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# Resolving the Creditor's Dilemma: An Elimentary Game-Theoretic Analysis of the Causes and Cures of Counterproductive Practices in the Collection of Consumer Debt

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# FIXING FLORIDA EXECUTION LIEN LAW

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State debtor-creditor law serves two purposes. First, it provides the remedial devices through which unpaid creditors may satisfy their claims out of the nonexempt property of their debtors. Second, where two or more people assert claims against the property of a debtor, it regulates the competition. Where, as is usual, the debtor's nonexempt property will not satisfy all claims, state law determines the order of priority in which these claims may be satisfied out of each item of property. In ordering the priorities, the age-old statutory objectives are: (1) avoiding

* Professor of Law, University of Florida. In the Fall of 1995, Paul Singerman, Chair of the Business Section of The Florida Bar appointed the Special Committee on Post-Judgment Creditors' Remedies, chaired by Michael Williamson. I have served as Reporter for the Special Committee. As I write, the Committee continues to consider a wide variety of proposed amendments to Florida debtor-creditor law. Execution lien law is one of the areas in which changes are being considered. During these discussions I have learned a great deal from the many dedicated lawyers on the Committee, for which I am grateful. Here, I do not purport to speak for the Committee. The opinions I offer are my own.

My special thanks to David Tetrick Jr., class of '96, whose excellent seminar paper taught me a great deal about execution lien law.

unfair surprise to innocent parties, and (2) encouraging and rewarding diligent creditors. It is my thesis that Florida execution lien law does a poor job of promoting both of these objectives. In this essay, I discuss the defects in the operation of Florida execution lien law, and argue that, taken together, these defects justify adopting a significantly different approach. Accordingly, I also discuss an approach that I believe does promote the above objectives.

## I. CURRENT FLORIDA EXECUTION LAW AND ITS FLAWS

The current Florida execution process dates back to medieval England. A creditor with a judgment may obtain a writ of execution from the clerk of the court in which the judgment was entered. The writ directs all sheriffs in the state to levy upon and sell sufficient tangible[1] property to satisfy the unpaid balance of the debt. Although courts can authorize multiple writs, normally only one writ is issued on a judgment. Because sheriffs have authority to act only within their own counties, an executing creditor must choose the county in which property of the debtor is likely to be located. On choosing a county, the creditor then delivers the writ to the sheriff, and here's where the medieval law enters the picture. As at common law, delivery of the writ to the sheriff creates an inchoate lien on all leviable personal property of the debtor within the county.[2] The creditor then leaves the writ in the possession of the sheriff until the writ is satisfied, or, if never satisfied, until the judgment expires twenty years later.[3] The inchoate lien becomes a true lien only when the sheriff levies on something, and only on the property levied upon and sold.[4]

As between the creditor and debtor, the inchoate lien is of no consequence. It is only the actual levy that interferes with the debtor's use and enjoyment of the property. Debtors frequently operate for years unimpeded and probably unaware that their leviable property is subject to any number of inchoate liens. The significance of the inchoate lien lies in its role in ordering priorities among competing creditors and others claiming an interest in the debtor's property. When the sheriff levies on something, the inchoate execution lien matures into a true lien

1. Florida Statutes § 30.30 provides that a sheriff must levy whenever a writ is delivered to the sheriff. FLA. STAT. § 30.30 (1995). The types of property subject to levy include "[l]ands and tenements, goods and chattels, equities of redemption in real or personal property, and stock in corporations. . . ." FLA. STAT. § 56.061 (1995). The sheriff may also levy on the "current money" of a corporation. FLA. STAT. § 56.09 (1995).

2. *See* Love v. Williams, 4 Fla. 126, 134 (1851).

3. FLA. STAT. § 55.081 (1995).

4. *See Love*, 4 Fla. at 134.

on the seized property that dates back to the moment when the writ was delivered to the sheriff.[5] It is sometimes inartfully said that the lien becomes "choate" on levy. All claims to the levied-upon property arising after the date of delivery to the sheriff take subject to the now choate lien. Thus, the holder of the first delivered writ takes priority over not only subsequent competing lien creditors, but also over subsequent lenders who have taken a security interest or mortgage in the property, subsequent purchasers, beneficiaries, decedents, and transferees of any stripe.[6] Any intervening party whose interest arises between the date of delivery and the date of levy takes subject to the lien of the eventually levying creditor.

Sixty years ago, most states were said to follow the lien-on-delivery rule.[7] Dissatisfaction with this rule, however, has fueled a strong nationwide movement away from it. Today, Florida is one of only eleven states that retain some form of the common law rule.[8] Florida should join those states that have discarded the lien-on-delivery rule because it both fails to protect innocent parties and discourages diligent creditors. I discuss these failings in order.

