



# The Florida Senate

*Interim Project Report 98-31*

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Committee on Judiciary

Senator Fred R. Dudley, Chairman

## **EFFICACY AND PRACTICALITY OF CENTRALIZED FILING AND RECORDING OF JUDGMENT LIENS IN FLORIDA**

### **SUMMARY**

There are two problems with the current judgment lien on personal property system. The lien is difficult to find, making it somewhat of a secret lien, and the lengthy continuation of unlevied liens can discourage collection actions of subsequent creditors. A short duration statewide judgment lien on personal property to be perfected by recordation in a central location could correct these problems. Although some other states, including California, Connecticut, and Maine, have adopted central filing systems, these systems are too new for there to be any empirical data as to their effect or cost. There are continuing efforts by interested parties to develop such a system for use in Florida.

### **BACKGROUND**

During the 1997 Regular Session, legislation was filed proposing the centralized filing of judgments as liens on personal property. Currently, a judgment creditor must perfect a judgment lien on personal property in each county in which the creditor seeks to attach personal property. Centralized filing of these personal property liens may eliminate perceived problems with the current system. The President of the Florida Senate directed staff of the Senate Committee on Judiciary to research current law and work with interested parties to determine whether there are problems with the current system and whether these problems could be addressed by a centralized filing system.

### **METHODOLOGY**

Staff researched the current law and worked with interested parties to determine: the problems with the current system; how these problems could be remedied by a centralized filing system; and the cost and feasibility of a centralized filing system. The interested parties included representatives from the Special

Committee on Post-Judgment Creditor Remedies of the Business Law Section of The Florida Bar, the Florida Sheriffs Association, the Department of State, Division of Corporations, and the Florida Association of Counties. Staff also reviewed relevant statutes and case law and studied a law review article written by Professor Jeffrey Davis, who was the Reporter for the Special Committee on Post-Judgment Creditor Remedies.

What follows is a synthesis of information from these sources. Much of the information relates to current procedures that have evolved in the application of general statutes in the absence of specific procedural statutes or rules. In general then, the information comes from discussions with the interested parties and the Professor's law review article. As many of the discussions were on the same points as Professor Davis made in his article, and many discussions, in fact, included references to the article, precise attribution of the source of the information is impossible. Unless a cite is provided, the information is a distillation of these discussions or the article.

### **FINDINGS**

#### **A. Current law**

##### **1. Creation and Execution of Lien on Personal Property**

Judgment liens are based on a judgment ordering the payment of money. To obtain a lien on the judgment debtor's personal property, the judgment creditor must first obtain a writ of execution from the clerk of the court which entered the judgment. A writ of execution orders that property of the judgment debtor be seized and sold. The writ is the document that will be filed to establish the lien on personal property.

However, the writ can only be filed, and a lien can only be established, in one county. The reason for this is as

follows. Although courts can authorize multiple writs, usually only one writ is issued on a judgment. Additionally, pursuant to statute, the writ is to be enforced by a sheriff. s. 30.30, F.S. Each sheriff can act only within his county. The combination of these two factors means that, generally, only one writ will be issued and each writ may be enforced in only one county. As such, the judgment creditor must carefully select the county in which the judgment debtor is most likely to have the greatest amount of personal property located. After selecting this county, the judgment creditor then delivers the writ to the sheriff of that county for enforcement.

The sheriff receives the writ and records it in a docket of writs. The writ directs the sheriff to levy upon, or to seize and sell, personal property described in the writ or in the instructions for levy. s. 30.30, F.S. When the sheriff records the writ, the lien is “inchoate” or incomplete. It becomes final only when the sheriff levies on specific property and only upon that specific property seized and sold. *Love v. Williams*, 4 Fla. 126, 134 (1851). If the sheriff finds and seizes property, the seized property is sold, the proceeds are paid to the judgment creditor who filed the execution. s. 56.27, F.S. If the sale brings more money than is owed the judgment creditor, the surplus is paid to the defendant. *Id.*

