

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 Finance and Tax Committee

BILL: SB 412

INTRODUCER: Senator Crist

SUBJECT: Service of Process

DATE: March 9, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell	Maclure	JU	Favorable
2.	Cellon	Cannon	CJ	Favorable
3.	ODonnell	McKee	FT	Favorable
4.			JA	
5.				
6.				

I. Summary:

The bill increases fees charged by a sheriff in connection with docketing and service of process in civil cases to \$40 from \$20. The State of Florida and its agencies are exempted from the increase in fees. The bill also deletes the provision of law that prohibits additional fees to be charged by the sheriff for service of alias and pluries documents when service was not effected on the original document. In addition, the bill:

- permits special process servers and certified process servers to serve criminal witness subpoenas and criminal summonses; and
- permits sheriffs to return to the clerk unserved writs that have been on a docket prior to October 1, 2001.

The bill also expands the execution sale and notice procedure to apply in the real property context in addition to the personal property context. More specifically, the bill:

- clarifies that the sheriff will provide notice of an execution sale prior to the advertisement of the sale to the judgment debtor;
- includes references to mortgages and other liens against real property to ensure that these lienholders also receive notice of the execution sale;
- requires creditors to identify in an affidavit provided to a sheriff the liens recorded on real property subject to an execution sale;
- clarifies that the affidavit must identify all judgment liens, mortgages, financing statements, tax warrants, and other liens against real property and include name and address information of each lienholder;

- clarifies that the levying creditor can either perform *or* review the title search regarding the real property that is the subject of the affidavit;
- specifies the priority in which proceeds will be distributed from the execution sale of real and personal property;
- clarifies that when the creditor's title search affidavit discloses the existence of any junior mortgages or other real property liens, then the proceeds will be paid into the court registry for distribution among the holders of any junior real property liens; and
- provides that any surplus from the execution sale is provided to the "owner of the property sold" rather than to the "defendant."
- provides that fees chargeable to the State of Florida or its agencies are not raised.
- permits sheriffs to serve facsimile copies of protective injunctions instead of certified copies of protective injunctions.

The Revenue Estimating Conference has not met to review the bill. In 2007, the Revenue Estimating Conference examined a similar bill that increased service of process fees from \$20 to \$40 and projected that, in fiscal year 2009-10, there would be an estimated \$22.8 million increase in revenue as a result of the fee increase. A dramatic increase in court filings above the prior estimate suggests the potential for a \$20 fee increase to raise closer to \$40 million in total additional revenue.

This bill amends the following sections of the Florida Statutes: 30.231, 48.021, 48.27, 56.041, 56.21, 56.27, 741.30, and 784.046.

II. Present Situation:

Overview

Service of process is the formal delivery of a writ, summons, or other legal process or notice.¹ As a general rule, "statutes governing service of process are to be strictly construed to insure that a defendant receives notice of the proceedings."² Currently, under Florida law process may be served by a sheriff, a person appointed by the sheriff in the sheriff's county ("special process server"), or a certified process server appointed by the chief judge of the circuit court.³ All process must be served by the sheriff of the county where the person to be served is found, except initial non-enforceable process, which may be served by a special or certified process server.⁴ Any person authorized by the Florida Rules of Procedure may also serve witness

¹ "The term 'process' is not limited to 'summons.' In its broadest sense[,] it is equivalent to, or synonymous with, 'procedure,' or 'proceeding.'" BLACK'S LAW DICTIONARY (8th ed. 2004). Thus, service of process may trigger the constitutional issue of procedural due process, which requires notice and the opportunity to be heard. *See, e.g., Minda v. Ponce*, 918 So. 2d 417, 422 (Fla. 2d DCA 2006) (citing *Schnicke v. Schnicke*, 533 So. 2d 337, 337-38 (Fla. 5th DCA 1988)).
² *Abbate v. Provident Nat'l Bank*, 631 So. 2d 312, 313 (Fla. 5th DCA 1994) (citing *Henzel v. Noel*, 598 So. 2d 220, 221 (Fla. 5th DCA 1992)).

