1-1-1990

New Judgment Liens on Personal Property: Does "Efficient" Mean "Better"?

William J. Woodward Jr.
Santa Clara University School of Law, wwoodward@scu.edu

Follow this and additional works at: http://digitalcommons.law.scu.edu/facpubs

Recommended Citation
27 Harv. J. on Legis. 1
ARTICLE
NEW JUDGMENT LIENS
ON PERSONAL PROPERTY:
DOES "EFFICIENT" MEAN "BETTER"?

WILLIAM J. WOODWARD, JR.*

Recently, state legislatures have undertaken procedural reform of the judgment collection system. In this Article, Professor Woodward reviews these changes, noting that despite an apparent improvement in the efficiency of judgment collection, the statutes have many potential side effects. In light of the impact the statutes may have on state taxpayers, small creditors, and the federal bankruptcy system, Woodward cautions state legislatures to move slowly in adopting the reforms.

I. INTRODUCTION

Not many would argue that yesterday's cumbersome rules of procedure are intrinsically superior to the lean, efficient procedural rules of today. Just as the flashy styles of nineteenth-century Victorian architecture have made room for the unembellished twentieth-century styles, the nineteenth century's intricate, tangled procedural law has been displaced by the twentieth century's clean, unadorned, simplified approach. Indeed, students of the law have come to accept as gospel the idea that procedural reform means less complexity—that the most efficient procedure in settling disputed rights is the best.1 In procedure as in architecture, we have come to think that clean and trim is simply better.

One edifice of legal procedure has largely escaped the twentieth-century wrecking ball: the procedural law that greets the plaintiff who, upon recovering a civil money judgment, must attempt to collect it from a defendant who will not or cannot

* Professor of Law, Temple University. B.A., University of Pennsylvania, 1968; J.D., Rutgers University, 1975. Special thanks to Amy Boss, Lissa Broome, David Papke, Elizabeth Warren, Bill Whitford, Harold Weinberg and Richard Woodward for their helpful comments on earlier drafts and to Donna Byrne for her research and editorial assistance.

1 Elihu Root, Secretary of State under Theodore Roosevelt, made the point as follows: "Everybody knows that the vast network of highly technical rules of evidence and procedure which prevails in this country serves to tangle justice in the name of form. It is a disgrace to our profession." 15 J. Am. Jud. Soc., 119 (1931). See also Miller, The Proposed Federal Procedure Rules, 11 Tul. L. Rev. 425 (1937) (finding the objective of simplifying civil procedure to be commendable).
pay. The procedure is a legal eyesore. It is crowded with writs, sheriffs, obscure actions, and traps for the uninitiated; the procedure differs in every state and its statutory foundations are often scattered throughout a state’s code. Surely many a victor has emerged from exhausting litigation only to learn from her lawyer that collecting the judgment will cost more than the judgment is worth. If ever a system demanded less complexity and more simplicity and efficiency, it is the judgment collection system.

Three states have responded with significant procedural reforms that promise to make the collection process more efficient by allowing judgment creditors to gain nonpossessory liens on their debtors’ personal property. As a long-overdue innovation, the legislation deserves description, scrutiny, and analysis in its own right. But the increased efficiency these changes bring to the collection process raises a host of issues that might not be apparent to the observer steeped in the “efficient is better” fashion of twentieth-century procedural reform.

Using these procedural reforms as a specific focus, this Article examines the implications of increased efficiency in the judicial collection process within the debtor-creditor system. The analysis proceeds at two levels of generality. The first level examines the statutes and their impact on the execution process. The statutes are viewed narrowly, ignoring the effects they might have in the broader debtor-creditor system. Part II begins with the background needed to understand the new provisions and Part III shows how they operate. The analysis in Parts II and III demonstrates how the new procedures will make judgment collection a less expensive, easier process for creditors and therefore shows that the statutes can be called more “efficient.”

---

2 “Amercement,” for example, is an action that asserts that the sheriff failed within the execution process to discharge his duties. See generally Wyatt, Amercement of Sheriffs, 10 Wake Forest L. Rev. 237 (1974); Meyers, In League with the League, 65 Com. L. J. 238 (1960); 9 Debtor-Creditor Law ¶ 37A.12[B] (1989).

3 See generally Leff, Injury, Ignorance, and Spite—The Dynamics of Coercive Collection, 80 Yale L.J. 1 (1970).

4 In Parts II and III, “efficient” means that it takes less time, effort, or money for a party to achieve the same result with the new procedures than with the old. In this narrow sense, the provisions apparently save economic resources. As will be suggested in Part IV, however, widespread use of these less expensive procedures might yield reactions in other parts of the debtor-creditor system that cost more than the new procedures save. If that is the case, the new procedures will not save resources but will consume them.
Yet if enthusiasm for the new legislation is generated by Parts II and III, Part IV will dampen it. In Part IV, the Article moves to the second level of analysis and takes a critical look at the statutes in the much broader context of the debtor-creditor system. Considered in the context in which the statutes will actually operate, these new provisions, which make collecting judgments easier and less complicated, become troubling.

Among the problems with the legislation are the following: First, the new statutes may make bankruptcy a less viable option for those whose interests it now serves. Second, they may provoke increased use of the legal system as creditors without judgments scramble to secure judgments that give them access to the new procedures. Third, and related to the second point, the new statutes may give a priority advantage to those relatively few large creditors who are expert at getting judgments. Fourth, they may shift some of the costs of collection from debtors and creditors to taxpayers both in and outside of bankruptcy. Finally, the statutes seem likely to yield a redistribution of leverage away from the debtor class and toward the creditor class, a political issue that needs to be addressed by legislators considering the new provisions. Ultimately, the analysis in Part IV suggests that when they operate in context, the statutes may turn out not to be truly "efficient" at all; rather, they may yield greater overall system losses than the archaic system currently in place.

The two-level analysis pursued here thus serves additional purposes. It demonstrates that one's normative judgments—even when "efficiency" is the standard for judging—can depend on the level of generality within which one looks at legal change. The analysis further indicates that in the extraordinarily interconnected debtor-creditor system, a very broad context for viewing legal change is more likely to produce valid conclusions. Finally, the analysis may even prompt some to wonder whether our attraction to "efficiency" in legal procedure, like our embrace of clean lines in architecture, may be more the product of fashion and popular culture than we might otherwise think.

---

5 This point was made in the context of tort law in Balkin, Too Good to be True: The Positive Economic Theory of Law, 87 COLUM. L. REV. 1447, 1477-78 (1987).
II. Reference

A. The Immediate Context of the New Statutes

California, Connecticut, and Maine have each recently developed statutes that enable a judgment creditor to get a non-possessory lien on a debtor’s personal property by filing a simple document in an appropriate state office. In other states a judgment holder must usually proceed with expensive execution proceedings in order to get a lien on the debtor’s personalty. If the judgment holder does not have a lien, the debtor can jeopardize the judgment holder's interests by paying other creditors, frittering away assets, or entering bankruptcy with the law's blessing.

The only way for a judgment creditor to get a lien on personal property as distinguished from real estate is to commence execution proceedings and levy on it. This costly procedure generally requires that the creditor locate leviable property, file numerous documents, motivate and direct the sheriff, and hope that the execution does not precipitate bankruptcy.

If the debtor owns unencumbered real estate, the situation is dramatically different. In most places, a simple filing by the judgment creditor in an appropriate office fixes a nonpossessory

---

6 Maine requires a judgment creditor to file a court-issued execution in order to obtain a judgment lien. While it requires the issuance and filing of an execution, obtaining a lien by this method is considerably less complex than taking the writ to the sheriff, having the sheriff execute it, and hoping that the sheriff can seize something of value.

7 See infra notes 26–32 and accompanying text.

8 The law of fraudulent conveyances, of course, places some restraints on the defendant's freedom to dispose of assets while a judgment is in force. See generally UNIF. FRAUD. CONV. ACT OF 1918; UNIF. FRAUD. TRANSFER ACT OF 1984. The classic treatise in the area is G. Glenn, Fraudulent Conveyances and Preferences (rev. ed. 1940).

9 But see ALA. CODE § 6-9-211 (1975); GA. CODE ANN. § 9-12-80 (1982); MISS. CODE ANN. § 11-7-191 (1972). In these three states, a judgment creditor has long obtained priority in all of a debtor's personal property without actually executing on it. Illustrative is Georgia's statute which provides:

All judgments obtained in the superior courts, justice of the peace courts, or other courts of this state shall be of equal dignity and shall bind all the property of the defendant in judgment, both real and personal, from the date of such judgments except as otherwise provided in this Code.

GA. CODE ANN. § 9-12-80 (1982). A later provision, however, makes the lien so obtained invalid as to "third parties acting in good faith and without notice who have acquired a transfer or lien binding the property of the defendant in judgment." GA. CODE ANN. § 9-12-81 (1982).

For several reasons, other states shunned the approach of these states in favor of a process requiring actual execution for creation of a lien. See infra notes 19–20 and accompanying text.
lien to the real estate and thereby preserves the creditor’s position inexpensively and without wresting possession from the debtor. This alternative may be all that is needed to get paid.