### A. *Failure to Protect Innocent Parties: The BFP Problem*

The lien-on-delivery rule unfairly surprises innocent parties because in practice inchoate liens attach to the debtor's assets largely in secret. Accordingly, good faith purchasers and lenders frequently buy and lend for value without knowledge of the lien, yet take subject to it. Even buyers in the ordinary course of business, such as retail buyers, lose out to the previously inchoate lien that becomes "choate" when the creditor causes the sheriff to seize the property.[9]

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5. *In re* Cone, 11 B.R. 925, 927-28 (Bankr. M.D. Fla. 1981).

6. *See* Bank of Hawthorne v. Shepherd, 330 So. 2d 75, 76 (Fla. 1st DCA 1976); *Cone*, 11 B.R. at 927-28.

7. "Most states accept the rule . . . that a lien exists at the time of the delivery of the writ to the sheriff for execution." JOHN HANNA & JAMES A. MCMAUGHLIN, CASES AND MATERIALS ON CREDITORS' RIGHTS 9 (3d ed. 1939).

8. Eight of these states follow the lien-on-delivery rule: Arkansas, ARK. CODE ANN. § 16-66-112 (Michie 1987); Colorado, COLO. REV. STAT. § 13-52-111 (1997); Hawaii, HAW. REV. STAT. § 651-41 (1993); Illinois, ILL. REV. STAT. ch. 10, para. 5/12-735 (1993); Indiana, IND. CODE ANN. § 34-1-34-9 (Burns 1986); Kentucky, KY. REV. STAT. ANN. § 426.120 (Michie/Bobbs-Merrill 1942); Pennsylvania, DeAngelis v. Commonwealth Land Title Ins. Co., 358 A.2d 53, 55 n.1 (Pa. 1976); and the District of Columbia, D.C. CODE ANN. § 15-307 (1981). Two others retain the even more archaic rule that the lien relates back to issuance of the writ. They are: Tennessee, TENN. CODE ANN. § 26-1-109 (Supp. 1996); and Georgia, GA. CODE ANN. § 9-12-20 (1994).

9. *See Cone*, 11 B.R. at 927-28. One perverse possiblity, probably the kind only a law

In states that have abandoned the lien-on-delivery rule, the BFP problem has been the driving force. Impetus for change also has been provided by secured transactions law, in which the problem has been solved. Under Article 9 of the Uniform Commercial Code (U.C.C.), good faith purchasers are protected in two ways from the surprise assertion of a prior security interest. Buyers in the ordinary course of a seller's business take free of all security interests,[10] and buyers not in the ordinary course of business take free of security interests that have not been perfected *by filing*.[11] The fundamental U.C.C. policy of protecting innocent buyers for value by requiring at the very least a filed financing statement is well known to anyone conversant with commercial law.

Perhaps the most striking example of how the BFP problem has caused states to retreat from the lien-on-delivery rule can be found in the Delaware case law. In *Flemming v. Thompson*,[12] a judgment debtor sold his mobile home to a dealer after a writ of execution had been delivered to the sheriff. The dealer sold the mobile home to an innocent buyer, who financed it through a Delaware bank. The trial judge, consulting the Delaware statute providing that "[a]n execution shall, from the time it is so delivered, bind all the goods and chattels of the defendant"[13] had no difficulty ruling that first priority went to the judgment creditor.[14] A stunningly unanimous supreme court disagreed, holding that Delaware's enactment of the U.C.C. had implicitly repealed the lien-on-delivery rule as to bona fide purchasers of goods,[15] and that the judgment debtor had the power to transfer good title to the dealer.

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professor would think up, is that the executing creditor could levy on property in the hands of a buyer that it could not levy on in the debtor's hands. For example, normally, the inventory lender to a retailer or manufacturer has a security interest in the inventory that has priority over a previously docketed lien creditor. U.C.C. § 9-301(2) (1995). This security interest is then cut off when the goods are sold to a buyer in the ordinary course of the debtor's business. U.C.C. § 9-307(1) (1995). However, the sale does not cut off the execution lien. Thus, even though a writ holder could not successfully levy on the inventory in the debtor's hands, the levy immediately after sale would presumably succeed unless the buyer could somehow argue that the priority of the inventory lender somehow sheltered the buyer. There is, however, no authority for this.

10. U.C.C. § 9-307(1) (1995).

11. U.C.C. § 9-307(2) (1995).

12. 343 A.2d 599 (Del. 1975).

13. DEL. CODE. ANN. tit. 10, § 5081 (1974).

14. *See Flemming*, 343 A.2d at 600.

15. *Id.* The court ruled that until the sheriff levies, the judgment creditor holds only voidable title. *Id.*

To this day, the Delaware statute remains unchanged on its face,[16] subject now to the judicial BFP exception.

