

Business Litigation Committee, Business Law Section of The Florida Bar

Memorandum

**Senate Bill 1268 and House Bill 1379
Proposed Amendments to Sections 48.031 and 56.27, Florida Statutes**

SB 1268 and HB 1379 amend Section 48.031, Florida Statutes pertaining to service of process and Section 56.27, Florida Statutes pertaining to execution sales as well as several other statutes. The Business Litigation Committee of the Business Law Section of the Florida Bar has concerns with respect to certain aspects of the proposed amendments to Sections 48.031 and 56.27, which are addressed below.

I. Section 48.031(1)(b)

Section 48.031(1) addresses the procedures for service of original process. Service of process is the means by which the defending party is notified of a lawsuit and provided with an opportunity to defend, and it is what confers the jurisdiction of the court over the defendant's person. Subsection (1)(b) currently provides that employers, when contacted by an individual authorized to make service of process, shall permit a process server to make service of process on employees in a private area designated by the employer.

SB 1268 and HB 1379 would amend Section 48.031(1)(b) in two ways. First, the amendments provide that failure to grant permission to the process server to serve the employee constitutes a first degree criminal misdemeanor. Second, the amendments expand the persons who are required to grant access to the process server (and those who are also subject to criminal sanctions.) While we have no problem with providing a sanction or penalty for the failure to provide access to the process server, we believe that it should apply only to employers. Expanding subsection (1)(b) to apply to not only the employer, but also to "any employee, representative, or agent" of the employer," presents several problems.

- From a legal perspective, employees, representatives, or agents of employers – especially those without managerial responsibilities, do not generally have control over the employer's place of business or the authority to grant or deny access to premises to other persons.
- There are serious policy questions with respect to making any employee a criminal in a myriad of factual circumstances that could arguably be triggered by the proposed language. Should a janitor or a sales clerk, for example, be subject to criminal prosecution for refusing to allow a process server access to serve the president of the company?
- An "agent" is a person who is authorized to act for a principal and is subject to the principal's control and consent. The scope of the agent's authority can extend to

any business conducted by the employer or can be very limited or narrow. Should the employer's real estate agent or stock broker, who may merely be visiting the employer's place of business, be subject to criminal prosecution if he or she fails to grant access to a process server? The amendments do not define the word "representative" and could cover even broader classifications of persons than "agent."

II. Section 48.031(2)(b)

Section 48.031(2)(b) currently provides for substitute service on an individual doing business as a sole proprietorship by serving "the person in charge of the business" in lieu of the individual who owns the business after two or more attempts have unsuccessfully been made to serve the owner at the place of business. SB 1268 and HB 1379 would amend Section 48.031(2)(b) by allowing substitute service on the person in charge of the business at any time the owner is absent.

We do not feel that the proposed amendment to subsection (2)(b) is necessary and may generate more problems than it would solve.

- A sole proprietorship is not a legal entity. Subsection (2)(b) merely presents another way to serve an individual defendant with process when that person is operating a business as a sole proprietorship.
- There are multiple ways to serve natural persons under Florida law, including by delivering a copy of the process and pleading to the person to be served or by leaving copies at his or her place of abode with a person residing there who is 15 years of age or older. *See Fla. Stat. § 48.031(1)(a); see also Trawick, Florida Practice and Procedure § 8:6* ("Service of process on competent adult natural persons in Florida can be made in six ways").
- The phrase "person in charge" of the business is not defined in the statute and who is in charge may often be ambiguous or depend upon what aspect of the business is involved. It seem to us that, by expanding the statute to allow service on "persons in charge" any time the owner is not present, will likely result in additional challenges to service of process that will require more judicial resources to resolve. It also will likely result in more expense by plaintiffs, who will have to arrange to serve additional process on defendants through other methods when the initial service ostensibly on the "persons in charge" of the business are determined to be improper.

III. Section 56.27(4)(d)

Effective October 1, 2001, legislation sponsored by The Florida Bar Business Law Section and approved by the Florida legislature enacted sweeping changes in the manner of enforcing money judgments in Florida. 2000 Fla. Laws ch. 258. Among other things, this act created a centralized system for perfecting and prioritizing judgment liens on personal property by filing a judgment lien certificate with the Florida Department of State, which is maintained in

a statewide database accessible online, and effected other broad changes in post judgment process and proceedings. *See* Joseph D. Bolton and Maxine M. Long, *What Do I Do with My Judgment Lien Now? A Primer on the New Centralized Judgment Lien Law*, 75 Fla. B. J. 73 (Nov. 2001) (hereafter “Bolton & Long”).

The 2000 legislation provided that the priority of a judgment lien is determined by the date (including the time of day) of filing the certificate. *See* Section 55.202(2)(c) (“priority of competing liens is determined in order of filing date and time). It removed the uncertainty which sometime arose from delays in docketing writs delivered to the sheriff. Bolton & Long, at 73. Under Section 56.27, to enforce the judgment by levy on personal property, the creditor must file an affidavit on or before the date of the first publication or posting of sale (1) stating that the creditor has reviewed the judgment lien index and that the information contained in the affidavit based on that review is true and correct and (2) providing certain information with regard to each judgment lien certificate on file as to the judgment debtor, including the file number and date of filing of each judgment lien certificate. Under Section 56.27(5), “[a] sheriff paying money received under an execution in accordance with the information contained in the affidavit under subsection (4) is not liable to anyone for damages arising from a wrongful levy.”

SB 1268 and HB 1379 would amend Section 56.27(4)(d) to require the creditor to include in the affidavit “[a] statement directing the sheriff how to pay out all moneys received under an execution sale.” The bills also provide that “[t]he sheriff paying pursuant to the affidavit is not liable to anyone from damages arising from a wrongful levy and pay out.” We are concerned about both of these amendments, for the following reasons:

- The procedure in section 56.27(4)(d) was developed by the Business Law Section in close consultation with the Sheriffs, through their representative, Iven Lamb.
- The affidavit received by the sheriff under the current statute provides all the information to enable the sheriff to determine who to pay, including information with regard to the date and time of filing of each judgment lien, and provides that the sheriff can safely rely on the information provided.
- The proposed amendments present a potential for abuse by shifting the determination of to whom to pay the proceeds of the sale to the levying creditor, who is far from disinterested. What if the levying creditor incorrectly directs the sheriff how to pay out the money, e.g. “Pay me.” The sheriff pays pursuant to the affidavit, and the money is gone -- even if the creditor or the sheriff knew better.
- The immunity provided to the sheriff under the proposed amendments, which provide that “the sheriff paying *pursuant to the affidavit* is not liable to anyone for damages arising from a wrongful levy and payout” appears to be considerably broader than current Section 56.27(5), which immunizes payments “*in accordance with information contained in the affidavit.*” The amendments would appear to immunize the sheriff even if there is fraud or conversion in connection with the execution sale, so long as the payments were made pursuant to the creditor’s affidavit.

- The amendments do not remove existing subsection (5) from Section 56.27; thus creating a potential conflict as to the scope of the sheriff's immunity.
- We see no reason to change the existing process, which has seemed to us to serve all parties to the process well and has provided a measure of protection against abuse.

We appreciate your consideration of our concerns. If you have any questions, please let us know.

Respectfully submitted,

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