

White Paper by Business Law Section of Florida Bar, Bankruptcy/UCC Committee, on Clarifying and Expanding the Scope of Florida's Judgment Lien on Personal Property

I. Background

When a plaintiff in a civil suit succeeds in obtaining a judgment, the next challenge is recovering money or property to satisfy it. If the debtor does not voluntarily pay it, the judgment holder must seek to satisfy the judgment from the debtor's nonexempt property. To assist in this effort, all states provide familiar creditor remedies, such as execution, garnishment, attachment, replevin, and proceedings supplementary to execution.

In addition, Florida has long permitted judgment creditors to obtain a judgment lien on the debtor's nonexempt real property by recording a certified copy of the judgment in the county in which the real property is located. Fla. Stat. s. 55.10(1). The chief benefit of a judgment lien is that the debtor can no longer easily transfer the property because any purchaser takes subject to the lien, which can be foreclosed upon despite the sale. Recording the judgment provides public notice of the lien, and prospective buyers are generally unwilling to buy property subject to a judgment lien. The ability of the judgment holder to foreclose on the judgment lien and the judgment debtor's inability to transfer the property may lead to the judgment debtor satisfying the judgment.

In 2000, the Florida legislature added a new judgment lien encumbering the judgment debtor's personal property. Fla. Stat. ss. 55.201 - 55.209. Upon recording a judgment lien certificate with the Florida Department of State, a judgment holder obtains a lien on all nonexempt leviable personal property in the state—that is, tangible personal property that can be taken into possession by the sheriff. The judgment lien holder can then search for the debtor's nonexempt personal property confident that the debtor will not be able to dispose of it before it can be found. If the debtor owns valuable personal property, such as works of art, construction equipment, a boat, or motor vehicles, this lien can be a significant boon.

In 2005, at the behest of used car dealers, the Florida Legislature modified the certificate of title statute to make clear that a judgment lien on motor vehicles and mobile homes, while enforceable against the owner, is not enforceable against creditors or subsequent purchasers for value unless noted on the certificate of title. Unfortunately, this permits judgment debtors to sell their titled motor vehicles and mobile homes free of a judgment lien. This not only undermines the value of the lien, but it also created an ambiguity in Florida's judgment lien statute. The statute implies that a judgment lien will be enforceable against all subsequent interest holders of the debtor's personal property, but this is no longer correct after the 2005 amendments as to motor vehicles and mobile homes unless noted on the certificate of title.

II. The Bill would clarify Fla. Stat. s. 55.205(5) and create a process whereby a judgment lien holder can obtain notation of the lien on a certificate of title.

The first objective of the proposed legislation (the "Bill") is to eliminate the ambiguity, caused by the 2005 amendment and clarify the judgment lien statute by cross-referencing the certificate-of-title statute. The second objective of the Bill, in order to properly effectuate the judgment lien on titled property, is to create a process through which the lien holder can cause the Department of Highway Safety and Motor Vehicles ("DHSMV") to note the lien on certificates of title.

There are two possible approaches to achieving this end and the Bill will facilitate both. First, it modifies the certificate-of-title statute creating a procedure through which a judgment lien holder obtains a statutory right to cause the DHSMV to note its lien on the certificate of title of a judgment debtor's motor vehicle, mobile home or vessel. This is a procedure familiar to the DHSMV because the modification is adapted to the current procedure through which an owner voluntarily adds a lien or security interest to its certificate of title.

A second procedure through which a holder of a judgment lien can obtain notification of the lien on a certificate of title is to obtain a court order instructing the DHSMV to note the lien on the certificate of title. Numerous judgment lien holders have done this by bringing a lawsuit seeking such a court order. However, such a court order can also be obtained more simply by motion through proceedings supplementary to execution. The Bill will simplify this process by stating explicitly in the judgment lien statute that this procedure is available, and by amending proceedings supplementary to state that on presentation of a copy of a recorded judgment lien certificate, a court presiding over proceedings supplementary shall order the DHSMV to note the lien on the certificate of title. The DHSMV currently has in place a procedure for noting liens on certificates of title in response to a court order. The Bill merely proposes clarifying the judgment lien statute and streamlining a creditor's ability to obtain the court order.

III. The Bill would expand the scope of Florida's judgment lien to include certain intangible assets and clarify the means for enforcing the lien.

