

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 Judiciary Committee

BILL: CS/SB 492

INTRODUCER: Commerce Committee and Senator Smith

SUBJECT: Garnishment

DATE: April 6, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Cooper	CM	Fav/CS
2.	Treadwell	Maclure	JU	Favorable
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

The bill increases, from \$500 to \$750 per week, the amount of disposable earnings of a head of family that is exempt from attachment or garnishment.

For a head of family earning greater than \$750 per week, the individual’s wages are exempt from garnishment unless the protection is waived in writing. The bill provides requirements for the agreement, including that the writing:

- Be in the same language as the contract or agreement to which the waiver relates;
- Be contained in a separate document attached to the contract or agreement; and
- Be in a form substantially similar and in 14-point font to a notice provided in the bill. The notice informs the individual of the availability of the exemption and the effect of the agreement to waive such protection.

The bill also amends the “Notice to Defendant” used in garnishment proceedings to correlate with the changes made to the exemption from garnishment.

This bill amends sections 222.11 and 77.041, Florida Statutes.

II. Present Situation:

Garnishment Generally

Garnishment is defined as a judicial proceeding in which a creditor asks a court to order a third party, who is indebted to or is bailee for a debtor, to turn over to the creditor any of the debtor's property held by that third party.¹ This may be part of a prejudgment seizure or post-judgment collection.² When a writ of garnishment is ordered, a copy of the writ, the motion for the writ, and a notice is sent to the defendant debtor in the action. The notice includes a form for Claim of Exemption and Request for Hearing, which lists major exemptions from garnishment and allows the defendant to request a hearing to decide the validity of the claim of exemption. To garnish salary or wages, the court issues a continuing writ of garnishment to the debtor's employer to periodically pay a portion of the debtor's wages until the judgment is satisfied or until otherwise provided by court order.³

Garnishment in Florida

Existing law specifically exempts certain funds from garnishment, including benefits from a church benefits plan (s. 624.4031, F.S.); firefighters' pensions (s. 175.241, F.S.); assets in qualified tuition programs, medical savings accounts, Coverdell education savings accounts, and hurricane savings accounts (s. 222.22, F.S.); and certain wages (s. 222.11, F.S.).

Section 222.11, F.S., provides an exemption from garnishment for certain earnings of a head of family.⁴ A "head of family" includes any natural person who provides more than one-half of the support for a child or other dependent. The Supreme Court of Florida has held that a debtor's former wife receiving alimony as her only form of income was a dependent for purposes of the statute.⁵ In general, Florida courts have held that the head of family may show that someone is a dependent by showing either:

- A legal duty to maintain arising out of the family relationship at law (*family in law*); or
- Continuing communal living by at least two people with one person recognized as being in charge (*family in fact*).⁶

The scope of the term "earnings" has been debated numerous times in Florida courts. The statute defines "earnings" to include compensation paid or payable, in money in an amount certain, for

¹ See ch. 77, F.S., about garnishment in Florida. Other forms of garnishment are legal or equitable procedures by the Internal Revenue Service or a state tax-collection agency to levy for unpaid taxes, and by federal agencies through administrative garnishments for non-tax debts owed the federal government. Garnishment does not include a debtor's voluntary agreement to turn over wages through their employers to a creditor.

² "Garnishment," BLACK'S LAW DICTIONARY (8th ed. 2004).

³ Section 77.0305, F.S. The continuing writ of garnishment against wages and salaries does not create an exception to the head of family exemption in s. 222.11, F.S. See *Vetric v. Hollander*, 566 So. 2d 844, 845 (Fla. 4th DCA 1990).

⁴ This exemption is only available to Florida residents. See *Reichenbach v. Chemical Bank of New Jersey*, 623 So. 2d 577 (Fla. 3d DCA 1993).

⁵ *Killian v. Lawson*, 387 So. 2d 960 (Fla. 1980).

⁶ *Mazzella, M.D. v. Boinis*, 617 So. 2d 1156, 1157 (Fla. 4th DCA 1993). See also *Killian*, 387 So. 2d at 962.

personal services or labor.⁷ Label of the compensation as wages, salary, commission, or bond is not dispositive to whether the moneys are “earnings” under the statute.

Prior to October 1993, when s. 222.11, F.S., was substantially amended to the form of today’s current law, most Florida bankruptcy courts held that only employees could earn money due for personal labor and services, whereas compensation to an independent contractor was not exempt under the statute. After the statute was amended, courts began to hold that the debtor’s label as an employee or independent contractor is not dispositive. The debtor must receive regular compensation dictated by the terms of an arms-length employment agreement. Further, the debtor must also perform personal services to the business, not just benefit from the business. Thus, distribution of profits by a business owner to himself did not constitute earnings under the statute.⁸ Courts look to whether the debtor’s activities were essentially a job and not in the same nature as running a business.⁹ For example, a Florida bankruptcy court recently held that gratuities paid to a bartender in regular bi-weekly checks were exempt earnings under the statute.¹⁰

The Florida exemption for disposable earnings¹¹ from garnishment can be applied in three different situations, involving the status and circumstances of the debtor:

- A head of family whose weekly disposable earnings are \$500 or less (\$26,000/year) – all earnings are exempt from garnishment regardless of an agreement in writing;¹²
- A head of family whose disposable earnings are greater than \$500 a week – earnings may be garnished only if agreed to in writing, but no more than that allowed under the federal Consumer Credit Protection Act; and
- Disposable earnings of a person other than a head of family – earnings may be garnished, but no more than that allowed under the federal Consumer Credit Protection Act, regardless of an agreement in writing.

