment debt. *Id.* When, within 1 year before the service of process on the defendant, the defendant has had title to, or paid the purchase price of, any personal property to which the defendant's spouse, any relative, or any person on confidential terms with defendant claims title and right of possession at the time of examination, the defendant has the burden of proof to establish that such transfer or gift from him or her was not made to delay, hinder, or defraud creditors. *Id.* When any gift, transfer, assignment or other conveyance of personal property has been made or contrived by defendant to delay, hinder or defraud creditors, the court must order the gift, transfer, assignment or other conveyance to be void and direct the sheriff to take the property to satisfy the execution. *Id.*

The court may refer the proceeding to a master at any time. *Id.* The master may be directed to report findings of law or fact, or both. *Id.* The master has the power to issue subpoenas, and is to be paid fees provided by law. *Id.*

**Right to Garnishment**

Every person who has sued to recover a debt or has recovered judgment in any court against any person or corporation has a right to a writ of garnishment. s. 77.01, F.S. This right is subject to any debt due to the defendant by a third person, and any tangible or intangible personal property of the defendant which is in the possession or control of a third person. *Id.* Officers, agents, and employees of any companies are subject to garnishment after judgment against the companies or corporations to which they are associated. *Id.*

**Notice to Defendant and Other Interested Persons**

Within 5 days after service of the garnishee's answer on the plaintiff, or after the time period for the garnishee's answer has expired, the plaintiff must, by mail, serve on the defendant a copy of the writ, a copy of the answer, a notice, and a certificate of service. s. 77.055, F.S. The notice must advise the recipient that he or she must move to dissolve the writ within 20 days or be defaulted and that he or she may have exemptions from the garnishment which must be asserted as a defense. *Id.* The plaintiff must serve these documents at the defendant's last known address and any other address disclosed by the garnishee's answer and on any other person disclosed in the garnishee's answer to have any ownership interest in the deposit, account, or property controlled by the garnishee. *Id.*

**Effect of a Writ**

Service of the writ makes the garnishee liable for all debts due by him or her to defendant and for any tangible or intangible personal property of defendant in the garnishee's possession or control at the time of the service of the writ or at any time between the service and the time of the garnishee's answer. s. 77.06, F.S.

**Proceedings for Exemption**

Whenever any money or other thing which is due for labor or services is attached by process, the person to whom it is due may make an oath before the officer who issued the process that the money attached is due for the personal labor and services of the person, and that she or he is the head of a family residing in this state. s. 222.12, F.S. When an affidavit is made, notice of the affidavit must be given to the party, or her or his attorney, who sued out the process. *Id.* If the facts set forth in the affidavit *are not denied* under oath within 2 days after the service of the notice, the process must be returned, and all proceedings must cease. *Id.* If the facts stated in the affidavit *are denied* by the party who sued out the process within the time above set forth, the matter must be tried by the court from which the writ or process issued in the same manner as claims to property levied upon by writ of execution. *Id.*

**Sheriff to Keep an Execution Docket**

The sheriff must keep an execution docket, which must contain a list of all executions, orders and decrees directed to the sheriff, in relation to the collection of moneys, and a statement of all moneys credited on such orders, executions and decrees, and when and to whom and by whom they are paid. s. 30.17. F.S. Interested parties may inspect the docket and if a sheriff fails to keep a docket, he may be fined up to \$100.

### III. Effect of Proposed Changes:

The bill provides that the creditor need not unsuccessfully attempt execution in order to qualify for proceedings supplementary.

The bill provides that a creditor be permitted to levy on current money in excess of \$1,000.

To protect against a debtor who moves property from one county to another, and to facilitate simultaneous levy on property of a debtor located in multiple counties, the bill provides that the Clerk of Court be permitted to issue multiple writs to more than one county. Of course, the creditor may not recover more than the outstanding balance on the debt. In such a case, the debtor may seek restitution, and, in a proper case, damages for abuse of process.