The more common means of departing from the rule to protect BFPs is by statutory amendment. In Maryland, for example, in 1973, the legislature amended the execution lien statute expressly to provide that "[a] writ of execution on a money judgment does not become a lien on the personal property of the defendant until an actual levy is made."[17] This change was later characterized as the third stage in the evolution toward providing "greater protection to innocent third parties and greater deference to the notion of notice to the world."[18]

In Florida, the rule has been severely criticized by both scholars and judges. In 1979, Professor Murray of the University of Miami law faculty surveyed the development of American execution lien law, arguing forcefully that bona fide lenders and purchasers need protection from Florida's "hidden lien."[19] Additionally, my colleague, Professor Williams, has been extremely critical of the rule.[20] Another commentator, Trawick, 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. . . . The Uniform Commercial Code, requiring actual seizure of property within its scope, is much better."[21] In the recent case of *Crudele v. Accent Realty of Jacksonville*,[22] a bona fide purchaser of contract rights for value was left empty handed because a writ had been delivered to the sheriff prior to the purchase. Judge Cope, concurring in the result, was moved separately to "note that this case exemplifies a problem area in creditor-debtor relations which may well call for reform."[23] Referring to the criticisms of Murray and Trawick, Judge Cope stated, "Although . . . the instant case [has been disposed of] 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 modifications would require legislative action."[24]

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16. DEL. CODE ANN. tit. 10, § 5081 (1974).

17. MD. CODE ANN., CTS. & JUD. PROC. § 11-403 (Repl. Vol. 1995).

18. *In re* National Quick Print, Inc., 103 B.R. 107, 110 (Bankr. D. Md. 1989).

19. D.E. Murray, *Execution Lien Creditors Versus Bona Fide Purchasers, Lenders, and Other Execution Lien Creditors: Charles II and the Uniform Commercial Code*, 85 COMM. L.J. 485 (1980).

20. *See infra* note 28, at 21-23.

21. HENRY P. TRAWICK, JR., TRAWICK'S FLORIDA PRACTICE AND PROCEDURE § 27-3, at 411-12 (1988).

22. 541 So. 2d 742 (Fla. 3d DCA 1989).

23. *Id.* at 742.

24. *Id.* at 743.

One of the most roundly criticized applications of the rule occurred in *Bank of Hawthorne v. Shepherd*.[25] There, one lien creditor had delivered a writ of execution to the sheriff in Alachua County. Three weeks later, Bank of Hawthorne took a security interest in the debtor's automobile, probably signing the papers at the bank in Clay County, and mailed its notice of lien to the Department of Motor Vehicles. The next day, before the notice of lien was received by the Department for notation of the bank's lien on the certificate of title, and thus before the security interest was perfected, a second judgment creditor delivered a writ of execution to the sheriff. The sheriff of Alachua County levied on the vehicle and the court properly held that the first-delivered writ holder had priority over the second writ holder and that the bank's lien was superceded by both the first and second writ holder.[26]

Those who would retain the rule argue that the inchoate lien acquired on delivery to the sheriff is not a secret lien. Sheriffs are required to keep a docket of all delivered writs,[27] and a prospective buyer or lender can check the sheriff's docket to see if any writs have been docketed against the seller or borrower. Lawyers skilled in this area of the law know this, and advise their clients to check the dockets in the counties in which their prospective debtors keep tangible assets. Undoubtedly, in large transactions, these clients, mostly banks, probably do. But, as *Bank of Hawthorne* illustrates, banks often do not check. Moreover, checking the docket is neither simple, nor foolproof. As Professor Williams has pointed out while lamenting the *Bank of Hawthorne* result,

> [T]he secured party would be required to check with the sheriff of all counties in this state into which the collateral—by some remote chance—might be taken. But alas, even if he does so—an unlikely practice in most cases considering the cost of such a search—a writ, delivered after his check with any particular sheriff but before his security interest is perfected, will subordinate the security interest as it did in *Bank of Hawthorne*.[28]

Another reason why checking the docket is not foolproof is because errors in docketing fall on the person checking. The inchoate lien arises on *delivery* to the sheriff, not on docketing. If the sheriff fails properly to docket, and the creditor produces the receipt proving delivery, the lien

25. 330 So. 2d 75 (Fla. 1st DCA 1976).
26. *Id.* at 76.
27. FLA. STAT. § 30.17 (1995).
28. WINTON E. WILLIAMS, 2 FLORIDA LAW IN SECURED TRANSACTIONS IN PERSONAL PROPERTY ch. 4, at 20 (1980).

is effective.[29] No wonder Professor Williams concludes that "a duty to check for prior-filed writs is an unreasonable one to place upon a secured party."[30] Following *Bank of Hawthorne*, the Legislature realized that the lien on delivery rule competes improperly with creditors taking security interests in motor vehicles and modified Florida Statutes section 319.27(3) to permit a secured party to establish priority in motor vehicles immediately by filing in the county tag agency office prior to filing with the Department of Motor Vehicles (DMV).[31] This modification provides no solace to creditors taking security interests in other types of collateral, nor would it have protected the Bank of Hawthorne from the inchoate lien that existed before the bank had taken its security interest.

