

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Justice Appropriations Committee

BILL: CS/CS/SB 370

SPONSOR: Justice Appropriations Committee, Judiciary Committee and Senator Campbell

SUBJECT: Judgment Liens

DATE: April 4, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cibula</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Hendon</u>	<u>Sadberry</u>	<u>JA</u>	<u>Fav/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill makes clarifying and technical changes to provisions in Florida law relating to judgment liens, garnishment, and security interests in mortgages. The bill amends various sections of statute to:

- clarify provisions relating to the responsibilities of a clerk of court regarding the satisfaction of a judgment lien;
- clarify provisions relating to the timing for filing a judgment lien certificate;
- clarify provisions regarding instructions to the sheriff and recordkeeping by the Department of State;
- remove an unnecessary sentence which has been read to require the filing of a judgment lien certificate as a condition precedent to seeking garnishment;
- make clarifying changes to the “Uniform Out-of-Country Foreign Money-Judgment Recognition Act”;
- make clarifying changes to provisions relating to the execution of liens and execution sales to recognize the possibility of multiple judgment lien creditors and give control over the mailing of notices to the sheriff;
- recognize that the provisions of s. 56.27, F.S., apply to liens on real property, as well as liens on personal property;
- remove the unnecessary requirement of delivery of a writ of execution prior to initiating proceedings supplementary to execution when the judgment debtor has no property available for a judgment lien;
- permit judgment holders to choose either a writ of execution or writ of garnishment to collect a judgment;
- extends the time by one business day for the garnishee to act expeditiously on the writ;

- extend by one business day the amount of time in which a judgment holder must object to a judgment debtor's claims of exemption from garnishment and allows the plaintiff to extend the writ for an additional 6 months;
- provide that a homestead property owner may use the notice of homestead provisions for liens based on foreign judgments;
- provide a clarifying reference within the definition of "lien creditor" in the Uniform Commercial Code provisions of Florida law relating to secured transactions;
- clarify that a security interest in a mortgage is perfected by possession or filing of the promissory note made in connection with the mortgage; and
- clarify that for transactions involving real property creditors and subsequent purchasers may rely on the records filed with the clerk of court as opposed to Uniform Commercial Code filings.

This bill substantially amends the following sections of the Florida Statutes: 55.141, 55.202, 55.204, 55.205, 55.602, 55.603, 55.604, 55.605, 55.606, 56.21, 56.27, 56.29, 77.03, 77.04, 77.041, 77.07, 222.01, 319.27, 679.1021, and 701.02.

II. Present Situation:

Background

In 2000, the Legislature adopted a major revision to Florida's judgment lien laws.¹ This revision became effective on October 1, 2001. Prior to the revision, judgment creditors were required to file a lien in each separate county where a judgment debtor may own property. Florida was one of 11 states that still followed the lien-on-delivery rule, which provides that a true lien is not actually created on personal property until the property is levied and sold by the sheriff. The revision established a statutory framework for perfecting and prioritizing judgment liens on personal property.² With the revision in place, judgment creditors need only file a single judgment lien certificate with the Department of State. Since the implementation of this major revision, the need for some clarification to the law has been identified.³

Judgment Liens

A judgment lien refers to a lien against property that is based on an underlying money judgment. When a party prevails in a lawsuit and is awarded monetary damages, the losing party is referred to as the "judgment debtor," and the winning party is referred to as the "judgment creditor" or "judgment holder." If the judgment debtor fails to pay the judgment creditor all or a part of the judgment, the judgment creditor may seek to attach and execute a lien against property owned by the judgment debtor. A judgment lien may be acquired on a judgment debtor's interest in all

¹ Chapter 2000-258, L.O.F.

² Sections 55.201-55.209, F.S.

³ See Jeffrey Davis, *Fixing Florida's Execution Lien Law Part Two: Florida's New Judgment Lien on Personal Property*, 54 Fla. L. Rev. 119 (2002). Prof. Davis first wrote about the need to modernize Florida judgment lien law in 1996, which was a strong motivating factor for the revisions in 2000. See Jeffrey Davis, *Fixing Florida Execution Lien Law*, 48 Fla. L. Rev. 657 (1996).

personal property in the state other than fixtures, money, negotiable instruments, and mortgages, by filing a judgment lien certificate with the Department of State.⁴