If the sheriff cannot find property to seize and sell pursuant to the writ, the writ is of little consequence as between the judgment creditor and the judgment debtor. In fact, unless the sheriff contacts the judgment debtor, he may not even be aware of the existence of the writ. Under these circumstances, the significance of the writ is that it establishes priority among competing creditors and others claiming an interest in the judgment debtor’s property. Each writ/lien takes priority in the order in which it was perfected by recording in the docket relative to the date on which other liens or claims on the property were perfected. A judgment is a lien on property of the judgment debtor for up to 20 years from the date of entry of the judgment. The writ is valid as a lien, if recorded by a sheriff, for the remaining life of the underlying judgment.

## 2. Problems with the Current System

There are two primary problems with the current system of perfecting a lien on personal property. The first is that the lien is, to some extent, a hidden or secret lien. As these liens are perfected by filing with

a sheriff, the only way to discover an existing lien is to check with the particular sheriff who has that writ recorded in his docket. However, it is not always easy to determine which sheriff or sheriffs may have a writ recorded in the docket. For example, if a judgment debtor lives in Gadsden County, and all of his assets are located there, but he works in Leon County, the judgment creditor may file a writ in Leon County in order to have the debtor’s vehicle seized while the debtor is at work. Such a writ could easily be overlooked.

This potential trap could be important in a number of different circumstances. Persons who would need to know of the existence of such liens would include: a person planning to purchase the motor vehicle that is subject to the lien; a lender who is considering making a loan to the debtor and is attempting to determine the debtor’s overall financial well-being; and a person who has a cause of action or a judgment against the debtor and is attempting to determine whether, economically, it makes sense to pursue the cause of action or collection of the judgment and, if so, how to pursue it. All of these persons could be harmed by a lack of knowledge of an existing lien. The potential purchaser could buy the vehicle and take it subject to a lien. The potential lender could make the loan without knowing that the debtor’s finances are weakened by the lien, and perhaps others like it. Finally, the person with the cause of action or judgment may expend considerable time, effort, and money only to later discover that he cannot collect due to the higher priority of the existing lien, and perhaps other similar liens.

To be certain that no such liens exist, an interested person would be required to expend the time, effort, and cost of checking the dockets of all 67 sheriffs. Even then, the transaction contemplated by the interested person would have to be completed before a writ could be filed after the lien search is conducted. This risk may seem unlikely, but it can happen. An example is found in a case involving competing liens on a motor vehicle. *Bank of Hawthorne v. Shepherd*, 330 So.2d 75(Fla. 1st DCA 1976).

In this case, on April 7, the Keystone State Bank executed a notice of lien on a motor vehicle and mailed it to the Division of Motor Vehicles for notation on the certificate of title. *Id.* at 76. On April 10, the Division received the notice and noted it on the certificate of title. *Id.* Meanwhile, on April 8, the Bank of Hawthorne delivered a writ of execution to the Sheriff of Alachua County, who docketed it and perfected it as

a lien on all leviable personal property of the debtor within that county. *Id.* The Sheriff levied on the motor vehicle and a law suit was instituted to determine priority of competing liens. *Id.* The appellate court held that the Bank of Hawthorne's lien was perfected before the Keystone State Bank's lien was, and therefore took priority, based on a then-existing statute providing that a notice of lien on a motor vehicle becomes a lien on the date it is filed in the Division of Motor Vehicles. *Id.* Thus, a lien which did not exist and could not be discovered at the time the loan was being processed ultimately took priority over the security interest in that loan.

The second problem with the existing system of perfecting a lien on personal property is that it can actually discourage a creditor who would otherwise actively pursue collection. If a judgment creditor has been unsuccessful in finding property of the debtor for the sheriff to seize, the writ and lien remain with the sheriff for the remaining life of the underlying judgment lien, which could be almost 20 years. s. 55.10, F.S. A subsequent judgment creditor's lien is secondary in priority to the initial lien and cannot be collected without satisfying the initial lien first. To make the situation worse, the initial creditor may have given up on collection efforts, leaving no possibility that his lien will ever be satisfied on his own efforts. Additionally, there may be multiple prior liens, not just one. This can be a great deterrence to subsequent judgment creditors, and could even discourage someone who has a later cause of action against the debtor from bringing that action. As a result, debtors who recognize this protection may be encouraged to incur further debt or to fail to pay debt they otherwise might pay.

