

**STORAGE NAME:** h4311.cjc

**DATE:** April 14, 1998

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
CIVIL JUSTICE & CLAIMS  
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

**BILL #:** HB 4311

**RELATING TO:** Debtors and Creditors

**SPONSOR(S):** Representative Culp

**COMPANION BILL(S):** SB 2016 by Senator Campbell

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) CIVIL JUSTICE & CLAIMS YEAS 9 NAYS 0
  - (2)
  - (3)
  - (4)
  - (5)
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**I. SUMMARY:**

HB 4311 addresses several issues relating to creditors and collection of debts which are recommendations of the Business Law Section of the Florida Bar. The bill includes the following changes:

- \* Simplifies access to proceedings supplementary by clarifying that there is no need for execution returned unsatisfied.
- \* Permits an executing creditor to levy on the current money of debtor in excess of \$1000.
- \* Protects debtors from multiple writs.
- \* Provides for central filing system.
- \* Clarifies that garnishment lien arises at time of service of writ on garnishee.
- \* Permits continuing garnishment of unilateral unconditional obligations to pay money in installments.
- \* Provides notice of garnishment to debtors by providing for prompt post-judgment notice informing the debtor of exemption rights.
- \* Conforms procedures for claiming exemptions under garnishment and exemptions statutes.
- \* Clarifies rate of interest on judgments.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Proceedings supplementary are, intended to be secondary to the remedy of execution. Ordinarily, a judgment debtor should not be required to appear and be examined under oath about his or her property if the remedy of execution would be sufficient to satisfy the judgment. Accordingly, current Section 56.29 states that a plaintiff's motion for proceedings supplementary must be accompanied by an affidavit stating that the sheriff holds an unsatisfied execution that is "valid and outstanding and thereupon is entitled to these proceedings supplementary to execution."

There is some confusion as to whether the statute requires an execution to be returned unsatisfied, or whether it is sufficient merely that a writ of execution have been delivered to the sheriff.

Section 56.09 provides:

On any judgment against a corporation plaintiff may have an execution levied on the current money as well as on the goods and chattels, lands and tenements of said corporation.

Nowhere is a plaintiff authorized to execution against the "current money" of an individual. It has been suggested to the Committee that this results in excessive protection for individual judgment debtors. It operates something like an exemption from execution. Of course, cash is not truly exempt. Through proceedings supplementary, "the judge may order any property of the judgment debtor, not exempt from execution, in the hands of any person...to be applied toward satisfaction of the judgment debtor."§56.29(5).

The concerns that by the time the debtor appears before the judge in the proceedings, any nonexempt cash that might have been levied upon will have disappeared. On the other hand, the explicit legislative decision not to permit access to an individual's cash except through a judicial order reflects the legislature's concern that the cash might have been immediately necessary for support, which might temper a judge's order.

Because Florida debtors are entitled to a \$1,000 exemption, the likelihood that a judgment debtor might be carrying nonexempt cash at the moment of levy is low. Forcing the debtor to apply the exemption to necessary cash might, however, cause the debtor not to apply the exemption to necessary hard goods.

Under current law, the statute requires the garnishee to serve an answer on the plaintiff within twenty days after receiving service of a writ of garnishment. (F.S. §77.04.) The plaintiff/creditor must then mail notice to the debtor of the garnishment five days after that. (F.S. §77.055.) The Committee believes this notice to debtors is not meaningful in at least two respects. First, the notice is not received early enough to enable debtors to protect themselves from the consequences of their own actions. When the statute was originally drafted, bankers knew their customers and contracted them when something unusual happened to an account. Those days are now gone, and debtors frequently do not discover that their bank accounts have been frozen until their checks have bounced.

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This not only creates havoc in the debtor's personal life, but results in bank charges, at \$25 per item, that can quickly exceed the amount on deposit.

Chapter 77 permits debtors to claim exemptions by affidavit notarized by a notary public. In contrast, Chapter 222 requires the debtor to make oath before the clerk of court

A recent amendment to F.S. § 55.03(1) calls for annual adjustment of the rate of post-judgment interest. Every January 1, the Comptroller is to set the rate for the coming year based on specified criteria. The statute has created great uncertainty in at least two respects. First, it is unclear whether the post-judgment interest rate on individual judgments is to fluctuate annually, which seems unduly complex and unworkable.

§55.03(1), states "Nothing contained herein shall affect a rate of interest established by written contract or obligation." There is great confusion as to what this means, particularly since recent Florida cases have held that it does not mean that the contract rate becomes the post-judgment rate. There are good reasons for refusing to apply the contract rate to judgments, particularly when contracts frequently call for special judgements, particularly when contracts frequently call for special default rates.

A recent amendment to F.S. § 30.231(2) (a), added in 1995, creates two uncertainties. First, it implies that a levy occurs only when the sheriff seizes property described in the creditor's instructions for levy. Because the sheriff's duty, stated in §30.30(1), goes beyond levying merely on property described in the instructions for levy, the implication is incorrect.

Another difficulty arises from the fact that, as defined, levy occurs when the property is "seized" by the sheriff. The recommended amendment makes clear that the definition of levy is not intended to change current case law, and that the reference to the act of seizure does not require that the sheriff take actual possession of the property. Rather, seizure may also be constructive, as where the sheriff, without taking actual possession, makes sufficiently public the act of taking the property into the custody of the law. See Ex parte Fuller et al., 99 Fla. 1165, 128 So. 483 (1930).

#### B. EFFECT OF PROPOSED CHANGES:

The amendment to the statute makes clear 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.

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The bill provides for replacing the current countywide 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 §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. § 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 five 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 second respect in which the notice is currently not meaningful is that it is not sufficiently informative. 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." (F.S. §77.055). 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 amendment to Chapter 222 would permit such affidavits to be notarized by a notary public, harmonizing the two chapters and saving the time of court clerks.

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.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

N/A

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

N/A

E. SECTION-BY-SECTION RESEARCH:

This section need be completed only in the discretion of the Committee.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A



3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

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VII. SIGNATURES:

COMMITTEE ON CIVIL JUSTICE & CLAIMS:

Prepared by:

Legislative Research Director:

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Richard Hixson

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Richard Hixson