A valid judgment lien confers on the judgment holder the right to proceed against the property of the judgment debtor through writ of execution, garnishment, or other judicial process.⁵ A writ of execution authorizes the enforcement of a money judgment. The writ must be obtained from the clerk of the court. The judgment creditor must deliver the writ to the sheriff. The writ of execution directs the sheriff to levy on the property owned by the judgment debtor located in the county. Upon levy, the sheriff seizes the property and sells it. The proceeds of the sale are distributed to cover the costs of the sale, to pay the judgment creditor and any other judgment creditors, with the remainder, if any, going to the judgment debtor.⁶ The levy is the process by which the property is seized for sale to satisfy the writ of execution based on the underlying judgment. A sheriff may take actual or constructive custody of personal property. The sheriff must take enough property to satisfy the judgment, although he or she may accept payment in full on the writ in lieu of making a levy.⁷

Satisfaction of Judgments

Section 55.141, F.S., authorizes a judgment debtor to satisfy the judgment against him or her before a judgment holder attempts to collect the judgment by paying the full amount of the judgment, with interest, plus the cost of issuing a satisfaction of judgment into the registry of the court that issued the judgment. Upon the payment, the clerk, or the judge if there is no clerk, must “record a satisfaction of judgment, *provided by the judgment holder*, upon payment of the recording charge . . . plus the necessary costs of mailing to the clerk or judge.”⁸ The clerk or judge then must notify the judgment holder, if such person and his or her address are known to the clerk or judge, and pay the funds to the judgment holder upon request, less fees for receiving into and paying out of the registry of the court.⁹

Section 55.141, F.S., “was enacted primarily for the benefit of judgment debtors, and not judgment creditors.”¹⁰ The benefits to a judgment debtor of making a payment to the registry of a court were described as follows in *Gerardi v. Carlisle*, 232 So. 2d 36, 39 (Fla. 1st DCA 1969):

By making such a deposit he precludes a levy from being made against his property, arrests the further accrual of interest on the judgment, and at the same time releases [any] property he may own from the lien of the judgment. The statute furthermore permits the judgment debtor to discharge his obligation by availing himself of the provisions of the statute under circumstances where the

⁴ Section 55.202(2), F.S.

⁵ Section 55.205(1), F.S. A judgment holder who has not acquired a judgment lien through the filing of a judgment lien certificate with the Department of State may nevertheless acquire a lien by writ of execution. Such lien is acquired at the time of levy against the property of the judgment debtor and is taken subject to the claims and priority of other judgment holders.

⁶ Chapter 30, F.S., contains provisions relating to sheriffs and their responsibilities regarding writs, execution, and other related processes.

⁷ See ch. 56, F.S., for provisions regarding writs of executions and execution sales.

⁸ Section 55.141(2), F.S. Emphasis added.

⁹ *Id.*

¹⁰ *Gerardi v. Carlisle*, 232 So. 2d 36, 39 (Fla. 1st DCA 1969).

judgment creditor is unknown, cannot be reached, or his place of residence cannot be ascertained.

According to the Real Property, Probate, and Trust Law Section of The Florida Bar (RPPTL), a clerk of court in southwest Florida has declined to record a satisfaction of judgment because the judgment holder could not be located or because the judgment holder failed to deliver a satisfaction of judgment form to the clerk.¹¹ As a result, the purpose of the statute to allow an expedited procedure to clear judgment liens when the judgment holder cannot be located or refuses to timely deliver a satisfaction is defeated, according to RPPTL.¹² The ability to clear judgment liens quickly is important to real estate practitioners who seek to close on a real estate transaction.¹³

Garnishment

Under ch. 77, F.S., a judgment holder may seek to garnish a judgment debtor's sources of income or accounts if the judgment holder believes that the judgment debtor does not have sufficient property to satisfy the judgment. As such, the law appears to prefer the seizure and sale of a judgment debtor's property over garnishment. Under s. 77.041, F.S., a judgment debtor may claim that some of his or her assets or income are exempt from garnishment within 20 days after the receipt of a writ of garnishment. For example, the judgment debtor's wages may not be garnished if the judgment debtor is the head of a household and furnishes more than half of the support for a child or dependent. Additionally, income and accounts including Social Security benefits, Supplemental Security Income benefits, welfare, workers' compensation, unemployment compensation, and Prepaid College Trust Funds or Medical Savings Accounts may not be garnished.¹⁴ For the judgment holder to preserve rights to funds claimed under an exemption, the judgment holder must object to an exemption claim that is hand-delivered to him or her within 2 business days.¹⁵ A judgment holder must object to exemption claims that are mailed to him or her within 7 business days of the date the exemption claims were mailed.

Assignment of Mortgages

Mortgage warehousing is a process in which a warehousing bank provides financing to mortgage lenders to issue mortgage loans.¹⁶ The financing from the warehousing bank to the mortgage lender is secured by a security interest in the underlying mortgages. The funds are advanced to the mortgage lender for a temporary period of time to allow the mortgage to be sold to a permanent investor. Because warehousing banks deal in large volumes of mortgages, they wish to be secure in the underlying mortgages without having to record the assignment of the security interest and incur the costs of recording.¹⁷

¹¹ The Florida Bar, Real Property, Probate, and Trust Law Section, *White Paper on F.S. 55.141 SATISFACTION OF JUDGMENTS AND DECREES*.