The argument that the lien is not a secret lien is weakest when the third party acquiring an interest subject to the lien is an innocent buyer—particularly a buyer in the ordinary course of business. Buyers of personal property don't normally consult lawyers, don't usually know about the possibility of inchoate liens, and don't consult the sheriff's docket before buying. In buying motor vehicles, buyers will normally look at the certificate of title, but this will not apprise them of inchoate execution liens.

On the side of those who would retain the rule, the strongest argument is this: While buyers occasionally get surprised when the sheriff levies on property they have acquired from another, it doesn't happen very often.[32] Perhaps this is correct considering most lien creditors have a difficult enough time finding the tangible assets of the debtor, let alone finding assets that the debtor once owned and then sold. Moreover, unless the asset is relatively valuable, such as a horse, a boat, or an automobile, the writ holder may not think it worthwhile to pursue the item into the hands of an innocent third party.

In response, I would argue that even if infrequent, when an innocent buyer of a valuable asset does get surprised in this manner, the buyer takes a big loss—one that the statute should not facilitate. Well

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29. Another lien that will not be discovered on searching the docket is a federal execution lien. Federal writs of execution attach and take priority in the same manner as state writs even though they are not docketed or levied by Florida Sheriffs. *See* Sephus v. Gozelski, 670 F. Supp. 1552, 1555 (S.D. Fla. 1987), *vacated on other gounds*, 864 F.2d 1546 (11th Cir. 1989); *Cone*, 11 B.R. at 929.

30. *See supra* note 28.

31. FLA. STAT. § 319.27(3) (1995); *see also In re* Cleveland, 106 B.R. 707, 708 (Bankr. N.D. Fla. 1987) (adopting the literal meaning of Florida Statutes § 319.27(3)).

32. Trawick surmises, "Perhaps the only reason it has not caused more problems is the relatively low value of most personal property at execution sales." TRAWICK, *supra* note 21, § 27-3, at 411-12.

conceived debtor-creditor law should protect against such severe surprises if, as the great majority of states have now done, sensible protective devices can be employed.

### B. *Discouraging Diligent Creditors: The Build-Up Problem*

The second problem with the rule is that it can operate to discourage diligent creditors from pursuing the assets of the debtor. In general, creditors finding insufficient property to satisfy their claims tend to leave their writs in the hands of the sheriff, hoping that the debtor will acquire leviable property in the next twenty years. Of course, a debtor who has failed to pay one creditor, often has failed to pay others. This can result, over time, in a build-up of writs delivered to the sheriff issued against the same debtor. The build-up consists largely of passive writ holders who have long stopped paying attention to the affairs of the debtor. The build-up also may include friendly creditors who have obtained judgments against the debtor, either with or without the debtor's cooperation, and established their position in line intending never to levy.

If the debtor later acquires new property, the passive writ holders never find out about it and the friendly ones don't act. If a new judgment creditor comes along and delivers a writ to the sheriff along with instructions for levying on the debtor's new property, the writ holder is told two discouraging things. First, the creditor must pay the sheriff's costs. For example, before the sheriff in Alachua County will levy on motor vehicles in a known location, a "deposit" of $500 per vehicle is required. Second, the value of the debtor's equity in any property levied upon will go first to pay the sheriff's costs, and then to satisfy all of the the previously delivered writs, including the interest that has been accruing since the relevant judgments were entered. Any value left over will then be distributed to the creditor causing the levy. On hearing this news, and recognizing that execution sales frequently bring stunningly low prices, the new creditor often gives up, leaving the debtor to enjoy the property free of intrusion. The result is that a sufficiently large build-up of passive and friendly writ holders has the effect of insulating a debtor that may have leviable assets.[33] Worse yet, unpaid creditors who have not obtained judgments may be deterred even from seeking them. This is the ultimate insulation—insulation from suit! Perversely, the worst offenders, those debtors that have amassed the

33. Of course, if the new judgment creditor finds assets of substantial value, the prior liens create no barrier because the levying creditor will still get paid. However, this happens only rarely. More commonly, the new creditor chooses not to spend the time and money to look.

largest collection of unpaid judgment creditors, receive the highest level of insulation. Moreover, a friendly creditor with a large enough judgment can provide nearly absolute protection for a period of twenty years.