The Bill proposes another improvement to the Florida judgment lien on personal property, which is to expand its scope to include certain intangible rights. As stated above, the reach of the current judgment lien extends only to "all personal property in this state subject to execution under s. 56.061." That is, it extends only to tangible personal property that can be levied upon. Some judgment debtors, however own valuable intangible property such as royalty rights, rights to receive income from personal property leases, or rights to receive payment for the sale of goods or services. There is no reason why a judgment lien should not attach to such property if it can be workably achieved. The Bill will expand the scope of the judgment lien to include "accounts" and "payment intangibles" as defined in Article 9 of the UCC of a judgment debtor that is located in Florida. In doing so, the Bill borrows the definition of "location" from Article 9. The limitation to the intangible property of a judgment debtor that is located in Florida is needed to minimize uncertainty as to jurisdiction and due process that would be created by attempting to enforce an involuntary lien across state lines.

The Bill proposes another amendment to the judgment lien statute to clarify that the means of enforcing the judgment lien are limited to judicial process, and that it may not be enforced through self-help repossession or replevin absent the express consent of the judgment debtor in a record authenticated after default. Apparently, some judgment lien holders have attempted self-help repossession without consent, which was never intended, and deprives the judgment debtor of the opportunity to claim that the property is exempt. By proceeding through judicial process, the debtor is assured of an opportunity to make a claim that the property is fully or partially exempt.

Where the judgment lien attaches to accounts, payment intangibles or proceeds thereof, the bill makes clear that the lien will not prime previously perfected security interests in such property. The statutory amendments will go into effect on October 1, 2022, which should provide plenty of time to get out the word of the process for noting the lien on Certificates of Title and expansion of its scope.

#### IV. Interested Stakeholders

The Business Law Section believes three additional sections of the Florida Bar will be interested in this Bill. They are the Trial Lawyers Section, the Solo and Small Firm Section, and the Real Property Probate and Trust Law Section. Lawyers in these sections engage in litigation leading to civil judgments. The Florida Judgment lien on personal property is intended to assist in collecting a judgment. This Bill, which will clarify and expand the Florida judgment lien will therefore be of interest to these sections. The RPPTL Section will also be interested in the effect of this bill on mobile homes.

One section of the Florida government that will be interested in this Bill is the Department of Highway Safety and Motor Vehicles (DHSMV). This department will be expected to adjust its procedures to accommodate the proposed amendments to Florida law. The Department of Revenue (DOR) will also be interested. The DOR files countless judgment liens, and there are special provisions in the judgment lien statute applicable to the DOR. The Department of State (DOS) keeps the judgment lien registry. The Bill does not directly affect the DOS, but the department will nevertheless want to be apprised of any amendments to the judgment lien law.

#### V. Financial impact.

The proposed amendments will have no financial impact on the State of Florida. The modifications to the certificate-of-title law will cause the DHSMV to modify its existing procedures somewhat, but the department currently charges a fee for any service it provides. See DHSMV Procedure TL-32. Any increase in DHSMV staffing costs will be covered by the increase in fees. Accordingly, there should be no financial impact on the state.

#### VI. Benefit to Florida citizens and businesses.

The Bill proposes a number of beneficial changes to existing law. First, it clarifies ambiguities created by conflicting provisions in the Florida certificate-of-title statute and the judgment lien statute. It also makes clear that the judgment lien may be enforced only through judicial process. These ambiguities cause confusion and misunderstandings that result in unmet expectations and unnecessary litigation. The benefit of clarification here is clear.

The Bill amends existing law to assist the holder of a valid Florida Judgment in obtaining payment from a judgment debtor that owns sufficient nonexempt assets that would permit the debtor to pay the judgment but chooses not to. By permitting the judgment debtor to obtain notification of its lien on titled vehicles, mobile homes and vessels, the judgment debtor will no longer be able to sell these assets in order to avoid paying. By expanding the scope of the lien to reach intangible rights to payment, debtors who currently enjoy these types of valuable assets will no longer be able enjoy them while refusing to pay a valid judgment debt. These amendments will clearly benefit citizens and business that have brought suit on a civil obligation, obtained a judgment in a Florida court, and seek to obtain payment from a debtor that is able to pay but refuses to do so.