¹² *Id.*

¹³ *Id.*

¹⁴ Section 77.041(1), F.S.

¹⁵ Section 77.041(1) and (3), F.S.

¹⁶ Jan Z. Krasnowiecki, J. Gregg Miller, and Lloyd R. Ziff; *The Kennedy Mortgage Co. Bankruptcy Case: New Light Shed on the Position of Mortgage Warehousing Bank*, 56 Am. Bnkr. L.J. 325, 328 (1982).

¹⁷ Conversation with Burt Bruton, Member of the Executive Committee of the Real Property, Probate, and Trust Law Section of The Florida Bar, January 6, 2005

In *Rucker v. State Exchange Bank*, 355 So. 2d 171, 174 (Fla. 1st DCA 1978), the court held that “the assignment of a real estate mortgage securing a promissory note as collateral for a bank loan is not a secured transaction under Article 9 of the Uniform Commercial Code.” An interest in a real estate mortgage was protected by recording the assignment as required by s. 701.02, F.S., according to the court.¹⁸

According to *American Bank of the South v. Rothenberg*, 598 So. 2d 289, 290 (Fla. 5th DCA 1992):

Section 701.02, was enacted to protect a creditor or subsequent purchaser of land who has relied on the record satisfaction of a prior mortgage, which satisfaction was executed by the mortgagee after he made an unrecorded assignment of the same mortgage.

Section 701.02, F.S., is not applicable to successive assignees of mortgages.¹⁹

Article 9 of the Uniform Commercial Code (UCC), which is codified as ch. 679, F.S., was revised since *Rucker* to clearly indicate that the assignment of a mortgage securing a promissory note *is* a secured transaction.²⁰ Under s. 679.3131, F.S., one perfects a security interest in a real estate mortgage by possession of the promissory note. Alternatively the secured party can be perfected through filing under s. 679.3121, F.S. Nevertheless, some in the mortgage-servicing industry believe that *Rucker* stands for the proposition that the assignment of a security interest in a mortgage or the assignment of a mortgage must be recorded in order to perfect the security interest in the mortgage. The act of recording an interest in a mortgage is costly to the mortgage-lending industry in terms of time and money. As a result, many assignments of an interest in Florida mortgages are not recorded.²¹ These unrecorded mortgage assignments are viewed by warehousing banks as having more risk than recorded assignments. Florida borrowers may pay for the increased risk borne by warehousing banks though higher borrowing costs.²²

III. Effect of Proposed Changes:

The provisions of the bill make clarifying and technical changes to provisions in Florida law relating to judgment liens, garnishment, and security interests in mortgages.

Satisfaction of Judgments

¹⁸ Section 701.02(1), F.S., states:

No assignment of a mortgage upon real property or of any interest therein, shall be good or effectual in law or equity, against creditors or subsequent purchasers, for a valuable consideration, and without notice, unless the assignment is contained in a document which, in its title, indicates an assignment of mortgage and is recorded according to law.

¹⁹ *American Bank of the South v. Rothenberg*, 598 So. 2d 289, 290 (Fla. 5th DCA 1992).

²⁰ See s. 679.1091(4)(k)1., F.S.

²¹ Conversation with Stuart Ames, member of the Executive Committee of the Business Law Section of The Florida Bar, January 4, 2005.

²² *Id.*

The bill clarifies that a judgment holder does not have to supply a satisfaction of judgment form to a clerk of court in order for a clerk of court to record a satisfaction of judgment under s. 55.141, F.S. Upon the payment of the full amount of the judgment, with interest, and other required fees into the registry of the court, a clerk must record a satisfaction of judgment.

The bill also deletes a requirement for a judge to record the satisfaction of judgment if there is no clerk. The inherent equitable powers of a court may enable it to issue a satisfaction of judgment when there is no clerk.²³ As such, express statutory authority for a judge to issue a satisfaction of judgment may be redundant.

Additionally, the bill creates a satisfaction of judgment form for use by a clerk of court to record judgments satisfied by judgment debtors under s. 55.141, F.S.

Judgment Liens

The bill clarifies that a judgment has become final; enabling a judgment holder to file a lien certificate with the Department of State, when the time to move for a rehearing has expired and no motion for a rehearing is pending. However, a judge, for cause shown, may authorize a judgment holder to file a lien certificate before the judgment becomes final. According to Professor Davis, a judge may wish to authorize a judgment holder to file a lien certificate before a judgment becomes final if there has been a showing that the judgment debtor may seek to remove to an out-of-state location personal property to which a lien certificate will apply.²⁴

The bill also clarifies the effect of a judgment lien after it lapses. Accordingly, the bill provides that a judgment lien continues for 90 days after it lapses if the instructions to levy are clear enough to permit a sheriff to levy on the judgment debtor's property and the instructions for the levy are delivered before the lapse of a judgment lien.