The crucial question is this: Granting that debtors are sometimes insulated by the build-up of passive liens, how severe is this effect? Are significant numbers of would-be diligent creditors discouraged or deterred? Lacking conclusive empirical data, I will have to be satisfied here with the inferences to be drawn from skimpy information.

To get a whiff of the magnitude of the build-up phenomenon, I sampled the execution docket of the Alachua County Sheriff. Looking at only the debtors whose last names began with the letters A, C, L, M, T, and W, I counted the debtors according to the number of writs docketed against them. I found that eighty-one percent of the debtors had one writ docketed against them, twelve percent had two writs docketed against them, and seven percent had three or more writs docketed against them. A few had as many as ten. Viewed another way, by subtracting the number of debtors from the total number of writs, I determined that approximately twenty-one percent of the writ holders in the docket were not first in line when they docketed their writs, and six percent were third or worse. That is, twenty-one percent of the writ holders went ahead and paid the docketing fee even though at least one writ preceded them.

The docket does not show, of course, how many judgment creditors chose not to pay the fee when seeing other writs ahead of them, nor does it show how many creditors chose not to pursue judgment on discovering the prior writs. Depending on how frequently this occurs, the proportion of unpaid Alachua County creditors faced with the discouraging news that they must first collect the debt of at least one other creditor before they may collect their own may be as high as one quarter, or perhaps even one-third. If the experience in Alachua County is representative of the experience statewide, the build-up problem is a significant one. Of course, Alachua County is a largely rural county whose only significant city, Gainesville, is dominated by the University of Florida. Extrapolating from that experience is obviously risky. While it is hard to imagine what factors would cause the proportion of previously docketed writs to differ significantly in an urban center from the proportion in Alachua County, it is equally troublesome to expect the proportion to be the same. What I can say is that these data suggest that the lien-on-delivery rule significantly inhibits diligent creditors to some extent, perhaps more in some counties than in others.

### C. *What Does It Mean?*

In light of the two flaws I have just discussed, a legislature writing on a blank slate would probably not choose the current process. But, since it has been in place for the better part of two centuries,[34] the current process has, at least, the virtue of familiarity. Nevertheless, taken together, the potential benefits of encouraging diligent creditors and better protecting innocent third parties provide a forceful argument for joining the large majority of states in departing from the lien-on-delivery rule if a better rule can be devised.

## II. How Should Florida Execution Law Be Changed?

Most states departing from the lien-on-delivery rule have adopted the lien-on-levy rule. This protects third parties because the levy dramatically publicizes the attachment of the lien. Third parties are highly unlikely to buy or lend against tangible personal property that has been siezed by the sheriff.[35] The lien-on-levy rule also encourages diligent creditors because any asset they find that has not been levied upon is, by hypothesis, not subject to a judicial lien of any sort. The asset may be subject to a perfected security interest, which will reduce the debtor's equity in it, but by levying the diligent creditor is assured of the highest priority judicial lien.

In at least one respect, the lien-on-delivery rule is superior to the lien-on-levy rule. Frequently, a levy on a significant asset is the signal event that drives a struggling debtor into bankruptcy. If the debtor files a bankruptcy petition within ninety days, the lien that attached on levy will be voidable by the trustee in bankruptcy as a preferential transfer.[36] The advantage of the lien-on-delivery rule is that the ministerial delivery of a writ to the sheriff is rarely even known to the debtor, and hardly a precipitating event. After delivery, the creditor may then wait ninety days before attempting to levy. If, then, the levy causes a precipitous bankruptcy filing, the lien will be invulnerable to preference

34. The first execution statute in Florida was enacted in 1828. *See* FLA. STAT. § 56.011 (1995) (statutory history).

35. Those that buy or lend against property not in the debtor's possession have only themselves to blame. Sheriffs may sometimes levy yet leave the property in the hands of the debtor by constructive seizure of the property. However, constructive seizure requires taking steps to notify the public of the levy, such as posting signs, or other such steps. That is, the sheriff must act in a manner toward the leviable property that, except for the protection of the writ, would subject the sheriff to an action for trespass. The question of dominion over and manual possession "is determined by the nature and condition of the property." *Ex parte* Fuller, 128 So. 483, 484 (Fla. 1930).

36. 11 U.S.C. § 547 (1994).

attack.[37] Of course, if the creditor has already found valuable assets, it takes nerve to wait out the ninety days. One must hope the assets don't somehow disappear during that period. It is, however, only the actual disappearance of the asset that the creditor must fear. Having obtained an inchoate lien, as long as the asset still can be located and levied upon, the creditor is assured of priority over intervening interests.