Consider, then, the dilemma facing the traditional unpaid judgment creditor whose debtor has no unencumbered real estate. If the creditor does nothing, she has no priority at all and risks losing the value of the judgment if the debtor’s situation deteriorates further. If, on the other hand, she levies on, for example, the debtor’s inventory, the debtor may be prompted to respond with a bankruptcy petition to halt and avoid the execution and to preserve the business. In short, the creditor can do nothing and risk deterioration of the hard-won value of the judgment, or she can spend the funds to execute on it and risk throwing more good money after bad. High procedural cost, risk of further losses, and uncertainty of result are the hallmarks of the execution system generally and, more specifically, the process for obtaining priority in personal property. As models of inefficient procedure, execution systems may have no equals.

B. The Larger Context

Execution statutes and judgment lien statutes are only small pieces of the much larger debtor-creditor system. The combination of discrete elements of that system working with and against one another is what establishes the relationships between debtors and creditors as groups. The most important thing to recognize here is that because the disparate parts of the system have strong ties to one another, one cannot assess change in one corner of the system without considering the consequences of the change throughout the system. Exemption statutes, the federal Bankruptcy Code and its state analogues,

---

10 Kentucky, Massachusetts, Michigan, New Hampshire, and Rhode Island have no such provisions. See S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 89 (4th ed. 1987).

11 When the lien appears with the real estate records, potential purchasers and lenders will discover the judgment lien because record searches typically accompany real estate transfers. See, e.g., Mo. Rev. Stat. § 511.500 (1986); N.Y. Civ. Prac. L. & R. § 5203(a) (McKinney 1978). When they discover it, potential purchasers will recognize that the lien will be superior to their interests and will modify their own behavior when dealing with the debtor. Indeed, to avoid their own involvement with the judgment creditor, prospective lenders and buyers may require the debtor to satisfy the lien as a condition to their secured loan or purchase of the property.

12 Exemption provisions are discussed in sections IV, B and IV, C, 1 of this Article.

lending regulations,\textsuperscript{14} priority rules in secured financing\textsuperscript{15} and other state laws creating liens, and extralegal methods used by debtors to avoid repaying debt and by creditors to collect debt are all part of the larger picture.

Considering legal change in this large, extraordinarily complex context makes analysis difficult. Each piece of the system is connected to the others in various ways, and movement in one part of the system yields some reaction in other parts.

Lawyers for creditors and debtors understand the interrelationship of these parts even if others do not. These scores of rules, practices, freedoms, and inefficiencies come together every day in an informal collection process, within which creditors and debtors settle with one another without direct recourse to the legal system.\textsuperscript{16} Legal change in any corner of the larger system undoubtedly affects the everyday negotiations between creditors and their debtors. Most debts are not collected coercively; debtors and creditors both know that the formal legal system is often far too expensive to be of much use in debt collection.\textsuperscript{17} Thus, in addition to assessing the impact of change on the operation of other formal rules within the larger system, it is important to address the impact that a legal innovation might have on the informal process of negotiation and settlement.

Improving the efficiency of the collection process—making the formal legal system less expensive to use—seems likely to increase creditors’ recourse to lawyers and courts in collecting debts. This raises a multitude of questions. For example, what impact might increased use of formal processes for debt collection have on our already-burdened legal system? Is it desirable to reduce the strong incentives debtors and creditors now have to arrive at consensual settlements? If creditors will more read-

\textsuperscript{14} Usury laws are perhaps the oldest examples of lending regulations. More recently, attention has focused on wage assignments, which came under scrutiny in the early 1930's and eventually were prohibited. 16 C.F.R. § 444.2(a)(3) (1989) (unfair credit practice to accept assignment of future wages unless revocable at will by debtor or preauthorized payroll deduction plan). The Federal Trade Commission rule prohibiting a debtor from creating a nonpossessory, non-purchase money security interest in substantially all her personal property is a lending regulation of more recent origin. 16 C.F.R. § 444.2(a)(4) (1989).

\textsuperscript{15} The primary source of these priority rules today is Article 9 of the Uniform Commercial Code (U.C.C.).

\textsuperscript{16} The legal system; of course, operates here most importantly as the context or backdrop for negotiation. See Whitford, \textit{A Critique of the Consumer Credit Collection System}, 1979 Wis. L. REV. 1047, 1048–49, 1057–58 (1979).

\textsuperscript{17} \textit{Id.} at 1054.
ily compete in the courts rather than informally for the debtor’s assets, are some creditors naturally better suited to the competition than others? After considering the specifics of the new statutes and their effects on discrete legal regimes elsewhere within the debtor-creditor system, this Article will try to assess the impact these statutes might have on this important informal process.

III. THE STATUTES AND THEIR IMPLICATIONS

A. Introduction

California, Connecticut, and Maine have each made it inexpensive and easy for a judgment creditor to get a judgment lien on personalty. In each state, a judgment creditor can, by filing an appropriate document in the correct office, stake a claim to much of a debtor’s personal property. The lien created by this procedure will secure the judgment creditor’s priority in the personalty against many later claimants. Obtaining a judgment lien in these states is possible without using the sheriff, without removing the property from the debtor’s control, and without much of the risk and cost one must sustain in other states to get a similar priority advantage. Given the long history of judgment liens on real property, one might preliminarily consider why such innovation took so long to arrive.

The absence of a dependable, centralized, routinely utilized system for recording title to personal property is surely a first reason. The lack of such a system no doubt raised the fear that buyers or lenders would advance money on personal property without any real chance of learning about a nonpossessory judgment lien.19 With real estate, prospective buyers or mortgagees typically examine the public record as part of the transactions creating their interests. As long as the judgment lien is recorded where they look, they learn about it and adjust their assessment...
of the transaction accordingly. By contrast, a procedure for filing judgment liens against personality would have been unlikely to alert those who might purchase encumbered chattels from the debtor. Until the appearance and assimilation of Article 9 of the Uniform Commercial Code (U.C.C.), secured lending consisted of a hodgepodge of legal devices with separate files for record keeping. As it was, buyers and lenders had difficulty determining which files to examine. It is not obvious that another set of files to record judgment liens on personal property would have offered realistic prospects for satisfying a felt need for real notice.

In addition, personal property has been economically inconsequential for most of our history. Indeed, early execution procedures themselves did not even extend to intangible assets, now a main category of personal property. This lack of importance probably eased whatever pressure there otherwise might have been to extend judgment liens to personal property.

Two twentieth-century developments have contributed to the political feasibility of extending judgment liens to personal property. The first is the extraordinary rise in importance of intangible wealth and the legal system’s increasing sophistication in dealing with it. The second is the arrival of Article 9 of the U.C.C. with its simplified filing systems.

Article 9 of the U.C.C. permits one to take a security interest in all the debtor’s personal property—tangible and intangible—inexpensively and easily. A very simple filing makes the security interest thereby created good against most competing claimants including, in most cases, the trustee in bankruptcy. Article 9 satisfies a craving for notice through its accessible recording system and through complex priority provisions that extend special protection to many who might not be expected to check personal property files.


The U.C.C. is simplified only in relation to what preceded it. A national filing system, though possible today with modern technology, has not yet arrived. Currently, secured lenders must cope with a central file in each state and with local county files within each of those jurisdictions. This has resulted in very complex provisions designed to steer filing and searching creditors to the correct file. See U.C.C. §§ 9-103, 401 (1978).

One exception is when the debtor gives a security interest to secure preexisting debt. A security interest thus secured can be successfully attacked as a preference in some cases. See 11 U.S.C. § 547(b) (Supp. IV 1986).
As will be detailed below, Connecticut, Maine, and California have taken the natural next step by building on these recent commercial law developments. Their procedures for getting a nonpossessory judgment lien are generally to file a simple form within the U.C.C. filing system. Given Article 9, its filing system, and the commercial practice that has developed in its wake, we might now expect such a public filing to alert some potential claimants that the judgment creditor has a claim to the debtor's property. In enacting these provisions, these states have sensibly determined that today's creditors need not seize the debtor's personalty in order to put all competitors on notice of their interests.


1. The Statutes Themselves

Connecticut's new provisions are the least complicated of the three. Section 52-355a specifies in part:

(a) Except in the case of a consumer judgment, a judgment lien . . . may be placed on any nonexempt personal property in which, by a filing in the office of the secretary of the state,

---

24 In addition, Iowa has a provision which uses the U.C.C. files within the levy process to create a nonpossessory lien in favor of the judgment creditor. Iowa R. Civ. P. 260(b) reads:

If the creditor or his agent first so requests in writing, the officer may view the property, inventory its exact description at length, and append such inventory to the execution . . . ; and, if the property is consumer goods or if the judgment debtor is not a resident of this state, file with the County Recorder of the county where the property is located his certified transcript of such inventory and statement; and, in all other cases, file with the Secretary of State his certified transcript of such inventory and statement. Such filing shall be accepted by the County Recorder or the Secretary of State as a financing statement . . . and shall be constructive notice of the levy to all persons . . . . The fees normally charged by the County Recorder or Secretary of State for the filing of a financing statement and the filing of a termination statement shall be paid by the officer and shall be taxed by him as a part of his costs of the levy. Iowa's procedure uses the U.C.C. files to give the judgment creditor an additional way to execute on the judgment. While the new levy does not separate the judgment debtor from his property, the procedure involves the sheriff and execution procedures generally. In that respect they resemble execution procedures more than they do the judgment lien procedures.