³ *Id.*

⁴ Section 48.021(1), F.S. Service of process may be categorized as enforceable or non-enforceable. *See* Florida Senate, Committee on Justice Appropriations, *Sheriff Costs – Service of Process*, Interim Project Report 2006-144, at 1 (August 2005). "Enforceable service of process involves a court order requiring the sheriff to take action (i.e., eviction, seizure of property)." *Id.* On the other hand, "[n]on-enforceable service of process is designed to place another party on notice that he or she must take action (i.e., summons to appear, witness subpoena)." *Id.*

subpoenas.⁵ However, at present, there is no statutory authority or rule of procedure that allows anyone other than a sheriff or a sheriff's deputy to serve criminal subpoenas.

Process Fees and Price Level Data

Under Florida law, county sheriffs of the state must charge fixed, nonrefundable fees for the service of process in civil actions as established by a statutory schedule.⁶ All fees collected under the statutory provisions for sheriffs' fees for service of process are to be paid monthly into the county's fine and forfeiture fund.⁷

In addition, special and certified process servers may charge any reasonable fee for services, which can be more or less than the statutorily set fee for sheriffs.⁸ Section 30.231, F.S., provides that the sheriff must charge \$20 for service of summons or writs except for executions and \$20 for each witness to be served.⁹ Executions are court orders directing a sheriff or other officer to enforce a judgment, usually by seizing and selling the judgment debtor's property.¹⁰ The sheriff's office must keep files and index these orders. For executions, the sheriff must charge \$20 for docketing and indexing each writ of execution, \$20 for advertisement of the sale of property under process, \$20 for each sale under process, and \$20 for each deed, bill of sale, or satisfaction of judgment.¹¹

Unsatisfied Executions

Prior to October 2001, a writ of execution had to be filed with the sheriff in the specific county where the assets were located. Under this system, a debtor could avoid judgment liens by moving personal property from county to county. The date of the writ was the most recent county filing, which then affected the priority of the liens.

In 2001, Florida established a statewide docketing system for civil writs of execution. Current law provides that a judgment lien on personal property may be filed with the Department of State.¹² This established priority among creditors statewide based upon the date of lien filing, rather than requiring a race from county to county in search of leviable property.

Despite the docketing system change in 2001, if an execution is unsatisfied, a sheriff may only return the writ to the court 20 years after the date of issuance of the final judgment.¹³

Fee Adjustments for Inflation

Service of process was the subject of a Senate Interim Project Report by the Committee on Justice Appropriations in 2005. The report noted that the fees for service of process, summons,

⁵ Section 48.021(1), F.S. Rule 1.070, Florida Rules of Civil Procedure, provides that service of process may be made by a person appointed by court order, known as an elisor.

⁶ Section 30.231(1), F.S.

⁷ Section 30.231(5), F.S.

⁸ See s. 48.021(2)(a), F.S.; see also ss. 48.27(1) and 48.29, F.S.

⁹ Section 30.231(1)(a) and (c), F.S.

¹⁰ BLACK'S LAW DICTIONARY (8th ed. 2004).

¹¹ Section 30.231(1)(d), F.S.

¹² Sections 55.201, F.S.

¹³ Section 56.041(2), F.S.

and executions had not been addressed by the Legislature since 1994.¹⁴ The report considered the fees using, among other indicators, the Consumer Price Index (CPI), which measures the average change over time in prices paid for consumer goods and services. Survey data of county sheriffs' offices compiled by the Florida Senate Committee on Justice Appropriations indicated that sheriffs acting as process servers require an average of four attempts to serve a party for an average cost of \$37.¹⁵

Alias and Pluries Writs

When service of process for a defendant is returned not effected, or returned improperly executed, the party issuing it is entitled to the additional process against the unserved party as is necessary to effect service.¹⁶ An alias writ is an additional writ issued after another writ of the same kind in the same case. For instance, an alias writ may be issued to be served at a different address. A pluries writ is a third or subsequent writ issued when the previous writs have been ineffective. Currently, Florida law prohibits sheriffs from charging additional fees for service of alias and pluries writs when initial efforts to serve process were unsuccessful.¹⁷ In practice, sheriffs do not charge for successive attempts to serve a document at the same address.