With regard to the head of family whose disposable earnings are greater than \$500 a week, those earnings may not be garnished absent an agreement in writing. A verbal commitment for garnishment is not sufficient. Further, the writing must expressly contain a garnishment provision. For example, a written settlement agreement entered into with a debtor did not remove

⁷ Income deduction orders are similar to a writ of garnishment, except that the term “income” is more broadly defined than “earnings,” as used in s. 222.11, F.S. For example, for alimony and child support orders, “income” means “any form of payment to an individual, regardless of source.” Section 61.046, F.S.; *see also* s. 61.1301, F.S.

⁸ *Brock v. Westport Recovery Corporation*, 832 So. 2d 209 (Fla. 4th DCA 2002). Debtor took disbursements of \$2,000 from company profits every two weeks. “A debtor that owns or controls a business cannot exempt the funds he distributes to himself from the business simply by calling the money ‘wages.’” *Id.* at 211.

⁹ *In re Pettit*, 224 B.R. 834 (Bankr. M.D. Fla. 1998) (holding that the debtor was an independent contractor who earned regular compensation in the form of commissions). *See also In re Zamora*, 187 B.R. 783 (Bankr. S.D. Fla. 1995) (holding that a sole practitioner attorney’s compensation was not exempt because earnings from a business controlled by the debtor are not exempt).

¹⁰ *In re Holmes*, 414 B.R. 868 (Bankr. S.D. Fla. 2009).

¹¹ Section 222.111(1)(b), F.S., defines “disposable earnings” as that part of earnings of a head of family which remain after deduction of any amounts required by law to be withheld.

¹² The \$500 amount was set in 1993 when s. 222.11, F.S., was substantially amended. Accounting for inflation, that amount is equal to around \$750 today. *See* Bureau of Labor Statistics, *CPI Inflation Calculator*, available at http://www.bls.gov/data/inflation_calculator.htm (last visited Apr. 2, 2010).

that debtor from the exemption under the statute because the agreement did not expressly contain any provisions related to garnishment.¹³

In all three situations, exempt earnings that are deposited or credited into a financial institution remain exempt from attachment or garnishment for six months after the earnings are received by the financial institution.¹⁴ However, this only applies if the monies can be traced and properly identified as earnings. “Comingling of earnings with other funds does not by itself defeat the ability of a head of family to trace earnings.”¹⁵

Consumer Credit Protection Act

The federal Consumer Credit Protection Act (CCPA) “protects employees from discharge by their employers because their wages have been garnished for any one debt, and it limits the amount of an employee’s earnings that may be garnished in any one week.”¹⁶ Congress found it necessary to regulate the garnishment of wages because:¹⁷

- The unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit. Such extensions of credit divert money into excessive credit payments and thereby hinder the production and flow of goods in interstate commerce.
- The application of garnishment as a creditors’ remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden on interstate commerce.
- The great disparities among the laws of the several states relating to garnishment have, in effect, destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many areas of the country.

The CCPA protects individuals by limiting the amount of earnings that may be garnished in any week to the lesser of:¹⁸

- 25 percent of disposable earnings for that week; or
- The amount by which disposable earnings for that week are greater than 30 times the federal minimum hourly wage prescribed by Section 6(a)(1) of the Fair Labor Standards Act of 1938.¹⁹

¹³ *Williams, III v. Espirito Santo Bank of Florida*, 656 So. 2d 212 (Fla. 3d DCA 1995).

¹⁴ Section 222.11(3), F.S. See *In re Weinshank*, 406 B.R. 413, 417-420 (Bankr. S.D. Fla. 2009) (holding that s. 222.11(3), F.S., is not limited to a head of family).

¹⁵ Section 222.11(3), F.S. The burden is on the debtor to prove entitlement to any exemption.

¹⁶ See U.S. Department of Labor, *Employment Law Guide: Wages and Hours Worked: Wage Garnishment*, available at <http://www.dol.gov/compliance/guide/garnish.htm> (last visited Apr. 2, 2010). Employees are not protected under the act from discharge by the employer due to a second or additional garnishment. See 15 U.S.C. s. 1671 et. seq. (Title III of the CCPA).

¹⁷ 15 U.S.C. s. 1671 (1968).

¹⁸ 15 U.S.C. s. 1673(a) (1968).

¹⁹ The federal minimum wage is \$7.25 per hour – effective July 24, 2009.