The bill clarifies the documents that must be maintained and the length of time those documents must be maintained by the Department of State (department) when a second judgment lien is filed by the judgment holder on the property of the judgment debtor. Under the bill, the department must maintain documents related to both the first and second liens for at least 1 year after the second judgment lien expires.

The bill deletes redundant language in s. 55.205(1), F.S., that authorizes a judgment holder to proceed against the property of a judgment debtor through judicial process. The bill also clarifies that a judgment holder that does not file a judgment lien may proceed against the judgment debtor's property through judicial process.

Sections 55.601-55.607, F.S., provide a method for the enforcement of specified judgments issued by courts of foreign countries. Throughout these provisions, a judgment from a court of a foreign country is referred to as a foreign judgment from a "foreign state." To prevent confusion between a state of the United States and a "foreign state," the bill clarifies that a foreign state

²³ See *Ford Motor Credit Co. v. Simmons*, 421 So. 2d 698, 700 (Fla. 2nd DCA 1982) (stating that "[e]very court of law possesses inherent equitable power sufficient to control its own judgments, and this includes power to set aside a satisfaction of one of its own judgments").

²⁴ Conversation with Prof. Jeffrey Davis of the University of Florida College of Law.

means an “out-of-country foreign state.” The bill also corrects an error in s. 55.604, F.S., by deleting the last sentence of s. 55.604(7), F.S. That sentence referred to a person designated pursuant to “paragraph (1).” No person, however is designated in subsection (1) of s. 55.604, F.S.

Section 56.21, F.S., is amended by the bill to recognize that multiple judgment creditors may attempt to levy on the property of a judgment debtor at the same time. The bill changes the responsibility of mailing a notice of the levy and execution sale from a levying creditor to the sheriff. This section is effective October 1, 2005.

Section 56.27, F.S., is amended by the bill to clarify that lien holders with the highest priority liens get paid before lien holders of lower priority are paid from the proceeds from the levy on the property of a judgment debtor.

Section 56.29, F.S., is amended by the bill to provide that a person or entity that has an unsatisfied judgment instead of an unsatisfied execution is entitled to supplemental proceedings to attempt to collect the unsatisfied judgment.

The bill also amends s. 679.1021(1)(zz), F.S., to provide that the term “lien creditor” includes a creditor that has acquired a judgment lien certificate.

Garnishment

Section 77.03, F.S., is amended to allow a judgment holder to seek to garnish the income or accounts of a judgment debtor even if the debtor has visible assets that could be seized and sold to satisfy the judgment. As a result, creditors will have more options available to pursue the collection of a debt.

Section 77.04, F.S., is amended to extend the time by one business day for the garnishee to act expeditiously on the writ.

Section 77.041, F.S., is amended to increase the amount of time in which a judgment holder must object to claims of exemption from garnishment made by a judgment debtor. Under the bill, the time to object is increased from 2 business days to 3 business days from the date the claims of exemption from garnishment are hand-delivered to a judgment holder. When claims of exemption are mailed to the judgment holder, the time to object is increased from 7 business days to 8 business days.

Section 77.07, F.S., is amended to provide for the automatic dissolution of a writ and discharge of a garnishee of liability and grants the plaintiff the authority to extend the writ for an additional 6 months.

Assignment of Mortgages

The bill creates s. 701.02(4), F.S., to clarify that the Uniform Commercial Code, as codified in the Florida Statutes, governs whether an assignment of a security interest in a mortgage has

perfected or attached to the mortgage. As a result, the ambiguity as to whether assignments of security interests in mortgages must be recorded to be secured will be removed.

The bill also creates s. s. 701.02(5), F.S., to clarify that creditors and subsequent purchasers of real property may rely upon the real property records filed with the clerk of court. Creditors and subsequent purchasers will not have to search Uniform Commercial Code filings.

Other Provisions

Lastly, the bill makes grammatical and technical changes to existing law.

The bill takes effect upon becoming a law except as otherwise provided therein.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill clarifies those procedures that a judgment debtor may follow to quickly obtain a satisfaction of judgment issued by a clerk of court. Additionally, judgment holders may be able to collect judgments more efficiently from judgment debtors. Lastly, mortgage warehousing operations may incur less cost in assigning mortgages.

C. Government Sector Impact:

The bill would have an insignificant fiscal impact on the clerks of the court.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
