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### CAPTURING UNICORNS, COLLECTING JUDGMENTS IN FLORIDA, AND OTHER DIFFICULT TASKS

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### The theoretical concept

- Involuntary taking of judgment debtor's assets
- Sale by public auction of seized assets – typically by Sheriff
- Apply net sale proceeds to reduce judgment indebtedness

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### But...

- Public policy – destitute judgment debtors are a potential drain on the public
- Destitute debtors may lead to destitute judgment debtors' families and dependents
- Solution? Boatloads of exemptions from forced sale

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### The actual concept

- Locate non-exempt assets of debtor – using discovery in many instances
- Seize those non-exempt assets
- Sell or monetize those non-exempt assets
- Apply net proceeds to reduce judgment debt

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### Exemptions - Homestead

- Homestead
  - Article X, §4, Fla. Const. (1968)
  - 160 acres of contiguous land and improvements outside municipality
  - ½ acre of contiguous land and improvements within a municipality
  - Grandfather clause if homestead annexed
  - §222.01 – Notice of Homestead / suit within 45 days of service of notice or homestead status for 180 days after filing of notice in public records

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### Exemptions – See Chapter 222

- \$1000 personal property
  - §222.061 – debtor's inventory filed & served within 15 days of levy / creditor objects within 5 days of service or accepts inventory / appraiser appointed by court if contested
- Tenancy by the entireties
  - immunity unless judgment against both husband and wife

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### Exemptions

- IRA, ERISA, employee stock ownership plans, and retirement accounts
- Cash surrender value of life insurance policies
- Proceeds of life insurance policies for residents of Florida (absent assignment of proceeds)
- Workers' compensation benefits – Ch. 440
- Disability income benefits – absent assignment

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### Exemptions

- Interests in spendthrift trusts
- Prepaid college tuition funds
- Money / benefits from fraternal benefits societies
- Deferred compensation plans – see §112.215(10)(a) and (b)

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### Exemptions

- Money due or likely to come due as damages under Chapter 769 for hazardous occupations
- Municipal property
- Municipal Fireman's Pension Trust Fund, Annuities, and other Benefits – Ch. 175
- Public School Teacher pensions
- State and County employee pensions
- Pension of Florida Highway Patrol

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### Exemptions

- Municipal Police Officer's Retirement Trust Fund
- Benefits under Florida Retirement System
- Veterans Benefits
- Criminal Restitutions awards – Ch. 960
- Social Security benefits – 42 U.S.C. §407(a)
- SSI benefits – 42 U.S.C. §1383(d)(1)
- VA benefits – 38 U.S.C. §5301(a)

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### Exemptions

- Federal Railroad Retirement benefits – 45 U.S.C. §231m(a)
- Federal Railroad unemployment and sickness benefits – 45 U.S.C. §352(e)
- Civil Service Retirement System benefits – 5 U.S.C. §8346(a)
- Federal Employees Retirement System benefits – 5 U.S.C. §8470.

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### Exemptions - Garnishment

- Wage garnishment - §222.11
  - Exemption for disposable earnings ≤ \$500 a week of **head of family**
    - Head of family status is question of fact
  - Earnings = compensation in sum certain for personal services or labor – wages, salary, commission, and bonuses
  - Disposable earnings = after legally required deductions
  - Wages earned from personal labor or services while residing in Florida
  - Wages exceeding \$500 a week exempt unless head of family has agreed otherwise in writing

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### Asset Discovery

- Rule 1.560, Fla.R.Civ.P. – all discovery mechanisms under RCP are available for asset discovery in aid of judgment / execution
- Rule 69(a)(2), Fed.R.Civ.P. – discovery in aid of execution / judgment as provided in Federal Rules or by procedure of state where court is located.

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### Asset Discovery

- State – Rule 1.560(c) - Form 1.977 Fact Information Sheet completion can be required
- State & Federal Rules:
  - depositions
  - interrogatories
  - requests for production of documents & things
  - third-party discovery (depositions and document requests)

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### Asset Discovery – Outside the box

- Request for entry onto land for inspection
  - Rule 1.350, Fla.R.Civ.P. & Rule 34, Fed.R.Civ.P.
- Receiver for debtor's non-exempt personal property - *Warshall v. Price*, 617 So. 2d 751 (Fla. 4th DCA 1993): Receiver appointment not particularly onerous b/c creditor could theoretically levy on debtor's property at any time, effectively putting debtor out of business, a more intrusive proceeding than appointment of receiver.