How can this advantage be retained while solving the BFP and build-up problems? One idea with superficial appeal is to keep the lien-on-delivery rule, but create statutory exceptions to it. As in Maryland, an exception could be created to protect BFPs and innocent lenders, and the diligent levying creditor could be given statutory priority over the liens of the previously delivered writ holders.[38] Any surplus from the execution sale, after paying costs and the claim of the levying creditor, could then trickle down to the other lien holders in order of their deliveries to the sheriff. Attractive as this idea may be, it has one enormous flaw. If the liens created by delivery could be primed by the lien of a subsequent creditor who causes levy, then all liens created by delivery would be voidable by the strong-arm-power of the trustee in bankruptcy.[39] This would be the case regardless of whether any actual levy has occurred; a hypothetical levying creditor with the power to defeat pre-existing liens is all the trustee needs.

A better solution, as suggested long ago by Professor Murray, is a true statewide judgment lien on leviable personal property obtained by central filing in the place where Article 9 financing statements are filed.[40] Like the current execution lien, the judgment lien would attach prior to any levy, retaining the current potential for protection from the

37. *See, e.g., In re* Vero Cooling & Heating, Inc., 11 B.R. 359, 361 (Bankr. S.D. Fla. 1981).

38. This is the current Florida rule if a creditor makes otherwise unleviable property available through proceedings supplementary to execution. *See* Salina Mfg. Co. v. Diner's Club, Inc., 382 So. 2d 1309 (Fla. 1982).

39. 11 U.S.C. § 544(a) (1994).

40. See FLA. STAT. § 679.401(1) for Florida's filing provisions. Motor vehicles, boats, and airplanes aside, the two exceptions to central filing for financing statements on leviable property occur where the security interest attaches to farm products and goods which are to become fixtures. These financing statements must be filed locally. FLA. STAT. § 679.401(1)(a), (b). This creates the slim possibility that a non-purchase money lender against such collateral might not check the central file to discover any judgment liens that may have attached to the goods. The properly recorded purchase money lender would take priority under Florida Statutes § 769.301(2). This problem could be solved by excepting these types of goods from the reach of the judgment lien. In my view, this would be an overreaction. Non-purchase money loans against farm products, most of which are perishable, or goods that are to become fixtures, most of which eventually do become fixtures, must surely be quite rare. The chance of a subsequent levy against such goods is rarer still. If such odd loans are made, it is not too much to expect the lender to check the central file.

debtor's bankruptcy. That is, if a levy more than ninety days after the central filing were to drive the debtor into bankrutpcy, the lien would not be vulnerable to the trustee's preference attack.

The key remaining questions are: (1) Would a statewide judgment lien better protect bona fide purchasers and lenders? (2) Would a statewide judgment lien better encourage and reward diligent creditors? and (3) What, if any, are the additional advantages and possible disadvantages of a statewide judgment lien? I take up these questions in order.

### A. *BFPs and the Statewide Judgment Lien on Leviable Personalty*

A centrally filed judgment lien should go a long way toward solving the BFP problem because of its increased notoriety and ease of access compared to the inchoate lien of a locally docketed writ. Just as Article Nine financing statements are today, these centrally filed liens would be easily accessable by computer. Professional buyers and lenders routinely would check the central file before committing to significant transactions. To further minimize the BFP problem, buyers in the ordinary course of a seller's business should take free of the lien, as they currently take free of the inventory lender's security interest.[41] Certain innocent buyers not in the ordinary course of a seller's business (hereinafter buyers NOCB) also should take free of the lien, such as buyers of non-vehicular consumer goods. The sale of these goods from one consumer to another poses no severe threat to an unpaid judgment creditor. The used lawn mower or bicycle is normally not worth the trouble, and the baseball card collection is the kind of asset judgment creditors rarely find. An innocent buyer who pays fair value should get the nod here, while a buyer who pays less than fair value will be vulnerable to fraudulent conveyance attack.

Not all ignorant buyers or lenders should take free of the lien, however. Some should be required to check the file or assume the risk of a filed judgment lien. Buyers NOCB of manufacturing equipment or

41. Buyers not in the ordinary course of business, such as buyers of consumer goods from other consumers should be treated in the same manner as they are treated under Article Nine, taking subject to any previous security interest that has been perfected *by filing*. FLA. STAT. § 679.307(2) (1995). This would give rise to the possiblity that an innocent purchaser for value would take subject to the lien. In most instances, where the goods sold are of modest value, there is little danger that the judgment lien holder will follow the property into the hands of the buyer and levy on it. If the asset is of significant value, such as a horse, a boat, or a coin collection, the buyer would do well to check the central file for both filed security interests and judgment liens. The fact that in 40 years there has been no cry for modification to § 9-307(2) suggests that few innocent non-ordinary course buyers have been harmed by this rule.

motor vehicles provide a good example. Under Article Nine, such buyers currently take subject to filed security interests, so they are, in essence, required to search for them.[42] In doing so, they also will discover the judgment lien, eliminating the need to provide them protection.