Execution Sales and Notice

Under existing law, notice of all sales under execution must be advertised weekly for four successive weeks in a newspaper published in the county in which the sale is to take place.¹⁸ On or before the date of the first publication or posting of the notice of sale, a copy of the notice of sale is to be furnished to the judgment debtor, although s. 56.21, F.S., does not specify who is to furnish the notice. When personal property is levied upon, notice of the levy and execution sale and a copy of an affidavit required by statute must be sent by the sheriff to all judgment creditors.¹⁹ When real property is levied upon, the notice of the levy and execution sale must be given to the property owner of record in the same manner as notice is made to the debtor.²⁰

Priority of Lienholders

Florida law also specifies the order of payment when money is received by execution in the following manner:

the sheriff, for costs; the levying creditor in the amount of \$500 as liquidated expenses; if the levy is upon real property, the first priority lienholder under s. 55.10; and if the levy is upon personal property, the first priority lienholder under s. 55.202, s. 55.204(3), or s. 55.208(2), as set forth in an affidavit required by [law], or his or her attorney, in satisfaction of the judgment lien, provided that the judgment lien has not lapsed at the time of the levy.²¹

¹⁴ Interim Project Report, *supra* note 4, at 1. The “[b]asic data relating to increases in the consumer price index, gasoline prices, and wages for deputy sheriffs since 1994 indicate the probability that sheriff’s costs to serve process have risen substantially.” *Id.* at 6.

¹⁵ *See id.* at 5. The \$37 figure accounts for things such as increased fuel costs.

¹⁶ *See generally* s. 30.231, F.S.

¹⁷ Section 30.231(4), F.S.

¹⁸ Section 56.21, F.S.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Section 56.27(1), F.S.

Florida law delineates the order of payment for lienholders when personal property that is sold under execution results in a surplus. Under the law, “the surplus shall be paid in the order of priority to any judgment lienholders whose judgment liens have not lapsed.”²²

Requirement for Affidavit by Levying Creditor

Florida law also requires a levying creditor in the personal property context to deliver an affidavit to the sheriff with information about a judgment debtor and the property lien before the first publication or posting of notice of the sale. In the affidavit, the levying creditor must:

- attest that he or she has reviewed the database or judgment lien records and that the information in the affidavit based on that review is true and correct;
- provide detailed information contained in the judgment lien certificate, including the legal name and address of the judgment debtor and creditor, the identity of the court which entered the judgment, the case number and date the judgment was entered, as well as the amount due on the money judgment; and
- provide a statement that the levying creditor does not have any other levy in process, or if another levy is in process, the levying creditor believes in good faith that the total value of the property under judgment does not exceed the amount of outstanding judgments.²³

Under existing law, there is no similar affidavit requirement for a levying creditor in the real property context.

Service of Process in Domestic Violence and Sexual Violence Cases

In domestic violence cases, a county clerk is required to furnish:

a copy of the petition [for injunction], financial affidavit, Uniform Child Custody Jurisdiction and Enforcement Act affidavit, if any, notice of hearing, and temporary injunction, if any, to the sheriff or a law enforcement agency of the county where the respondent resides or can be found, who shall serve it upon the respondent as soon thereafter as possible on any day of the week and at any time of the day or night.²⁴

The clerk of the court is also responsible for furnishing the sheriff with information on the respondent’s physical description and location.²⁵ In a similar fashion, the sexual violence statute requires the clerk to furnish a sheriff or county law enforcement agency with a copy of the petition, notice of hearing, and temporary injunction to be served as soon thereafter as possible.²⁶ The clerk must also furnish the sheriff information on the respondent’s physical description and location.²⁷

²² Section 56.27(2), F.S.

²³ Section 56.27(4), F.S.

²⁴ Section 741.30(8)(a)1., F.S.

²⁵ *Id.*

²⁶ Section 784.046(8)(a)1., F.S.

²⁷ *Id.*

III. Effect of Proposed Changes:

Service of Process Fees (Section 1)

This bill amends s. 30.231, F.S., to increase sheriff's fees to \$40 from \$20 for service of the following:

- summons or writs except executions; and
- witness subpoenas.

Private process servers indicate that they will likely increase fees for service of process to reflect these changes.

In addition, the bill increases the fees charged by sheriffs to \$40 from \$20 to:

- docket and index each writ of execution;
- advertise sales under process;
- conduct each sale under process; and
- prepare each deed, bill of sale, or satisfaction of judgment.

Although the sheriff's service of process fee is increased, the bill exempts the State of Florida and its agencies from this increase in fees, and makes clear that the fees applicable to the state and its agencies will be those in place on June 30, 2009, which is the day before the new law takes effect.

Alias and Pluries Writs (Section 1)

The bill also removes the provision that prohibits the sheriff from charging additional fees for alias and pluries documents when service was not accomplished on the original document. The effect of the removal of this provision in the bill is that sheriffs will now be able to charge the party requesting service for additional attempts at service when alias or pluries writs are issued due to unsuccessful service of the original document.