Similarly, Minnesota allows a U.C.C. filing to function as a levy "when personal property, by reason of its bulk or other cause, cannot be immediately removed." Minn. Stat. Ann. § 550.13 (Supp. 1987).

25 The new procedures differ fundamentally from those long existing in Georgia, Alabama, and Mississippi by enlisting accessible and frequently-used U.C.C. files to supply notice to those who might later assert interests in personalty. See supra note 9.
a security interest could be perfected under title 42a. The judgment lien shall be created by filing a judgment lien certificate in the office of the secretary of the state.

(c) Any such judgment lien shall be effective, in the same manner and to the same extent as a similar security interest under the provisions of title 42a.\(^2\)

By explicitly tying the lien to the interest created under Article 9 of the U.C.C., Connecticut permits, in its title 42a, the judgment creditor to secure her judgment with the equivalent of an Article 9 security interest.

Maine's provision is comparable. It reads in part:

§ 4651-A. Execution Liens

2. Lien on personal property. The filing of an execution duly issued by any court of this State or an attested copy thereof with the proper place or places for perfecting a security interest in personal property pursuant to Title 11, section 9-401, subsections (1) and (5) within one year after issuance of the execution shall create a lien in favor of each judgment creditor upon the right, title and interest of each judgment debtor in personal property which is not exempt from attachment and execution and which is of a type against which a security interest could be perfected by filing pursuant to Title 11, section 9-401.\(^2\)

Unlike the Connecticut statute, Maine's provision is ambiguous on questions of priority. As will be developed below, the result is that some battles between judgment lienholders and other claimants will have less than certain results.

California has been the most explicit in defining and refining\(^2\) its new provisions. In their broad compass, California's provisions are similar to the others. The judgment creditor may file a "notice of judgment lien on personal property"\(^2\) with the Secretary of State\(^3\) and obtain priority in the debtor's business property\(^4\) against other claimants largely in accordance with the priority scheme in Article 9 of the U.C.C.

\(^{28}\) The California provisions, first enacted in 1982, have gone through at least one major revision since that time.
Both California and Connecticut have tried to exclude consumer debtors from the reach of the new procedures.\textsuperscript{32} Maine has no comparable exclusion.

2. Cost and Risk Considerations

Compared with the alternatives available in other jurisdictions, these new procedures are extraordinarily “efficient,”\textsuperscript{33} because they reduce the costs and risks of converting a mere judgment into a specific claim to assets. Before considering the priority in specific assets that these new systems supply, it is worth comparing generally the costs of getting something more than an unsecured judgment under these new systems with the costs a creditor must sustain under more traditional systems.

If the creditor’s objective is merely to establish priority, the new systems save one the costs of executing on a judgment in order to get priority. Execution in many places involves meticulous document preparation,\textsuperscript{34} involvement with the sheriff’s office, and, to be successful, personal attention from the lawyer during this extended process. Under the new procedures, the costs of getting priority are those of completing a financing statement form and filing it. In many cases, the cost savings possible under the new schemes are sizeable.

Under the old systems, the general need to direct the sheriff to assets and the relatively high costs of execution make it ill-advised for a creditor to attempt execution without knowing the

\textsuperscript{32} Connecticut directly excludes judgments against consumers. \textit{Conn. Gen. Stat. Ann.} § 52-355a (West 1986). Although Connecticut’s language, “except in the case of a consumer judgment” could be read as “except in the case of a judgment held by a consumer,” it seems more likely that Connecticut attempted to protect consumers rather than disadvantage them by the exclusion. As will be seen infra text accompanying notes 127–131, Connecticut might not have delivered all the consumer protection it may have intended.

California’s legislation has a similar effect by extending the lien only to U.C.C. categories of property less likely to be held by consumers than businesses, e.g., accounts, chattel paper, equipment, farm products, inventory, and negotiable documents of title. \textit{Cal. Civ. Proc. Code} § 697.530 (West 1987 & Supp. 1989).

\textsuperscript{33} See \textit{supra} note 4 for a definition of “efficient” as used in this context.

\textsuperscript{34} In Pennsylvania, a plaintiff must arrive at the sheriff’s office with (1) the original and the correct number of copies of a writ of execution (secured from a different office), P.A.R.C.P. 3108(b); (2) envelopes addressed to all those who have to be served with the writs with postage on them, \textit{id.}; and (3) a “Writ of Execution Notice” which contains advice to the defendant about exemptions and a form through which to claim them. P.A.R.C.P. 3252(a). To have the clerk’s office issue the Writ of Execution, the plaintiff must also prepare a “Precipe for Writ of Execution.” P.A.R.C.P. 3103, 3251. Each of the forms must be properly completed by the plaintiff or his attorney; the execution will not go forward without a complete and correct package.
whereabouts and character of the debtor's personal property. Acquiring that knowledge is expensive, requiring either investigation or discovery, both of which entail nonrecoverable expenses. Under the new statutes there is no need to learn of the existence and whereabouts of the judgment debtor's personal property. None of the three new systems requires detailed specification of the personal property to be encumbered. Thus, under these systems a judgment creditor might, without any investigation, file a notice broadly describing the types of property to be subjected to the lien and hope that the lien will stick to something of value.

In addition, under the new procedures, one may often avoid the litigation inevitable under traditional procedures. Often the valuable forms of personal property are intangibles such as patent or royalty rights, contract rights, judgments, and claims not reduced to judgment. The law has long been confusing, at best, as to whether such rights may be reached at all and, if so, how one should proceed to execute on them. Thus, a judgment creditor attempting to establish a claim to such property in most states must begin by uncovering answers to these often-indeterminate legal questions. One needs answers at the beginning, because the process of directing the sheriff may include persuading the sheriff that such property can be levied on and instructing the sheriff on how the law specifies that levy be done.

Moreover, once the sheriff acts, the legal questions may well arise in litigation with the judgment debtor about the propriety of the levy. The judgment debtor will be provoked by the lien-creating process of execution to litigate because that process will have directly interfered with the debtor's possession and enjoyment of the property. Thus, one can expect the debtor in many cases to dispute uncertain legal questions if he can afford litigation or to file a bankruptcy petition if he cannot. Either way, unreimbursable legal costs escalate and dilute the value of the judgment. Yet the judgment creditor's alternative—doing nothing—is equally unattractive.

By contrast, in these three states, the judgment creditor's position, whatever it will later turn out to be, can be preserved just by filing the notice. The major question that arises at the outset is in which office to file, a far less complex legal question under Article 9 of the U.C.C. than the question how to levy under state law.
In addition, while the liens created under the new statutes are probably as strong as execution liens both in and outside of bankruptcy, the notice itself is not so likely as actual execution to provoke an immediate battle with the debtor. The new liens are nonpossessory, leaving the judgment debtor in control of his property. While the lien may eventually have a serious impact on the judgment debtor's ability to finance his business, the initial provocation the debtor receives with a judgment lien filing is far less than with actual execution.

For the same reasons, the risk that the debtor will immediately respond to a judgment lien notice with a bankruptcy petition seems far less than the risk of such a debtor response to actual execution. If this is true, it follows that the danger of losing priority through a preference attack is lower under the new systems than it was under the old: unless someone files a bankruptcy petition within ninety days of the fixing of the lien, the priority will be largely immune to preference law. Although empirical study is needed to assess the interaction of these new provisions with the bankruptcy system, one would expect far more of these liens to survive bankruptcy than survive under the present system.

In “efficiency” terms then, these new systems warrant high praise. If one believes that the law should enhance what it means to have a judgment, the new liens—even if they were weak and subordinate to many other interests—surely would advance that end. As the discussion will now show, the new state provisions

35 The priorities of the new liens against various competing claimants are discussed in section III, B, 3 of this Article.
36 A judgment lien filed under the new provisions will be avoidable as a preference if a bankruptcy petition is filed within 90 days of the lien filing. The judgment debtor may not, however, be as directly concerned with who has priority to certain assets under the new systems as he would have been under the old if he maintained possession and use of the assets. Other creditors, of course, might be concerned and provoked by the judgment lien filing to bring an involuntary bankruptcy proceeding against the judgment debtor.
37 The debtor's ability to finance his business will be affected by priority rules for Article 9 secured creditors. These priority rules are discussed in section III, B, 3 of this Article.
38 Similarly, execution carries with it the risk that seizure of the debtor's property is not legally warranted; there is thus always a possibility that execution will give a debtor a later claim for wrongful execution if the creditor proceeded to seize property without legal authority. A judgment lien, however, does not deprive the debtor of use of property to the same extent as seizure; therefore, the risk that large damages will accrue following wrongful use of procedure seems lower under the new procedures than under the old.
39 The bankruptcy law provides an extended period, however, for preferences to "insiders" as defined in the Bankruptcy Code. See 11 U.S.C. § 547(b)(4)(B) (Supp. V 1987). The provision is quoted infra note 111.
breed strong liens that give judgment creditors substantial priority over competing claimants.