Buyers NOCB of titled assets such as motor vehicles, boats, mobile homes, and the like, also should be required to check the file, for a number of reasons. First, assets of this type are particularly important from the viewpoint of an unpaid creditor because they are the most common leviable assets of any value individual debtors are likely to own. Second, the risk of unfair surprise can be minimized for buyers of these types of goods. Because perfected security interests must be noted on the certificate of title, buyers may protect themselves against prior secured creditors by noting that the certificate of title is clean. While checking the title certificate would not alert a buyer or lender to the judgment lien as illustrated in *Bank of Hawthorne*,[43] the most common buyers NOCB of such goods are dealers taking the vehicle in trade. There is no severe burden in expecting professional buyers to check the central file. The hardest call is this: Should non-professional innocent buyers of titled goods be required to check the central file even though the title certificate is clean? In my opinion, the answer should be yes because the risk of unfair surprise can be minimized here. Everyone who buys such titled goods must go to the DMV to transfer the title. In the process, the DMV employee can easily check the central file and inform the buyer of the judgment lien before the transfer is complete. At that point, the buyer can decide whether to hope the judgment lienor is not paying attention, negotiate with the seller for a reduced price, or back out of the sale. Granted, there is risk here to gullible buyers who are bamboozled into giving value before completing the transfer, but it is no worse than the risk they take today, and hardly comparable to the price of gullibility in other realms.

It would not be appropriate to protect lenders from the lien because this would encourage conscious ignorance of the lien. One who extends credit despite discovery of the lien would be in a worse position than one who does not check. This would undermine the tendency of the lien to encourage voluntary payment which I discuss below. Moreover, at present, careful lenders either check for filed financing statements or order credit reports. In doing so, they will discover any judgment liens. Expecting them to do what they normally do is no hardship. In lending against titled vehicles with clean certificates, checking the central file is

42. U.C.C. § 9-307(2) (1995).
43. *See supra* note 25.

no great hardship. To this day, the Bank of Hawthorne probably checks the sheriff's docket before lending against motor vehicles, which is no less burdensome than checking the central file.

### B. *Diligent Creditors and the Statewide Judgment Lien*

In its simplest form, the centrally filed judgment lien has the potential to make the build-up problem worse than it is today. If the build-up of countywide writs serves to insulate debtors by deterring diligent creditor activity within the county, a statewide build-up would surely make this problem worse for two reasons. First, because a writ can today normally be filed in only one county at a time, debtors who own property in more than one county may have some writs filed in one county and others filed in another, effectively diluting the build-up effect in each county. If all writs were filed in the same place the build-up effect would be maximized. Second, and probably more important, as I suggest below, the ease of central filing and the statewide reach of the lien will make central filing more attractive than docketing in the county. Together, centralization of liens combined with an increase in the absolute number of liens will exacerbate the build-up effect and add to the discouragement of diligent creditors.

The solution to the build-up problem here is to cause the liens of inactive or passive creditors to lapse. There is nothing wrong with a build-up of active creditors. There is no debtor insulation in such a case. It is the build-up of passive liens that insulates the debtor from the diligent creditor. After a specified amount of time, say, two years, an unsatisfied statewide lien should lapse unless the creditor can demonstrate to a court that the lien remains unsatisfied despite continued efforts to collect. On such showing, the court may order the lien continued for another such specified period. It would not be desirable to adopt a system for continuing the lien through a mere ministerial act similar to the filing of an Article Nine continuation statement. This would not assure that the build-up of valid liens was composed of active creditors. Many passive lenders have systems in place for the periodic recording of continuation statements. Of course, the lapse of the lien would not deprive a creditor that has later found leviable property of the right to levy. Any creditor with an unsatisfied judgment can always levy. In such a case, the unfiled creditor would obtain an execution lien on the property seized as of the moment of levy, subject, of course, to any existing valid judgment liens.

The difficult call here is to select the proper duration of the lien prior to lapse. How much time must pass before the build-up of too many liens is likely? Again, I looked to the Alachua County docket for an

indication. I discovered that approximately seventy-three percent of the writs had been on file five years or more. An additional seventeen percent had been on file for between two and five years, and the remaining ten percent had been on file for less than two years. Thus, a five-year lapse period would eliminate seventy-three percent of the currently docketed writs, and a two-year lapse period would eliminate ninety percent of them. If I am correct in predicting that central filing will exacerbate the build-up phenomenon, these data suggest to me that five years is too long a period to permit passive judgment lienors to clog the record. Two years should be a long enough period in which to proceed against the debtor in order to determine whether continued pursuit will be worthwhile. If so, it would not be difficult to obtain a court's order continuing the lien. Moreover, unless central filing causes a dramatic increase in the number of judgment creditors who record, by eliminating ninety percent of the currently docketed writs, a two-year lapse period will largely eliminate the build-up problem.[44]

My proposal does not perfectly solve the build-up problem. There still will be diligent creditors that are occasionally dismayed to encounter prior existing judgment liens, particularly if the debtor acquires a batch of them all at once. But the effect of lapse will be to eliminate most of the passive liens. Moreover, time is on the side of the diligent but patient creditor. At least if the debtor's leviable assets are not disappearing, a new junior lienor can wait for the prior passive liens to lapse leaving the coast clear.