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### Proceedings supplementary

- Rule 69(a)(1), Fed.R.Civ.P. & §56.29, Fla. Stat.
- Per §56.29:
  - file affidavit and motion re: unsatisfied writ of execution
  - upon filing, court enters order for proceedings supplementary
  - debtor appears for examination before court / magistrate regarding assets

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### Proceedings supplementary

- §56.29(5) – Court may order any non-exempt property of debtor in hands of any person, or any property, debt or obligation due debtor to be applied toward satisfaction of debt.
- §56.29(9) – Court may enter any order required to carry out purpose of section – including any orders to subject debtor’s property or property rights to execution, & entry of money judgments against impleaded defendants

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### Proceedings Supplementary

- Appoint receiver for non-exempt assets
  - debtor directed by Court to assemble & turn over non-exempt assets under penalty of contempt
- Implead third parties
  - LLC’s
  - Parties in pending lawsuits
- Attack fraudulent transfers
  - §56.29(6) – transfer w/in 1 year to family or “person on confidential terms” = presumption of fraud

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### Levy & Execution – writ of execution

- "Execution" - most common method used by judgment creditor to collect on judgment.
- Defined as "act of carrying into effect the final judgment...; the writ which directs and authorizes the officer to carry into effect such judgment." *Raulerson v. Peebles*, 87 So. 629 (Fla. 1921).
- Pursued through writ of execution - issued upon request. *Davidson v. Seegar* 15 Fla. 671 (Fla. 1876).
- Money judgment creditor entitled to issuance of a writ of execution. Rule 1.570(a), Fla. R. Civ. P.
- Writ of execution issued by court which entered judgment, usually through its clerk. Issuance permitted b/c of court's inherent power to enforce own judgments and orders. *Hazen v. Smith*, 135 So. 813 (Fla. 1931).

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### Levy and Execution – sale process

- Form 1.914 - officially approved form for writ of execution
  - writ directed to Sheriffs of Florida
  - directs levy on property of judgment debtor
- Sheriff seizes debtor's property upon which levy of execution to be made
- Sheriff advertises sale - execution sale or sheriff's sale
- Sheriff sells property at sale he / she conducts
- Procedure for advertising & conducting the sale governed by Sections 56.21 through 56.28, Fla. Stat.
  - Sale advertised once a week for 4 weeks in advance in a local newspaper
  - Sale at least 30 days after first advertisement - §56.21, Fla. Stat.
  - No particular sale method / most common is public auction w/ no minimum bids, no warranties, & cash due at close of sale.

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### Levy and Execution – low, low prices

- Sale prices at Sheriff's execution sale often low.
  - Courts recognize that forced sales often mean below market prices. *Maule Indus. v. Seminole Rock & Sand Co.*, 91 So. 2d 307 (Fla. 1956); *City of Sanford v. Ashton*, 179 So. 765 (Fla. 1938); *O'Neal v. McElhiney*, 172 So. 2d 492 (Fla. 1st DCA 1965).

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### Levy and Execution – getting started

- §30.30 provides:

Whenever any writ, issuing out of any court of this state, shall be delivered to a sheriff, commanding the sheriff to levy upon property specifically described therein, it shall be his or her duty to levy upon such property. If no property is specifically described in the writ, he or she shall levy upon:

- (a) Any property in the possession of the defendant which is described in instructions for levy; and
- (b) Upon any property assessed against the defendant on the current tax rolls of the county or registered in his or her name under any law of the United States or of the state, upon the request of the plaintiff or the plaintiff's attorney listing such property in an instructions for levy. The instructions for levy shall state the balance due on such writ.

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### Levy and Execution – Instructions for levy

- Judgment creditor can obtain writ of execution from clerk, and deliver it to Sheriff
  - Sheriff won't act on writ, won't levy on any of judgment debtor's property, until and unless creditor provides specific list of property to sheriff.
  - If sheriff levies per specific instructions, Section 30.30(2) provides him with immunity from liability for wrongful levy – e.g., a levy on exempt property.

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### Levy and Execution – What can be levied on?

- What property can the judgment creditor direct the sheriff to levy execution upon? Section 56.061, Fla. Stat. provides:

Lands and tenements, goods and chattels, equities of redemption in real and personal property, and stock in corporations, shall be subject to levy and sale under execution. Likewise, the interest in personal property in possession of a vendee under a retained title contract or conditional sale contract shall be subject to levy and sale under execution to satisfy a judgment against the vendee. This shall be done by making the levy on such personal property.

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### Levy and Execution – The real story

- Locate non-exempt debtor assets
- Give Sheriff instructions for levy so that the sheriff will levy
- Sheriff sells assets
- Net sale proceeds to judgment creditor
- Sale proceeds go first for advertising, storage, & sale fees. §30.231, Fla. Stat. See *Flagship State Bank of Jacksonville v. Carantzas*, 352 So. 2d 1259 (Fla. 1st DCA 1978), cert. den. 361 So. 2d 830 (Fla. 1978).
- Sale-related expenses significant & Sheriff may demand substantial "security deposit" up front - several hundred to more than \$1000 to commence levy

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### Garnishment – briefly considered

- Chapter 77
- §77.01 – Can garnish debts due, or to become due solely through passage of time
  - So can have continuing garnishment vs. non-negotiable instrument installment debts
- Can do continuing wage garnishments
- Can garnish pre- and post-judgment
- Can garnish both money and things

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Thanks for coming!

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