3. Priority Implications: Contests with Those Competing for Debtor Assets

A lien is primarily important to a creditor because it fixes, as of a point in time, the creditor's claim to specific assets against possible competing claims. These new statutes are significant because they allow a judgment creditor to obtain a lien cheaply and with fewer risks of debtor retaliation. But liens vary in quality. For example, some are good against all competitors, with or without actual notice, others fail in various contests with buyers, and still others are specifically excluded from protection under the Bankruptcy Code.

This section will first consider the protection these new state statutes afford those who buy the encumbered property from the debtor after the lien has been filed, and then will examine comparable contests with various Article 9 secured creditors. Part IV will consider contests with a bankruptcy trustee representing unsecured creditors.

a. Priority Contests with Buyers

Unlike transactions in land, sales of personal property have not typically featured record searches. The absence of trust-
worthy records to accommodate movable personal property\(^4\) no doubt contributed to the commercial practice and general legal presumption that possession constitutes the most reliable indication of ownership.\(^4\) Somewhat related to this central place occupied by possession is the law’s historic concern for the bona fide purchaser, the innocent buyer who advances money and takes real or personal property without knowledge that it is subject to a competing claim.\(^4\)

Under traditional execution systems, there is little need to worry about persons who might buy without notice of the lien created in the execution process. Many of these systems require a seizure of the property from the judgment debtor to create a lien,\(^4\) and the seizure itself puts any reasonable prospective purchaser on actual notice.\(^4\) In those places where the execution lien can arise before the debtor’s property is actually seized,\(^4\) states sometimes protect those who buy without notice of the lien.\(^4\) In any event, the law requires seizure to follow soon after delivery of a writ to the sheriff.\(^5\)

\(^4\) The technology is probably available to record reliably the status of each individual’s assets, real and personal. While privacy concerns probably will not constrain private industry, these concerns will likely impede efforts to construct in the near future a public file with such comprehensive information.


\(^4\) See, e.g., Gilmore, supra note 19; Murray, Execution Lien Creditors Versus Bona Fide Purchasers, Lenders and Other Execution Lien Creditors: Charles II and the Uniform Commercial Code, 85 COM. L.J. 485 (1980).


\(^4\) Where the property cannot be carried away, the law has developed forms of “constructive” seizure, such as immobilizing the property or tagging it, which, similarly, can be expected to put third parties on notice. See, e.g., MD. R. CIV. P. 3-641, -642 (district court) & 2-641, -642 (circuit court); IOWA R. CIV. P. 260(b) (U.C.C. filing); MINN. STAT. ANN. § 550.13 (West 1987) (same).


\(^4\) E.g., N.Y. CIV. PRAC. L. & R. 5202(a) (McKinney 1978) quoted supra in note 41.

\(^4\) Many states specify a “return date” of 60 days after which the writ of execution becomes void. States vary on when the 60-day period begins to run. See HAW. REV. STAT. § 651-34 (1988) (from issuance); IDAHO CODE § 11-103 (Supp. 1987) (from “receipt”); KAN. STAT. ANN. § 60-2401(c) (1983) (from issuance); MINN. STAT. ANN.
The new statutes could undercut the policy reflected in the older systems. Since the statutes create non-possessory liens in the judgment debtor's personal property and because many prospective buyers would not search public records before purchasing the debtor's property, there is some chance that a court will resolve any dispute in favor of an innocent buyer. Consequently, any legislative reform should resolve contests that may arise between new judgment lien holders and later buyers of the encumbered property.

Besides the importance of clearly resolving such contests, there is the policy question of how to settle the priority issue. On one side of the equation is the desire to strengthen the hand of the judgment creditor by making the debtor's sale of the encumbered property ineffective. On the other side is the desire not to impede free transfers of personal property by requiring buyers to check public files each time they buy personal property. California and Connecticut have articulated their balancing of these policies; Maine has not.


Because many buyers without actual notice will take property subject to prior perfected Article 9 security interests, see U.C.C. § 9-307, at least some can be expected to check the U.C.C. files prior to buying if the property is valuable enough and if they have heard of Article 9.

There is a strong tradition in this direction. For example, the court in Lanterman v. Luby, 114 A. 325, 327 (N.J. 1921), decreed that even where a relevant statute provided that loss of the garage keeper's "control" did not result in loss of its lien, if the legislation had "expressly included subsequent innocent purchasers for value without notice within those against whom the right of seizure [upon loss of "control"] . . . would exist (which it did not), the act would be unconstitutional as a deprivation of property without due process of law . . . ." In the process of reaching this result, the court articulated a strong policy of protection for bona fide purchasers:

Secret liens upon chattels are an obstruction and a menace to trade, and as such are against the policy of the law. They attempt to contradict and to destroy the universally accepted and natural, as well as legal badge of ownership of chattels, which is possession. The law is most jealous in its protection of an innocent purchaser of a chattel for value without notice, who has relied upon possession as the badge of ownership.

Id. at 326. Accord In re Mission Marine Assoc., 633 F.2d 678 (3d Cir. 1980). See also Radcliff Finance Corp. v. City Motor Sales, 323 S.W.2d 591 (Tex. 1959).
California has been the most explicit in treating contests between buyers and holders of its new judgment lien and strikes a policy balance comparable to that struck by the drafters of Article 9 of the U.C.C. The legislation protects buyers in the ordinary course of business as defined in U.C.C. § 9-307(1); "[holders] to whom a negotiable document of title has been duly negotiated within the meaning of Section 7-501 of the Commercial Code"; and purchasers of chattel paper who give new value and take possession of the chattel paper in the ordinary course of business. Otherwise, the lien survives the sale of the property.53

Like California, Connecticut articulates the policy choice by specifying that its new judgment lien "shall be effective, in the same manner and to the same extent as a similar security interest under the provisions of [the Code]."54 U.C.C. § 9-307(1) extends protection to buyers "in the ordinary course of business," generally buyers of the debtor's inventory.55 Buyers of encumbered inventory from retailers are thus protected under both Connecticut and California's legislation. But those who buy encumbered property that the debtor does not sell "in the ordinary course of business" apparently are not protected, even if they buy without actual notice.56

In Maine, the outcome of a contest between a new judgment lien holder and a later buyer of the property is unclear, since Maine's legislation, unlike California's, is silent on the rights of buyers. Moreover, unlike Connecticut, Maine does not specify the nature of the lien created by the new filing procedures. This

53 CAL. CIV. PROC. CODE § 697.610 (West 1987).
54 CONN. GEN. STAT. ANN. § 52-355a (West 1989).
55 "Buyer in the ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind. U.C.C. § 1-201(9).
56 U.C.C. § 9-307(2) has been interpreted to offer protection only in transactions in which a consumer is the seller and another consumer is the buyer. See J. White & R. Summers, UNIFORM COMMERCIAL CODE § 24.15 (3d ed. 1988). The Connecticut legislation excludes "consumer judgments." See supra note 32. U.C.C. § 9-307(3) addresses "future advances," which have no application in the judgment lien context because a judgment lien holder does not make new advances to the debtor.

A different result could follow from § 9-306(2) which allows a purchaser to take free of a security interest if disposition has been authorized by the secured party. While it seems unlikely, allowing a debtor to remain in possession in Connecticut might be seen as implied authorization to sell free of the lien.
defect in the legislation requires resolution by a court or the legislature.

If Maine’s lien is interpreted as the equivalent of a security interest, the results of the buyer-judgment creditor contest will be the same as in the two other states. The later buyer will lose unless she was a “buyer in the ordinary course of business” falling within the protection of Code section 9-307(1). If, on the other hand, the judgment creditor holds a lien similar to an execution lien or other judicial lien, a court would have to decide whether to charge buyers with record notice or extend bona fide purchaser protection to all such buyers. Without Article 9 there is no easy way to treat separately the “buyer in the ordinary course of business” who clearly needs protection, and thus a court interpreting the lien in this way probably would feel compelled to protect all buyers without actual notice, including those who buy the judgment debtor’s inventory.

b. Priority Contests with Article 9 Secured Parties

(1) Later secured parties. One readily expects Article 9 secured parties to check the U.C.C. files before they make a secured loan to most debtors. Checking the files is necessary under the Code because the statute grants priority to the first person to place a proper document—the financing statement—in the files. If a judgment creditor places a judgment lien in the correct file, secured parties presumably will see it and take any necessary protective action. It thus offends no principles of notice to award a judgment lien holder priority over a later secured party. And, indeed, it is difficult to justify why a secured

---

57 Without “buyer in the ordinary course of business” protection, the judgment lien holder would prevail against a buyer of an encumbered clothing store’s shirt or of an encumbered appliance store’s microwave oven. In the context of modern commercial law, such results would be extraordinary and unsound.

58 One exception is the retailer who makes loans to consumers to finance their purchases. These seller-lenders take purchase money security interests in the goods they sell. The Code makes their security interests perfected without filing and gives them priority over competing security interests in the same collateral. See U.C.C. §§ 9-302(1)(d), -312(4). We can thus expect many such secured parties to operate largely without concern for the files. But see infra text accompanying notes 86–88.