### C. *Additional Advantages of the Statewide Judgment Lien*

One additional advantage of a centrally filed judgment lien is its potential to encourage voluntary payment by the debtor. At present, judgment creditors often don't bother to docket their writs with the sheriff until they can direct the sheriff to leviable property in the county. In contrast, the simple ministerial act of obtaining a judgment lien on present and future realty by recording in the real estate records is undertaken much more routinely. In time, because of the simplicity of central filing and the statewide reach of the lien, filing centrally as to personalty probably will become similarly routine. Moreover, because of the ease of access to the central file, prospective landlords, prospective creditors, business people generally, and perhaps the occasional consumer or blind date, will begin customarily to check the file before

44. Lapsing of liens should not be permitted to undermine the benefits of notoriety. The lapse of a lien should not cause it to be removed from the record. People checking the record still should be informed that the judgment remains unpaid.

dealing with an unknown person or entity. In effect, statewide judgment liens will have much greater notoriety than the current countywide liens. For some debtors, this added constraint on the ability to do business will provide added incentive to discharge these liens. If the debtor is honest and bankruptcy is unattractive, the incentive will be to pay.

Another advantage of this proposal is that it eliminates the problem, and the tactical conduct it engenders,[45] of liens clicking on and off like light bulbs as goods move from county to county. Creditors no longer will have to fret over losing their place in line in one county in order to pursue goods in another county.[46] Creation of a true judgment lien also will put to rest the current split of authority as to whether an unlevied inchoate lien has priority over the trustee in bankruptcy.[47]

## III. CONCLUSION

The best way to reward diligent creditors and to protect innocent purchasers or lenders is to adopt the lien-on-levy rule, but this creates the risk of losing out to the trustee in bankruptcy if the levy forces the debtor into bankruptcy. Just a few decades ago, this risk was not so great, which explains why the great majority of states adopted it. Today, however, the stigma of bankruptcy has all but disappeared, and bankruptcy filings have topped one million per year. The risks of bankruptcy now looms much larger than they did in years past.

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45. One lawyer triumphantly told me this story. The debtor owned a valuable automobile, but had built up a number of liens in his county of residence. The creditor happened to know that the debtor also had season tickets to the Tampa Bay Buccaneers games, which are played in Hillsborough county. The creditor's lawyer delivered a writ to the Hillborough County Sheriff, the only writ delivered to the sheriff of that county, and levied on the car in the stadium parking lot. A first priority lien was the result.

Under the current rule, a clever buyer who has discovered a build-up of writs could presumably ask the debtor to deliver movable goods outside of the county. Once title has passed, which normally occurs on delivery, the buyer could then return the goods to the original county and the inchoate liens would not reattach.

Although these are the kinds of stories lawyers love to tell, well conceived rules of law do not require such shenanigans.

46. The Special Committee on Post-Judgment Creditors' Remedies, *see supra* note *, is currently considering alleviating this problem by recommending that the clerk of court be authorized to issue multiple writs to different counties. This creates a potential risk that creditors may be able to collect more than the outstanding debt. However, other devices, such as an action in restitution or abuse of process, should suffice to protect against this abuse.

47. *See In re* Kolany, 49 B.R. 781, 782 (Bankr. S.D. Fla. 1985) (holding that a creditor must show delivery of writ and seizure of property to defeat trustee's § 544(a) power); Matter of Gerstel, Inc., 65 B.R. 602 (Bankr. S.D. Fla. 1986) (holding that a judgment creditor must deliver writ of execution to obtain priority in bankruptcy); *see also In re* Miele, 139 B.R. 296 (Bankr. D. N.J. 1992) (holding that an unlevied inchoate lien delivered to the sheriff more than 90 days before the petition was filed, was not subject to avoidance under § 544(a)).

Ironically, this reality may now serve in some degree to deter creditor activity in the majority states if creditors fear that levy will too readily induce bankruptcy. My proposal strikes a balance that rewards most diligent creditors, preserves the current protection against the trustee in bankruptcy, protects buyers in the ordinary course from lien creditors, provides a simple way for other bona fide buyers and lenders to protect themselves, and may add incentive for the debtor to pay lien creditors voluntarily. In all, it will be better law.