This limit applies regardless of how many garnishment orders an employer receives. These limits apply to a head of family who earns more than \$500 a week and has agreed in writing to garnishment of earnings, and to a person other than a head of family, as discussed above. The federal law also allows for exceptions to the garnishment limits set in the CCPA. For child support or alimony, the CCPA allows up to 50 percent of an individual's disposable earnings to be garnished if the individual is supporting another spouse or child, or up to 60 percent if the individual is not.²⁰ The garnishment exemption does not apply to court orders in Chapter 13 bankruptcy proceedings, debt due for any state or federal tax, or certain court orders of support.²¹

Florida law allows for exceptions to the garnishment limits set in s. 222.11, F.S., only for periodic payment of child support and alimony. Section 61.12(2), F.S., allows for a continuing writ of garnishment for a person's salary to pay periodic child support or alimony or both, notwithstanding ch. 77, F.S., or "any other provision of law to the contrary."²²

The CCPA does not prohibit the additional protections for a head of family from garnishment as set out in s. 222.11, F.S.²³ "By providing protection for more of a head of family's disposable earnings, the [Florida] statutory scheme recognizes that a head of family bears additional responsibilities and support obligations for their dependents."²⁴

III. Effect of Proposed Changes:

Section 1 amends s. 222.11, F.S., to increase the amount of earnings exempt from garnishment or attachment from \$500 to \$750 per week (increase from \$26,000/year to \$39,000/year).

Further, the bill provides that the earnings of a head of family that earns greater than \$750 per week may be garnished if agreed to by the head of family in writing that meets certain requirements. The requirements include that the writing:

- Be in the same language as the contract or agreement to which the waiver relates;
- Be contained in a separate document attached to the contract or agreement; and
- Be in a form substantially similar and in 14-point font to a notice provided in the bill. The notice informs the individual of the availability of the exemption and the effect of the agreement to waive such protection.

Section 2 amends s. 77.041(1), F.S., to conform the Notice to Defendant in garnishment proceedings to the increase in exempt wages.

²⁰ 15 U.S.C. s. 1673(b)(2) (1968). An additional 5 percent may be garnished for support payments more than 12 weeks in arrears.

²¹ 15 U.S.C. s. 1673(b)(1) (1968).

²² See also *Vetric*, 566 So. 2d at 845. In Florida, to recover delinquent taxes, penalties, or interest due to the Department of Revenue, a writ of garnishment can be served on third parties in control of any credits or personal property belonging or owed to the delinquent taxpayer, exclusive of wages. Section 213.67(1), F.S. Under s. 414.41(3), F.S., the Department of Children and Families can "enforce an order of income deduction by the court against [a] liable adult recipient or participant, including the head of a family, for overpayment received as an adult under the temporary cash assistance program, the [Aid to Families with Dependent Children] program, the food stamp program, or the Medicaid program" (emphasis added). It is unclear whether this is an exception to the protections of s. 222.11, F.S.

²³ *Killian*, 387 So. 2d at 960. See also *Anderson v. Anderson*, 404 A.2d 275, 285 (Md. 1979).

²⁴ *Weinshank*, 406 B.R. at 419.

Section 3 provides an effective date of October 1, 2010.

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:

None.

B. Private Sector Impact:

An additional \$250 of earnings of individuals who are debtors and heads of families will be sheltered from their creditors. In the alternative, this reduces the ability of creditors to be repaid by \$250, unless the head of family earns greater than \$750 a week and agrees to garnishment in writing. This will not affect any agreements entered into prior to the effective date of the bill on October 1, 2010.

Because child support and alimony can be attached despite the exemption from garnishment, there would be no impact on such payments to dependents. There would be an indeterminate impact on the amount of money a head of family has to pay in child support or alimony because an additional \$250 is being protected from other creditors.

C. Government Sector Impact:

Because taxes due are an exception to the exemption, there would be no impact on state or local government.

VI. Technical Deficiencies:

None.

VII. Related Issues:

A U.S. Bankruptcy Court found an ambiguity in the statute in the definition of “disposable earnings” and its use in the exemption for persons other than a head of household.

Section 222.111(1)(b), F.S., defines “disposable earnings” as that part of earnings of a head of family which remain after deduction of any amounts required by law to be withheld.

Although the term “disposable income” is defined with reference to a head of family, it is then used in subsection (2)(c) which specifically addresses persons other than a head of family. Replacing the term “disposable earnings” in subsection (2)(c) with its definition pursuant to subsection (1)(b) produces the following internally inconsistent statement: “[that part of the *earnings of any head of family* remaining after deduction from those earnings of any amounts required by law to be withheld] *of a person other than a head of family* may not be attached....” (emphasis added).²⁵

The court held that the ambiguity did not affect the issue of whether the exemption is available to a debtor who is not a head of family.

VIII. Additional Information:

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

CS by Commerce on March 17, 2010:

The committee substitute differs from the bill as filed in the following ways:

- Amends s. 77.041, F.S., to conform the Notice to Defendant to the increase in exempt wages; and
- Changes the effective date to October 1, 2010.

B. **Amendments:**

None.

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

²⁵ *Weinshank*, 406 B.R. at 419.