59 U.C.C. § 9-312(5).
lender with record notice of a judgment lien should have priority over the earlier party who already holds a judgment.\textsuperscript{60}

As a broad proposition,\textsuperscript{61} all three states adhere to the Article 9 approach that the first person to file a correct document or to otherwise perfect an interest covering the personal property will prevail over later parties who have acquired an interest in the same property.

The effect of this policy decision is significant: the holder of a judgment can, by a proper filing, keep the debtor from using the encumbered property for new financing because a new financier will not be able to acquire priority higher than the judgment lien holder's. The lien's ability to choke off the debtor's new financing might, in at least some cases, influence the debtor to pay the judgment without actual levy or garnishment.

As a baseline, Connecticut has incorporated a general first-to-file-or-perfect rule by treating the judgment lien as an Article 9 security interest\textsuperscript{62} for priority purposes. California's statute is similar and somewhat more specific.\textsuperscript{63} In Maine, regardless of whether the judgment lien is treated as a security interest or judicial lien, a judgment creditor who files before a subsequent secured party will prevail under the U.C.C., since a secured

\textsuperscript{60} Under the statutes, a secured party who checks the files on day 1, loans money on day 2, and files her financing statement on day 4 will lose to a judgment lien holder who files on day 3 just as she would lose to a secured party who had filed on day 3. While the intervening judgment creditor and intervening secured party might be distinguished on the basis that the former acted without actual reliance on a clear record on day 3 (she would have filed anyway), the statutes appear to make no distinctions in this case. One might well argue that the prudent secured creditor, steeped in Article 9 practice, should be expected to check the files on day 4 before advancing the cash, thereby eliminating the risk of defeat by either an earlier secured party or a judgment lien holder. The U.C.C. permits some later purchase-money lenders to defeat earlier secured parties. The priorities of purchase-money lenders are discussed in the next section.

\textsuperscript{61} There are several exceptions to the general first-to-file rule which these states embrace that will be developed \textit{infra} at text accompanying note 65.

\textsuperscript{62} CONN. GEN. STAT. ANN. § 52-355a(c) (West Supp. 1989) states that its judgment liens "shall be effective, in the same manner and to the same extent as a similar security interest under [Article 9 of Connecticut's Commercial Code]." U.C.C. § 9-312(5) provides that the first person to file or perfect a security interest will prevail.

\textsuperscript{63} The California legislation provides, in part:

[Priority between a judgment lien on personal property and a conflicting security interest in the same property shall be determined according to this subdivision. Conflicting interests rank according to priority in time of filing or perfection. In the case of a judgment lien, priority dates from the time filing is first made covering the personal property. In the case of a security interest, priority dates from the time filing is first made covering the personal property or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.]

CAL. CIV. PROC. CODE § 697.590(b) (West 1987).
party loses to either an earlier lien creditor or to an earlier secured party.64

(2) Earlier secured parties—priority as to future advances. The first-in-time rule employed by all three states obviously means that a judgment lien holder will be subordinate to a secured party who already has filed a financing statement earlier. But Article 9 allows a party already properly secured to make additional later secured loans—future advances—without filing additional financing statements. This innovation forced U.C.C. policy makers to decide what priority the later advance should have over interests arising after the original financing statement but before the future advances.65 The Code’s resolution distinguishes among intervening buyers,66 intervening lien creditors,67 and intervening secured parties.68

Later secured parties make their loans after searching the files and uncovering the earlier secured party’s financing statement; Code drafters determined that later parties should carry the risk that the earlier party will make a future advance. In this situation the Code provides that the future advance carries the same priority as the original advance.69 While one might debate the wisdom of a scheme that supplies the first secured party with a monopoly on financing,70 it is difficult to otherwise challenge the fairness of the Code towards the second secured party. Given the notice supplied by the files, the second party can choose not to take on the risk and either walk away from the transaction or seek a subordination agreement from the first secured party.

The situation is different when one obtains a judicial lien on property already subject to a security interest. Unlike the later secured party, a lien creditor cannot “walk away” from the debtor on discovering the earlier party’s financing statement.

64 U.C.C. §§ 9-301(1)(b), -312(5).
66 U.C.C. § 9-307(3) gives the creditor who made a future advance priority over an intervening buyer unless the secured party knew of the sale or made the advance more than 45 days after the sale.
67 U.C.C. § 9-301(4).
68 U.C.C. § 9-312(7).
69 Id.
The lien is non-consensual, follows perhaps costly litigation, and is an attempt to secure an old debt. Once such a lien is asserted, it is much harder to justify a rule giving an earlier secured party her original priority in all future advances. Code drafters have recognized the fundamental difference between a later secured party and a later lien creditor by crafting a special rule giving future advances much more limited protection against a later judicial lien. Article 9 gives the future advance priority over the judicial lien only if the advance was made within forty-five days after the lien or the secured party had no notice of the lien.\(^7\)

The three states seem to diverge on the question of what priority to award a secured party’s advances made after the arrival of a new judgment lien. California has determined that the proper analogy is that of the judicial lien holder under Article 9. The other two states are silent on the specific question, but one can draw some tentative conclusions from their legislation.

California explicitly addresses the priority contest that will occur between a judgment lien holder and an earlier secured party who makes future advances. Section 697.590 provides in part:

(f) A judgment lien that has attached to personal property and that is also subordinate . . . to a security interest in the same personal property is subordinate . . . only to the extent that the security interest secures advances made before the judgment lien attached or within 45 days thereafter or made without knowledge of the judgment lien or pursuant to a commitment entered into without knowledge of the judgment lien . . . . [A] secured party shall be deemed not to have knowledge of a judgment lien on personal property until (1) the judgment creditor serves a copy of the notice of judgment lien on the secured party personally or by mail and (2) the secured party has knowledge of the judgment lien on personal property, as “knowledge” is defined in Section 1201 of the Commercial Code.\(^2\)

---

\(^7\) The pertinent section provides:
A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

U.C.C. § 9-301(4).

\(^2\) CAL. CIV. PROC. CODE § 697.590(f) (West 1987).
It should be easy to see the enormous effect a judgment lien in California might have on continued secured financing from the debtor's primary creditor. In revolving financing arrangements, the same secured party will make additional loans to the debtor as earlier loans are repaid or as the collateral changes. As discussed above, under Article 9 those future advances are protected against later secured parties to the same extent as the original advance. By making its new lien a judicial lien, California has given its judgment creditors the power to destroy these financing arrangements by simply filing the equivalent of a financing statement, serving notice, and waiting the requisite period.

If the lienholder gives the proper notice, the original secured party may safely make advances only for forty-five days after the lien has been filed. After that, the advances will be subordinate to the judgment lien. As a practical matter, one would expect the secured party to refuse to make additional advances after that point and, perhaps, to begin to terminate the financing arrangements even sooner. This will obviously supply the judgment creditor with immense leverage to effect payment of the judgment without actual execution.

Connecticut has treated the issue less explicitly and, perhaps, differently. The Connecticut statute says only that its judgment lien is to be treated as a "similar security interest." If the legislature intended the judgment lien to be treated as a security interest in this context, it made a policy choice very different from California's, because the Code does not give priority to a second secured party over the first secured party's later advances. Therefore, if the Connecticut lien is treated as a security interest, the judgment holder will not be able to affect the judgment debtor's ongoing financing arrangements. Thus, the judgment holder in Connecticut will have a substantially weaker lien than a similar party in California. Such an interpretation would ignore fundamental differences between a judgment holder getting a lien to secure an old debt and a later secured party considering whether to make a new loan.

---

73 Given the California notice provision, quoted supra at text accompanying note 72, providing notice to secured parties of record should be part of a lawyer's standardized process of obtaining a judgment lien following entry of judgment.

74 See also infra note 114.

75 The Connecticut statute is quoted supra at text accompanying note 26.

76 U.C.C. § 9-312(7). See supra text accompanying notes 69–70.

77 See supra text accompanying note 70.
Yet, perhaps, Connecticut determined that it was simply bad policy to supply a party holding a judgment with this extraordinary leverage over the debtor's continuing financing. Current U.C.C. provisions were drafted against the backdrop of a traditional system which made a creditor's obtaining a lien on personalty a rather extraordinary event. The new statutes may make nonconsensual liens on personalty commonplace with unpredictable effects on a local economy. Connecticut may have decided that the stability of ongoing business financing was not outweighed by the need to secure the payment of judgments and may have intentionally resolved this policy question in favor of the pre-existing secured party.

As will be seen in Part IV, the leverage given a judgment holder is, ultimately, a deeply political question to which there are no simple answers. The policy choices imbedded within these new statutes inevitably require a delicate balancing of competing interests. Given the actual language of the Connecticut statute and the uncertainty of its legislature's policy choice, a strict reading of the statute to favor the pre-existing secured party is probably appropriate until the legislature clarifies its preference.

Maine's legislation is silent on how to treat the new lien in this context. By specifying that the proper procedure is to file an execution in the U.C.C. files and that the procedure "shall create a lien," the terminology suggests that the new lien should be considered a judicial lien and not a security interest. If that is the case, the results of this contest will be consistent with those in California.