The bill provides for the build-up of passive liens to be minimized, so as to better encourage and regard the efforts of a would-be diligent creditor.

The bill provides for replacing the current county-wide inchoate lien with a statewide judgment lien on leivable property created through central filing. One distinct advantage over the current approach is that central filing may induce voluntary payment by some debtors. Anyone in the state seeking to do business with the debtor will probably check the central file. This readily available statewide information could be very intrusive to the debtor, forcing the debtor either to file bankruptcy or find a way to pay. A statewide lien would also carry the current benefits against the trustee's preference attack, and, because the lien would be "choate" as of the moment of recording, it would clearly defeat the trustee's s. 11 U.S.C. 544(a) power, resolving the split in the case law.

The bill clarifies Florida law regarding the effect of service of writ of garnishment. In *In re Masvidal*, 10 F.2d 761 (11th Cir. 1993), the Eleventh Circuit Court of Appeals construed existing Florida law not to afford a garnishing creditor who has not yet obtained judgment against the garnishee priority as against an attack by a bankruptcy trustee under 11 U.S.C. s. 544. Under this amendment, the service of a writ of garnishment will create a lien upon funds or property belonging to a debtor in the hands of a third party garnishee that will establish the creditor's priority in bankruptcy, thus altering the result the court reached in *Masvidal*.

The bill clarifies existing law that authorizes garnishment of a debt under an obligation which is to become due in the future where the only contingency is the passage of time. See *West Florida Grocery Co. V. Teutonia Fire Ins. Co.*, 77 So. 209 (Fla. 1917). The proposed amendment will avoid the necessity of serving additional writs of garnishment periodically as additional payments

are made under such an obligation, as some courts have required under the present statute. It does not affect the traditional rule limiting garnishment to obligations which are absolute and unconditional. See *Tomlin v. Anderson*, 413 So.2d 79 (Fla. 5th DCA 1982); *Moss v. Sperry*, 191 So. 531 (Fla. 1939). So that the rights of potential holders in due course are not adversely affected, the proposed amendment exempts future installment payments under negotiable instruments from garnishment. This exception also follows longstanding Florida law. *Sullivan v. Musella*, 564 So.2d 150 (Fla. 2d DCA 1990); *Huot, Kelly & Co. v. Ely, Candee & Wilder*, 17 Fla. 775 (1880). In addition, the amendment makes clear that corporations and other entities are entitled to writs of garnishment to the same extent as natural persons.

The bill requires the creditor to mail notice to the debtor as soon as the creditor knows the garnishee has been served. It must be mailed, at the latest, within 5 days after issuance of the writ. Because most garnishees are financial institutions or employers, they are easily served within a day or two. Accordingly, this notice requirement would create no meaningful danger that the debtor would withdraw funds before the garnishment takes effect. The notice would, however, cut down by as much as twenty days the period of debtor ignorance.

The current notice informs the debtor that he or she must move to dissolve the writ within twenty days or be defaulted and that he or she “may have exemptions from garnishment which must be asserted as a defense.” s. 77.055, F.S. Most individuals have no idea what kinds of property might be exempt or how to assert a defense. The proposed notice would inform the debtor of the types of property that might be exempt, such as disability checks and wages for low income heads of household. The notice would also provide a simplified means to assert the defense of exemption.

The bill states the contract rate should control up until the date judgment is entered, and the judgment should include accrued interest at that rate. Thereafter, post-judgment interest would accrue at the rate specified by the comptroller for that year.

The bill takes effect October 1, 1998.

#### **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.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill will require the Department of State to hire more employees and add to its administration costs. The bill has a substantial, but as yet undetermined, fiscal impact.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

#1 by Judiciary:

The amendment deletes the entirety of the bill as filed and amends s. 222.21, F.S., to provide an exemption from claims of creditors for an interest in a Roth IRA. (WITH TITLE AMENDMENT)