The current system of perfecting a lien on personal property has been criticized by both commentators and judges. Davis, *Fixing Florida Execution Law*, 48 U. FLA. L. REV. 661(1996). An example of this is Judge Cope's comments in his concurring opinion in *Crudele v. Accent Realty of Jacksonville*, 541 So.2d 742 (Fla. 3d DCA 1989). Judge Cope first noted that Florida's current system for perfecting a judgment lien on personal property is derived from the law of England, adopted in the late 1600's and that England had abandoned this law by statute in 1856. *Id.* He then wrote the following:

As one commentator has stated:

Serious defects exist in Florida's execution laws. The execution lien is a

hidden lien on personal property. A good faith purchaser for value has no protection from it. Perhaps the only reason it has not caused more problems is the relatively low value of most personal property at execution sales. The Uniform Commercial Code, requiring actual seizure of property within its scope, is much better.

H. Trawick, *Trawick's Florida Practice and Procedure* Sec. 27-3, at 411-12 (1988). The reform suggested by Trawick has been accomplished in many states by legislation, but not in Florida. *Crudele*, 496 So.2d at 162 (Pearson, J., concurring).

Professor Murray has ably canvassed the law of the various states. Murray, *supra*, at 491-95. Approaches to the problem have varied widely among the states, and have included modification of the time at which the execution lien attaches, and a limitation of the duration of the lien to a relatively short period.

Professor Murray has proposed a simplified recording system coupled with durational limitations on the execution lien.

Although the prior panel, and the present one, have disposed of the instant case within the parameters of existing law, the experience of other jurisdictions suggests that our system could be improved. As has been true in other jurisdictions, any significant modification would require legislative action.

*Id.* at 742-743.

## **B. Centralized Filing Proposal**

In his article, Professor Davis proposed a statewide judgment lien on personal property to be perfected by recording the judgment in the same centralized filing location as is used for U.C.C. Article 9 financing statements, the Department of State, Division of Corporations. Davis, *supra*, at 667. This proposal would address the problems with the current system of perfection of the lien which were discussed above. Additionally, the use of this particular central filing location would allow interested persons to check both filings at the same time. *Id.*

This proposal was reviewed by the Special Committee on Post-Judgment Creditor Remedies of the Business

Law Section of The Florida Bar, for which Professor Davis was the Reporter. The Special Committee then worked with legislators to develop legislation proposing a centrally recorded statewide lien on personal property, SB 2016. This legislation did not pass.

The interested parties continued to work on the subject. The most recent version of the proposal was developed by the Department of State (Department). This version is discussed below.

The proposal creates ss. 55.201-55.209, F.S., to provide for the central filing of judgment liens on personal property. Section 55.201, F.S., is created to provide that the Department is to maintain a database of Judgment Lien Certificates. The newly created section also provides legislative intent that the Department provide data base information to the general public via electronic means and that the Department be restricted from bulk sale of the information in any form.

Section 55.202, F.S., is created to provide that a judgment lien may be acquired on the judgment debtor's interest in all personal property subject to execution in this state, other than fixtures, money, and negotiable instruments. The lien is obtained by filing a judgment lien certificate in the office of the Department after the judgment has become final, so long as no stay of the judgment or its enforcement is in effect at the time the certificate is filed. The lien is effective as of the date of filing. Only one lien may be filed on a judgment, with the exception of a new lien for a second 5 year period, as discussed below.