(3) Purchase money secured parties. One of the U.C.C.'s innovations was to permit a party in a single transaction to acquire a security interest in property the debtor would acquire in the future, that is, in after-acquired property. Under the Code's priority provisions, priority goes to the first party who files a financing statement covering the collateral regardless of when the collateral was acquired. To this general rule the U.C.C. makes an exception for purchase money secured parties—generally, parties that finance the debtor's purchase of the

---

78 Maine's statute is quoted supra at text accompanying note 27.
79 U.C.C. § 9-312(5).
If a secured party meets various Code requirements, he can acquire priority in the new collateral over a pre-existing secured party despite that party's earlier filing.

This strong policy of special priority for purchase money secured parties has a long history. Before the arrival of the Code, courts reached the Code result by manipulating property concepts: the earlier creditor's security interest never attached to the new collateral because the debtor had insufficient rights in that collateral to grant a security interest to the first party. More recently, the policy has been justified on the basis that the purchase money secured party has added specific value to the debtor's assets, that this additional financing option is useful, and that it harms no one to give the new secured party priority as to that added value.

When Article 9 was drafted, it was not necessary to give great thought to whether a purchase money secured party should take priority over a pre-existing lien creditor. This is because in most states actual execution on specified, existing assets was the sole method available to a judgment creditor for obtaining a lien on personal property. The only after-acquired property that could be reached was property the debtor acquired between the time the judgment creditor delivered the writ of execution and the time the sheriff levied. U.C.C. § 9-301(2) addresses the problem in this way:

If the secured party files with respect to a purchase money security interest before or within ten days after the debtor receives possession of the collateral, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

One might infer from the rule that if the lien arises either before or at the same time as attachment of the security interest, the lien creditor will win.

In the context of most state systems, the rule is consistent with the strong policy of facilitating purchase money lending
that is found in the Code. The risk that a purchase money loan will be defeated by an earlier lien creditor is very low as long as the secured party files within 10 days. Many states require actual levy in order to obtain a lien, and levy cannot occur until the debtor acquires some rights in the collateral. In those states that permit an execution lien to arise on delivery of the writ to the sheriff, the lien will typically be of short duration and may not reach after-acquired property.

The situation is different under these new systems, of course, because the liens are easier to get, last longer, and reach after-acquired property. Like security interests, the liens will arise when the debtor gets rights in the new collateral, that is, at the same time the purchase money security interest attaches. Under a strict reading of current Code language that addresses the contest between the lien creditor and purchase money secured party, the new liens might defeat many purchase money secured parties and thus could pose a substantial risk to purchase money lending.

On the other hand, if one wished to further strengthen the hand of the judgment creditor, one could give these liens priority over later purchase money lenders. The effect would be to force sellers and others who finance purchases to check the files before lending and to decline purchase money loans if the debtor's personal property is found to be encumbered with a judgment lien. Policy makers should weigh the probable economic costs of forcing purchase money lenders to check files prior to lending against the benefits of further strengthening the judgment creditor's hand.

86 U.C.C. §§ 9-312(4), -313(4)(a), and -314 are all illustrations of the Code policy that a person who finances the debtor's acquisition of new collateral ought to have priority as to that collateral over pre-existing secured parties or encumbrancers.

87 See supra note 46.

88 See supra note 48.

89 A security interest can attach no earlier than the time the debtor acquires "rights in the collateral." U.C.C. § 9-203(1)(c).

90 The provision is set out supra at text accompanying note 85.

91 Where the contest is between a purchase money secured party and another secured party, Article 9 has resolved this policy issue in favor of the purchase money party. U.C.C. § 9-312(4).

Except in the case of financing a debtor's acquisition of inventory, a purchase money financier can be assured of priority without checking the U.C.C. files prior to lending. If the Code requirements are met, the later purchase money lender will have priority regardless of what she would have found in the files.

A policy maker might ask whether a judgment lienholder who has engaged in litigation to collect an old debt should be treated better than a secured party who, while not owed an old debt, is induced to lend money by the security her purchase money security interest will provide.
Because Article 9 was drafted in an era devoid of judgment liens on personal property, one can only speculate how its drafters would have treated the contest between a judgment lienholder and a later purchase money secured party. But the strong policy in the Code of protecting a purchase money lender by awarding priority over a pre-existing lienholder\(^9\) suggests that the drafters probably would have protected the purchase money lender in this context as well.

California is the most explicit in determining the contest between a judgment lien holder and a later purchase money lender. Its legislature drafted a specific provision which favors the purchase money lender by providing:

A purchase money security interest has priority over a conflicting judgment lien on the same personal property or its proceeds if the purchase money security interest is perfected at the time the judgment debtor receives possession of the personal property or within 10 days thereafter.\(^9\)

A court in Connecticut, treating its lien as a similar security interest,\(^9\) could reach a result similar to California’s by ruling that the contest is determined by the U.C.C. provisions that resolve priority contests\(^9\) between holders of security interests and later purchase money lenders.\(^9\)

\(^9\) See supra text accompanying notes 80–83.

\(^{91}\) CAL. CIV. PROC. CODE § 697.590(d) (West 1987).

\(^{92}\) The Connecticut statute is quoted supra at text accompanying note 26.

\(^{93}\) U.C.C. § 9-312(4) provides:

A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter.

\(^{94}\) U.C.C. § 9-312(3) establishes far more specific requirements that must be met before a purchase money lender on inventory can get priority over a pre-existing security interest in inventory. Among other things, the rule requires that the purchase money lender’s security interest be perfected at the time the debtor receives possession of the inventory and that the purchase money lender notify the earlier secured party before the later lender files. U.C.C. §§ 9-312(3)(a), -312(3)(b). Since the Connecticut judgment lien reaches the judgment debtor’s inventory, if U.C.C. § 9-312(3) is applied in the judgment lien context, the practical effect might well be to seriously impede a judgment debtor’s acquisitions of new inventory through purchase money loans. On encountering the judgment lien within the files, the new lender might well reconsider making the loan. Or, on receiving the required notification from the purchase money lender, the judgment lien creditor might be prompted to begin execution proceedings.

While this result seems inoffensive as a policy matter, it differs from the result the California legislature mandated, because California made no distinctions between purchase money lenders on inventory and others. See also CAL. CIV. PROC. CODE § 697.590(e) (West 1987), which resolves a circular priority problem created by its judgment lien priority provision in the inventory financing setting.
By failing to define the nature of its lien or to specify priority rules, the Maine legislature left the contest between a judgment lien holder and a later purchase money lender unsettled. If the lien is treated like a judicial lien, the U.C.C. rule that resolves contests between holders of judicial liens and later purchase money secured parties will apply, and a strict reading of that rule could defeat a purchase money secured party who filed after the judgment lien was in place. Such a result would be at odds with the U.C.C. policy of protecting purchase money lenders.

Moreover, if a court ruled that a purchase money lender must check the files before lending to protect against earlier judgment liens, it would undermine the U.C.C. rule by forcing a pre-transaction file check in a situation where the Code drafters thought it unnecessary. Maine’s legislation ought to be clarified on this point. By the same token, because a state has the capacity through these liens to undermine purchase money lending, U.C.C. policy makers might well consider a revision to the Code to accommodate this new kind of judicial lien.

IV. IMPACT OF THE PROVISIONS ON THE LARGER SYSTEM

A. Contests Between Lien Holders and Unsecured Creditors: Implications for Bankruptcy

It is a basic tenet of our debtor-creditor system that unsecured creditors have no claims to specific assets. They must themselves secure judgments on their claims and obtain liens before they are able to assert priority in specific assets. Consequently, there is no real contest between an ordinary unsecured creditor and any lien holder: within the state systems, a lien holder will defeat most creditors who do not have liens.

97 The Maine legislation is quoted supra at text accompanying note 27.
98 U.C.C. § 9-301(2) is quoted supra at text accompanying note 85.
99 One final issue which policy makers might want to consider is the extent to which these new liens in a few jurisdictions affect desired uniformity of the U.C.C. The Code was drafted before such liens were possible and against a backdrop of the inefficient creditor enforcement system. As the text suggests, the new liens interact with secured lending in a different way than did execution liens under older systems. Given the major change these new statutes bring and given the state-to-state variation even in the new provisions, have we begun injecting further complexity into our basic commercial legislation whose strongest attribute is supposed uniformity?
Unsecured creditors are, however, represented by the trustee in bankruptcy and collectively get what is left of the debtor’s assets after the claims of valid lien holders have been satisfied. This competition for the debtor’s limited assets combined with the bankruptcy law’s recognition of state-created liens make bankruptcy, in many respects, a contest between secured and unsecured creditors. Because the debtor’s finite assets must be divided among secured and unsecured claims, any state law that creates new liens that are enforceable in bankruptcy carries with it the potential of upsetting the current balance between secured and unsecured creditors. Although there may be nothing sacrosanct about the present balance, when evaluating the new provisions, policymakers may want to consider whether the new judgment lien provisions alter the current distribution. Some policymakers may consider an altered distribution in bankruptcy to be an undesirable side effect of the “efficiency” brought about by the new statutes.