1 A bill to be entitled  
2 An act amending s. 702.036, F.S. and providing an effective date.

3  
4 Be It Enacted by the Legislature of the State of Florida:

5  
6 Section 1. Section 702.036, Florida Statutes, is amended to  
7 read:

8 702.036 Finality of ~~mortgage~~ foreclosure judgment.-

9 (1)

10 (a) In any action or proceeding in which a party seeks to set  
11 aside, invalidate, or challenge the validity of a final  
12 judgment of foreclosure of a mortgage or other lien or to  
13 establish or reestablish a lien or encumbrance on ~~the real~~  
14 property in abrogation of the final judgment of foreclosure of  
15 a mortgage or other lien, the court shall treat such request  
16 solely as a claim for monetary damages and may not grant  
17 relief that adversely affects the quality or character of the  
18 title to the property, if:

19 1. The party seeking relief from the final judgment of  
20 foreclosure of the mortgage or lien was properly served  
21 in the foreclosure lawsuit as provided in chapter 48 or  
22 chapter 49.

23 2. The final judgment of foreclosure of the mortgage or  
24 lien was entered as to the property.

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25 3. All applicable appeals periods have run as to the  
26 final judgment of foreclosure of the mortgage or lien  
27 with no appeals having been taken or any appeals having  
28 been finally resolved.

29 4. The property has been acquired for value, by a person  
30 not affiliated with the foreclosing ~~lender-mortgage~~  
31 holder, the foreclosing lien holder or the foreclosed  
32 owner, at a time in which no lis pendens regarding the  
33 suit to set aside, invalidate, or challenge the  
34 foreclosure appears in the official records of the county  
35 where the property was located.

36 (b) This subsection does not limit the right to pursue any  
37 other relief to which a person may be entitled, including, but  
38 not limited to, compensatory damages, punitive damages,  
39 statutory damages, consequential damages, injunctive relief,  
40 or fees and costs, which does not adversely affect the  
41 ownership of the title to the property as vested in the  
42 unaffiliated purchaser for value.

43 (2) For purposes of this section, the following, without  
44 limitation, shall be considered persons affiliated with the  
45 foreclosing lender:

46 (a) The foreclosing ~~lender-mortgage holder, the foreclosing~~  
47 lien holder or any loan servicer for the loan being  
48 foreclosed;

49 (b) Any past or present owner or holder of the ~~loan mortgage~~  
50 or lien being foreclosed;

51 (c) Any maintenance company, holding company, foreclosure  
52 services company, or law firm under contract to any entity  
53 listed in paragraph (a), paragraph (b), or this paragraph,  
54 with regard to the ~~loan mortgage or lien~~ being foreclosed; or

55 (d) Any parent entity, subsidiary, or other person who  
56 directly, or indirectly through one or more intermediaries,  
57 controls or is controlled by, or is under common control with,  
58 any entity listed in paragraph (a), paragraph (b), or  
59 paragraph (c).

60 (3) After foreclosure of a mortgage based upon the enforcement of  
61 a lost, destroyed, or stolen note, a person who is not a party to  
62 the underlying foreclosure action but who claims to be the person  
63 entitled to enforce the promissory note secured by the foreclosed  
64 mortgage has no claim against the foreclosed property after it is  
65 conveyed for valuable consideration to a person not affiliated  
66 with the foreclosing lender or the foreclosed owner. This section  
67 does not preclude the person entitled to enforce the promissory  
68 note from pursuing recovery from any adequate protection given  
69 pursuant to s. 673.3091 or from the party who wrongfully claimed  
70 to be the person entitled to enforce the promissory note under s.  
71 702.11(2) or otherwise, from the maker of the note, or from any  
72 other person against whom it may have a claim relating to the  
73 note.

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74 (4) When a party seeks relief from a final judgment foreclosing a  
75 mortgage or lien, or files a separate action attacking such a  
76 final judgment, and claims that it holds or held a lien superior  
77 in right, priority or dignity to the mortgage or the lien  
78 foreclosed in the judgment, then the court shall award the party  
79 prevailing on that claim its reasonable attorney's fees incurred  
80 in such litigation. This subsection applies whether the  
81 litigation seeking relief from the final judgment occurs in the  
82 case in which the judgment was entered or in any separate case or  
83 proceeding.

84 (5) As used in this section, the word "property" refers  
85 exclusively to real property.

86 Section 2. This act shall take effect July 1, 2022.