Section 55.205, F.S., is created to provide the effect of a judgment lien. A valid judgment lien gives the judgment creditor the right to take possession of the property subject to the lien through writ of execution, garnishment, or other judicial process. A creditor who has not filed a judgment lien certificate or whose lien has lapsed may nonetheless take possession of the debtor's property through such judicial process. A creditor proceeding through writ of execution obtains a lien as of the time the levy occurs and only on the property levied upon. A buyer in the ordinary course of business would take free of the lien. If enforceability of the judgment lien was temporarily stayed or enjoined as a result of any legal or equitable proceeding, the time for lapse of the judgment lien would be tolled until 30 days after the stay or injunction is terminated.

Section 55.204, F.S., is created to provide that a judgment lien lapses and becomes invalid 5 years after the date of filing. At any time after the sixth month prior to the scheduled lapse, the creditor may file for a second lien by recording a new judgment certificate. This second lien is a new lien, not a continuation of the initial lien. As such, it would not maintain the lien priority of the initial lien. The second lien also lapses after 5 years, at which point no additional personal property liens may be obtained on that judgment.

A lien may be continued for 90 days after the scheduled lapses to any property that has been itemized with particularity in instructions for levy which have been delivered to a sheriff prior to the time of lapse. The lien is to continue only if the itemized property and its location are described with sufficient particularity to permit the sheriff to act, and only if the property is located within the county at the time of delivery of the instructions.

Additionally, a court may order further continuation of the itemized lien on a showing that extraordinary circumstances have prevented levy. The Department is to maintain a record of the information contained in the judgment lien record for at least one year after lapse.

Section 55.203, F.S., is created to provide the content of the judgment lien certificate and to provide for the process of filing and indexing the certificate. Each certificate must contain:

- The legal name of the judgment debtor and if the judgment debtor is a recorded legal entity the registered name and document filing number as shown on the records;
- The last-known address and social security number or Federal Employer Identification Number of the judgment debtor;
- The legal name of the judgment creditor or, if the judgment creditor is a recorded legal entity, the registered name and document filing number, and the name of the judgment creditor's attorney or duly authorized representative, if any;
- The address and social security number or Federal Employer Identification Number of the judgment creditor;
- The name of the court in which the judgment was entered and the record number and date of filing;
- The amount due on the judgment and the applicable interest rate; and

- The signature of the judgment creditor or his attorney or duly authorized representative.

If a second 5-year lien is filed, the certificate must contain all the above plus the file number of the original judgment lien certificate, the amount remaining unpaid on the judgment lien and the amount of interest which has accrued. If an amendment or a corrective statement is filed, the document must state the file number of the judgment lien to which the amendment or corrective statement relates and state the change or statement to be added to the judgment lien record.

The Department is to examine each submitted record for compliance with the newly created statutory requirements and file or reject the document accordingly. The Department is to promulgate mandatory forms of all instruments to be filed. In filing a document relating to a judgment lien, the Department must:

- Assign a unique number to the filed record;
- Create a record that contains the assigned number and the date filed;
- Maintain the filed record for electronic public inspection;
- Index the original judgment lien certificate according to the name of the judgment debtor; and
- Index all subsequently filed records relating to the original judgment lien certificate such that they are associated with the original judgment lien certificate.

Section 55.205, F.S., provides that the validity of a recorded certificate could not be defeated by technical or clerical errors which were not misleading nor could any claim of estoppel be based on such errors.

Section 55.206, F.S., is created to provide for amendment of a judgment lien. An amendment may be filed to: terminate, partially release, or assign a judgment lien; toll the lapse of a lien if enforceability has been temporarily stayed or enjoined as a result of any legal or equitable proceeding; or correct or change any information. If a lien has been satisfied or partially released, the judgment debtor may a written demand that the judgment creditor provide to the debtor a statement of this satisfaction or release. If the creditor fails to timely provide the statement, he is liable to the debtor in the amount of \$100 and for any loss caused to the debtor, including any attorneys' fees.

Section 55.209, F.S., is created to provide the fees and responsibilities of the Department. The Department would be required to collect:

- \$20 per instrument filed;
- \$10 for certification of any recorded document;
- \$1 per page for copies of judgment lien instruments, with no charge for copies provided in an online electronic format via the Internet;
- \$5 per additional name for indexing a judgment lien by multiple names; and
- \$5 for each additional facing page attached to a judgment lien certificate or other instrument.