The present balance of distribution amongst claimants within the bankruptcy process will remain undisturbed if the Bankruptcy Code enables trustees to avoid the new liens. It is, after all, federal bankruptcy law’s deference to state law-created liens and security interests that ties the welfare of lien creditors to the claims of unsecured claimants, and Congress certainly has the power to make such liens ineffective in bankruptcy. Trustees will probably be unable to avoid the new liens, however, because under current law, any attack on the liens is likely to fail.

The Bankruptcy Code’s strong arm provision gives the trustee the power, as of the date of the bankruptcy filing, of a “creditor on a simple contract [with a] ... judicial lien.” The trustee’s challenge under this strong arm power, however, will probably fail. In all three states, an earlier filed lien will defeat a later lien. Therefore, a person (here read trustee) with a

---

100 This recognition seems unlikely to be constitutionally based. See Rogers, The Impairment of Secured Creditor’s Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause, 96 Harv. L. Rev. 973 (1983).

101 Congress, for example, made liens “for rent” and “of distress for rent” avoidable as a class in bankruptcy. 11 U.S.C. § 545(3)-(4) (1982).


103 Id.

104 The same rule that applies to contests between judgment lien holders and later secured parties will apply to later lien holders as well and thereby defeat the trustee. See supra text accompanying notes 59–61.
judicial lien arising after the judgment lien will be subordinate. The trustee's other strong arm powers would probably not fare any better. 105

An attack on these liens as statutory liens under Code section 545(2)106 also seems unlikely to succeed. Section 101(47) of the Code defines a statutory lien, in part, as a "lien arising solely by force of a statute on specified circumstances or conditions . . . , but does not include security interest or judicial lien."107 The Code in turn defines judicial lien as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding."108 Since the new judgment liens are "obtained by judgment," they appear to be judicial liens rather than statutory liens under the Bankruptcy Code's definitions. Moreover, even if one gets beyond these definitional problems, avoidable statutory liens must fail the bona fide purchaser test found in section 545(2). Such failure seems unlikely, because judgment liens are valid against later secured parties—purchasers under the Bankruptcy Code's definitions.110

Like all other liens and security interests, judgment liens on personal property will be subject to attack as preferences, pro-

---

105 Congress also gave the trustee the rights and powers of:
   (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
   (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.
106 11 U.S.C. § 545(2) permits the trustee to:
   avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—
   (2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists.
109 See supra note 106 for the text of 11 U.S.C. § 545(2), which describes the circumstances under which a statutory lien may be avoided. "Purchaser" is defined in the Code as "transferee of a voluntary transfer," 11 U.S.C. § 101(37) (Supp. V 1987), which would include lenders who take security interests as well as buyers.
110 11 U.S.C. § 101(37) (Supp. V 1987). A "buyer in the ordinary course of business" may be able to defeat the liens, see supra text accompanying notes 53-57, but this is a far narrower class of buyers than "bona fide purchaser" as defined in the Bankruptcy Code.
vided they meet the requirements of section 547. But as suggested earlier, since fixing these liens does not deprive the debtor of possession of personality as does execution, a precipitous bankruptcy filing may be less likely as a matter of course. A debtor receiving notice of a judgment lien is unlikely to have the same reaction as, for example, a debtor whose property has just been seized by the sheriff in satisfaction of a judgment.

Moreover, Connecticut, unlike Maine, does not explicitly require the judgment creditor to notify the debtor that she has filed her judgment lien notice. In some cases this means that the debtor may not discover the lien soon enough to file a bankruptcy petition and capture the encumbrance within the statutory preference period. In short, it seems that these liens are less likely to be avoided as preferences than the execution liens which these judgment liens have partly displaced.

Since it is likely that these liens will be enforceable in bankruptcy, the present distributional balance between secured and unsecured creditors may be significantly altered. Claimants in

---

111 This section will apply only if there is a:

"transfer of an interest of the debtor in property—
(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made—
(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if—
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.


114 A debtor in a revolving financing arrangement, see supra text accompanying note 74, could avoid the lien if it interfered with the financing arrangements but, in this case, filing a bankruptcy petition to do so might be a cure worse than the disease.
these three states may well file complaints and obtain default judgments because a claim to specific assets can so easily follow such a process. Thus, as suggested earlier, these cheaper and more efficient procedures for obtaining liens on personalty will probably result in more liens on personalty.

In addition, one can expect the new judgment liens to reach beyond narrow categories of property. Given the low expense and low risk of obtaining these judgment liens, judgment holders are unlikely to investigate a debtor's assets and assert interests only in the limited categories of personal property that they find. Rather, their lawyers are apt to mass produce judgment lien documents to assert priority in all personal property, thereby making expensive individual treatment unnecessary.

All of this means that in these states more debtors who enter bankruptcy should enter with their property already encumbered by these new liens. States that have enacted these systems have, in short, set up a legal regime that may redistribute property from unsecured claimants to the new lien holders in bankruptcy.

These distributional consequences may be worse for some unsecured creditors than for others. The impact of these new liens will be felt only by those who would have been paid something in bankruptcy had the liens not been in effect. The most likely classes of unsecured creditors to be affected in bankruptcy, therefore, are those near the top of the detailed federal priority scheme. Employees, pension plans, taxing authorities, and other priority claimants, therefore, have more to fear than others from a reallocation of assets from unsecured to secured creditors in bankruptcy.

From the perspective of both policy makers and all unsecured bankruptcy claimants, perhaps the most important group of un-

---

115 See supra text accompanying note 33.
116 The lawyers' forms will likely assert claims to all the debtor's personal property, including after-acquired property, in words which meet the then-current U.C.C. test for specificity within a financing statement. Current cases hold descriptions such as "all assets" as inadequate and descriptions in U.C.C.-defined categories as adequate. See J. White & R. Summers, supra note 56, § 22-18, at 1040-44. It seems likely that the forms will simply list all U.C.C.-defined categories of collateral.
117 Yet these results may not come to pass. The degree of reallocation from unsecured to judgment lien claimants will depend on the amount of unencumbered assets that would have been available for distribution absent the new provisions. If, for example, most California judgment debtors' assets are fully encumbered to begin with, the new judgment liens will have little impact on unsecured creditors in any event.
secured creditors is the first priority class\textsuperscript{119} of administrative claimants, including trustees who are paid by the estate to preserve the assets for the benefit of all unsecured creditors and to avoid liens, preferences, and other transfers. Since much of the bankruptcy system's operation is financed by administrative expenses, the new liens have the potential of draining money away from the bankruptcy system itself. If the new liens result in more cases where there are insufficient unencumbered assets to pay a private bankruptcy trustee, the system may have to rely on federal officials to oversee these no-asset bankruptcy cases that would have been asset cases under the traditional system.\textsuperscript{120} The impact such a shift in responsibility would have on the federal budget and the taxpayer is uncertain but could be substantial.

Since the new judgment lien provisions are theoretically available to all unsecured creditors, it could be said that neither priority nor non-priority unsecured creditors have cause to complain. But for many creditors, the theoretical ability to use the new provisions is of little solace and the possibility of adjusting credit practices in light of the new provisions is limited. Employees, for example, will be unable to get judgments for their wages in time to avail themselves of the new provisions and will be unlikely to get security interests for their unpaid wages.\textsuperscript{121} Tort creditors do not engage in consensual credit transactions and do not decide for themselves whether to extend credit. Buyers of goods who have already paid for them can be creditors on warranty claims, but claims for breach of warranty arise after the warranty has been extended.\textsuperscript{122} Small or legally unsophisticated creditors may be unable to justify the expense of getting the judgment necessary to deploy the new procedures. And, administrative expense claimants only begin their work when most of the estate's assets are already spoken for.

\textsuperscript{121} See 3A A. CORBIN, CONTRACTS § 676, at 209: Why must the employee give "credit" and the employer not? Why must the employee carry the risk of getting nothing for his labor, while the employer does not carry the risk of getting no labor for his money? The answer is that such is the almost universal custom of men.

Unsecured employee claims may not, however, be a great problem in fact. One commentator maintains that numbers of wage claims in bankruptcy are very low, because employers in financial trouble want least to precipitate trouble from their employees. See Buckley, The Bankruptcy Priority Puzzle, 72 Va. L. Rev. 1393, 1407 (1986).

\textsuperscript{122} See Leff, supra note 3, at 20. But cf. Buckley, supra note 121, at 1393, 1407.
Thus, while the new judgment lien provisions are technically available to everyone, they might actually tend to favor larger creditors and those in businesses that have reduced the unit costs of obtaining judgments. Put another way, the main beneficiaries of these provisions may be those that, as an empirical matter, get judgments most easily. The losers may be those who have the most difficulty obtaining judgments on their claims.

Ordinarily, questions of priority among various classes of creditors occupy a prime position in public policy debates in the debtor-creditor field. The set of priorities within the Bankruptcy Code\textsuperscript{123} was itself the product of long deliberation. Similar priority issues in the new judgment lien statutes, however, have engendered little or no political or policy debate despite the fact that some creditors will be much better than others at obtaining judgments. Whether differences in judgment-getting potential stem from the nature of the underlying claims (e.g., loan defaults versus personal injury), legal sophistication, access to legal resources, or other factors, in these states some creditors will enjoy priority over other state claimants and even over priority claimants in bankruptcy. Who the privileged creditors are is an empirical question; however, it seems nearly certain that they are not employees claiming wages, tort claimants, consumers with warranty claims, or persons without routine access to the resources required to get a judgment. This de facto subordination of whole classes of creditors not only entails a normative decision about which creditors are more deserving of recovery, it may also alter the system that supplies creditors with incentives to discover hidden debtor assets.