Service of Criminal Process (Sections 2 and 3)

In addition, the bill allows criminal witness subpoenas and criminal summonses to be served by special process servers and certified process servers in addition to a sheriff. Currently, there is no statute or rule that allows anyone other than a sheriff or deputy to serve criminal witness subpoenas and criminal summonses. The bill also amends the statute that generally governs certified process servers (s. 48.27(2), F.S.), to ensure that the statute is consistent with the bill's grant of authority to certified process servers in s. 48.021, F.S.

Unexecuted Writs (Section 4)

The bill also amends current law to allow sheriffs to return to the clerk unserved writs that have been on a docket prior to October 1, 2001, or after 20 years after the date of the issuance of the final judgment. In effect, this change allows sheriffs to dispose of unexecuted writs held by the sheriffs that were docketed before the statewide docketing system was created in 2001.

Execution Sales and Notice (Section 5)

In conjunction with the service of process changes, the bill expands certain execution sale and notice procedures to apply in the real property context in addition to the personal property context. First, the bill includes references to mortgages and other liens against real property in the execution sales and notice statute, which are similar to the statute's current references to Uniform Commercial Code security interests and judgment liens against personal property. In practice, the bill would require that upon levy of real or personal property, a notice of the levy and execution sale and a copy of the affidavit currently required by law will be provided to all judgment creditors, including mortgage and other lienholders against real property.

The bill also clarifies that the sheriff is responsible for providing notice of an execution sale to the judgment debtor prior to the advertisement of the sale.

Requirement for Affidavit by Levying Creditor (Sections 5 and 6)

The bill also requires creditors attempting to levy on real property to supply an affidavit to the sheriff similar to the affidavit required for levying on personal property. The affidavit requirement is revised to require an affidavit, used in connection with the levy on real property, to state that the creditor has performed a title search or reviewed the property and lien records for real property subject to the execution sale. Additionally, the bill clarifies that the creditor's affidavit must identify all judgment liens, mortgages, financing statements, tax warrants, and other liens recorded against the real property subject to an execution sale. The creditor's affidavit must also include the name and address of each lienholder as shown in the recorded document as disclosed by the title search.

Lien Priority (Section 6)

The bill also amends current law to specify the priority in which proceeds would be distributed from execution sales of real and personal property. When the creditor's title search discloses the existence of any junior mortgages or other liens against real property, any proceeds will be paid into the court registry to be distributed among junior lienholders. This change allows junior lienholders to dispute the relative priority of their respective liens in court, while removing the burden of determination of the proper order of distribution from the levying officer. This provision does not affect the priority of senior mortgages with priority over the levying creditor.

The bill also clarifies that any remaining surplus must be paid to the "owner of the property sold" rather than to the "defendant." This change accounts for scenarios in which the current property owner is not the same person as the defendant in the creditor's original action.

Service of Process in Domestic Violence and Sexual Violence Cases (Sections 7 and 8)

Finally, the bill allows sheriffs to serve a facsimile copy of a protective injunction instead of a certified copy in domestic violence and sexual violence cases. Thus, faster service of process could be accomplished in these cases.

Effective Date (Section 9)

The bill provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

This bill will increase the service of process fees collected by sheriffs to \$40 from \$20, as well as allow sheriffs to charge for successive attempts at service, which will, in turn, increase county revenues. See “Government Sector Impact” below.

B. Private Sector Impact:

By increasing the service of process fees, this bill may increase the cost to persons paying a sheriff or certified and special process server for service of process. It is likely that certified and special process servers will increase their fees to reflect the increases in fees for sheriffs.

Levying creditors on real property may encounter additional expenses to satisfy the new affidavit requirement.

C. Government Sector Impact:

The Revenue Estimating Conference has not met on this bill. It is believed that the bill will increase the fees that are collected by sheriffs for carrying out service of process, which will increase county revenues by an unknown amount.

In 2007, the Revenue Estimating Conference examined a similar bill that increased service of process fees from \$20 to \$40 and projected that, in fiscal year 2009-10, there would be an estimated \$22.8 million increase in revenue as a result of the fee increase. The estimate assumed civil case filings would grow to 650,740 as of FY 2009-10. Actual circuit and county court filings in FY 2007-08 exceeded 1.3 million. This suggests the potential for the fee increase to raise an additional \$40 million.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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