The Department would not be authorized to conduct any search of the record database to determine the existence or nonexistence of any recorded lien. The Department is to make no certification or determination of the validity of any recorded claim of lien. The Department is to ensure the availability of electronic access to the database information for general public use via the Internet, but in no case may it permit or provide bulk sale of such information.

Section 55.207, F.S., is created to provide for inaccurate or wrongfully filed records. A person who has a judgment lien indexed under his name may file with the Department a correction statement if the person believes that the record is inaccurate or was wrongfully filed. The correction statement must state the judgment debtor named and the file number of the original lien, indicate that it is a corrections statement, and either provide the basis for the belief that the record was wrongfully filed or provide the basis for the belief that the record is inaccurate and indicate how the record should be amended to cure the inaccuracy. The filing of a correction statement does not affect the validity or effectiveness of the original judgment lien or other record.

Section 55.208, F.S., is created to provide for the transition from the current system of perfecting a lien on personal property to the new system. Existing liens on personal property which were created by delivery of a writ of execution to a sheriff prior to the effective date of the proposal would remain in effect for 2 years after that date as to any property of the debtor which was located in the county on that date and remained in that county after that date. The lien would not apply to any property brought into the county after that date.

A judgment creditor could extend this 2-year period by recording the lien with the Department within 2 years of the effective date. The recording would have to be accompanied by a certification from the sheriff as to the date on which the writ was delivered to him. The resulting lien would be deemed to have been recorded on the date the writ was delivered to the sheriff as to all property of the debtor within that county. As to all other property of the debtor, the judgment lien would take effect on the date of recording with the Department. If a judgment creditor has perfected a lien by delivery of a writ to the sheriff prior to the effective date of the proposal and did not record a lien certificate with the Department after that date, the lien would expire 2 years after that date.

Section 55.604, F.S., relating to recognition and enforcement of foreign judgments, is amended to provide that a judgment lien on personal property is created only by recording a judgment lien certificate with the Department.

Section 15.16, F.S., is amended to allow the Department to determine the specific details of electronic filing of records with the Department, including such things as: the appropriate format, the manner of execution, the method of electronic transmission, and the amount of any fee surcharge for using an electronic filing format. The proposed amendment to this section also allows the Department to utilize the contractual services of other government or private sector trading partners in the provision of any electronic filing services.

## RECOMMENDATIONS

Although some other states, such as California, Connecticut, and Maine, have adopted a central filing system, no empirical data is available as to how these systems are working. Letter from Professor Jeffrey Davis to Kevin Wiehle (September 22, 1998) (discussing the central filing systems of other states and the lack of data on the efficiency or effectivity of these systems). The central filing proposal continues to evolve as the interested parties continue their work. Although it appears at this time that there has been agreement on the major points, there is still some uncertainty as to whether the current version will be accepted as the most practicable. For example, there was a recent suggestion that the Florida Sheriffs Association develop and operate the central filing location instead of using the Department of State. Due to this uncertainty and the fact that many details as to system requirements and costs depend on the details of the proposal, no system requirement or cost information has been discussed.

Despite the fact that more work must be done on the proposal, it is recommended that a bill be filed containing the most recent version of the proposal, the draft developed by the Department of State. If this proposal could be improved upon to address all concerns, it would be an improvement to the current system. The proposed central filing system would make information relating to liens on personal property easier to access, so that these would be no longer be "secret liens." Additionally, the proposal would terminate these liens after 5 years, with only one additional 5 year period. This would encourage lienholders to actively pursue collection and would end the current disincentive for subsequent lienholders. The greater awareness of liens against debtors and the incentives to collect on those debts may in turn provide an incentive for the debtors to pay their debts.

### COMMITTEE(S) INVOLVED IN REPORT *(Contact first committee for more information.)*

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 Committee on Governmental Reform and Oversight  
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### MEMBER OVERSIGHT

Senators Charles Williams and Daryl Jones