Under the traditional systems which award priority only to creditors who locate and seize property, claimants have a powerful incentive (i.e., priority) to spend money in a search for a judgment debtor's hidden personal property. Such investigatory activity may be useful, since it improves the lot of creditors generally by increasing the total assets available for collection. Therefore, as a policy matter at the state and federal level, one might appropriately reward with priority those claimants who engage in the activity of uncovering debtors' hidden assets, regardless of the underlying nature of their claims.

By contrast, the new systems provoke no similar investigatory activity, because it is unnecessary to locate a judgment debtor's

property in order to obtain priority over it. Getting a judgment and filing a document are all that are necessary to fix priority in the debtor's assets, whatever they happen to be. Once someone has filed for a judgment lien, remaining claimants have no incentive to engage in investigatory activity, since chances are they will lose to the earlier-filed judgment lien holder, even if they locate hidden assets and levy on them. Policy makers should question whether the simple activity of getting a judgment and filing a document is an activity that justifies the award of priority regardless of the merits of the claim.

What is most troublesome is that these questions of priority may not have been raised when these new statutes were considered. State policy makers appraising the new provisions and federal policy makers contemplating changes to the bankruptcy laws should consider the significant changes that the judgment lien statutes may create within the preexisting priority system before advising adoption of these more "efficient" procedures. The impact on the bankruptcy process may be yet more subtle and difficult to quantify. One can hypothesize, for example, that fewer business debtors will have the unencumbered assets that make the bankruptcy process worthwhile for trustees and unsecured claimants in the first place. Many such debtors may avoid bankruptcy altogether in these states and simply abandon their property to the lien holders. And while large numbers of the new liens may not make Chapter 11 reorganizations disappear, the liens could make it more difficult for a debtor to reorganize than it was before.

If this is the case, is the diminished bankruptcy activity that will follow desirable? Does or should federal policy protect the bankruptcy process and its federal priority claimants from state procedures that, on their face, are available to all yet tend to favor some over others? If the new judgment lien provisions

---

124 Judgment liens on real property suffer from the same sorts of problems and might well be attacked on the same basis. They might be distinguishable from judgment liens on personal property, because real property may be harder for a debtor to conceal. In addition, there may well be less unencumbered real property in difficult cases than unencumbered personal property.


126 The question whether the bankruptcy law should, as a matter of policy, affect a distribution of assets different from that mandated by state law has received recent scholarly attention. See Warren, Bankruptcy Policy, 54 U. Chi. L. Rev. 775 (1987);
are enacted by other states, these questions may become more pressing.

B. Effects on Debtor Protection—Direct Impact on Exemptions

Exemption provisions generally provide that some portion of the debtor’s property is not available to creditors to satisfy their judgments. These provisions vary immensely from state to state but generally arise from a concern that the judgment debtor not be reduced to total destitution and dependency through the operation of the execution statutes. All exemption provisions reflect a general legislative judgment that preserving some amount or types of debtor property is more important, for one or more reasons, than allowing the collection of debts from that property. Execution statutes typically contain procedures through which a debtor can raise an exemption claim and through which, if the claim is sustained, the property cannot be reached by the execution.

The new liens will probably affect the protection afforded debtors by exemption statutes because they handle exemption rights differently from the old statutes. Connecticut has apparently\(^1\) tried to keep these provisions from having an impact on consumers by excluding consumer judgments from the reach of these provisions.\(^2\) Nonetheless, since the legislation treats the lien as a security interest,\(^3\) if the lien were to reach the property of consumers it could have a devastating impact, because the law typically regards a debtor’s exemption rights as subordinate to the rights of one possessing a security interest.\(^4\)

---


\(^1\) See supra note 32.

\(^2\) The Connecticut legislation is quoted supra at text accompanying note 26.

\(^3\) *CONN. GEN. STAT.* § 52-355a(c) (Supp. 1988).

\(^4\) In most states, an exemption will be invalid against one holding a security interest in the exempt personal property. See generally Haines, *Security Interests in Exempt Personality: Toward Safeguarding Basic Exempt Necessities*, 57 Notre Dame L. Rev. 215 (1981).

This rule has not been lost on creditors. It has been an open secret for some time that creditors could simply and easily gain access to exempt property by getting the debtor to give a security interest in it. And this was so despite a near-universal rule that executory waivers of exemption rights were ineffective. *Id.*

The situation has been remedied somewhat by a provision in the Bankruptcy Code making many such security interests ineffective against exempt property, 11 U.S.C. § 522(f)(2) (1982), and by a similar rule enacted by the Federal Trade Commission to apply outside the bankruptcy context. 16 C.F.R. § 444.2(a)(2) (1984).
The Connecticut legislation is explicit in treating its lien as a security interest and, without substantial judicial countervailing forces, the lien could defeat a judgment debtor's exemption rights in the targeted property. Yet, in Connecticut one cannot obtain such a lien based on a consumer judgment. The question, then, is whether there are nonconsumer judgments that could be entered against those for whom exemption rights might be important. There may well be.131

Instead of excluding consumer judgments from the scope of its judgment lien legislation, California has limited its liens to certain categories of property. The legislation specifies that judgment liens can be acquired against accounts receivable, chattel paper, equipment (not including motor vehicles), farm products, inventory, and negotiable documents of title.132 By its terms, the California legislation excludes virtually all types of property its exemption statutes protect. One exception, however, is the California exemption for "personal property used in trade, business, or profession," the traditional tools-of-the-trade exemption, which is limited in California to a relatively generous value of $2500.133 Much of a small business debtor's business equipment fits this common exemption, thereby raising a question whether the judgment lien is subordinate to this exemption right.

The California statutes do not explicitly answer this question.134 However, since the legislation tends to treat its new lien as a judgment lien in most respects and not as a security interest, a sensible resolution is that the lien is inferior to the exemption rights as are more traditional judgment liens elsewhere.

Unlike the statutes of Connecticut and California, Maine's provision is explicit on the status of exemption rights. The lien only covers those types of "[real and] personal property which

---

131 Recently completed research confirms what many practitioners are already aware of: a substantial number of individual bankruptcies involve small businesses in which the business assets and the personal assets of the principal are hopelessly intertwined. See generally T. Sullivan, E. Warren & J. Westbrook, As We Forgive Our Debtors 108-27 (1989). Whether because debtors have given personal guarantees for the debts of their corporations or because their businesses lack a corporate form to shield their personal assets, creditors might seek potentially exempt personal assets for business-related debts.


134 But see Cal. Civ. Proc. Code § 703.010(a) (West 1987), which provides, in part, that "[t]he exemptions provided by this chapter . . . apply to all procedures for enforcement of a money judgment." The language suggests that the lien will be subordinate to the debtor's exemption rights.
New Judgment Liens are not exempt from attachment and execution.\textsuperscript{135} The statute thus will have no direct effect on debtors' exemption rights.

C. Other System-Wide Impact: "Efficient" Reconsidered\textsuperscript{136}

1. Indirect Impact on Exemptions

As suggested earlier, some debtors retain non-exempt property simply because for the creditor, the cost of attempting to collect is too great, and the possibility of success in collection efforts is too uncertain.\textsuperscript{137} Any realistic assessment of the debtor defenses provided by a collection system ought to take account of this shielding of debtor assets, whether or not the legislature deliberately intended such debtor protection. Such protection, the direct product of collection system inefficiencies, may well be more important to debtors than exemption statutes.\textsuperscript{138}

While it is highly unlikely that any legislature intended to bestow debtor protection through system inefficiencies, it does not follow that legislatures enacted substantive debtor protections within the collection system without regard to system inefficiencies. For instance, system inefficiency may have affected past legislative judgment on the appropriate substance of its exemption provisions. Similarly, an inefficient collection system may have made it less necessary to develop effective procedures for asserting exemption claims. Indeed, it appears that contemporary efforts to reduce system inefficiency may raise the same political question of wealth distribution that efforts to reduce the substance of exemption provisions themselves do.

Exemption statutes were generally enacted against the backdrop of local law, including typically inefficient collection sys-

\textsuperscript{135} ME. REV. STAT. ANN. tit. 14, § 4651(A) (Supp. 1986).

\textsuperscript{136} See generally Balkin, supra note 5, at 1477–78 (assailing a narrow "efficiency" analysis conducted by some proponents of law and economics as ultimately misleading and political in content).

\textsuperscript{137} Voluntary bankruptcy and the accompanying power to avoid a levy as a preference inject a substantial risk of failure into any execution. As discussed earlier, the new judgment lien statutes will probably create liens more likely to survive bankruptcy. If so, the bankruptcy risk within the collection system will have been lowerd by the new statutes.

\textsuperscript{138} Surely this would be the effect in a state like Pennsylvania where the exemption statutes protect only $300 of personal property plus a few odd miscellaneous items such as sewing machines. See 42 PA. CONS. STAT. ANN. §§ 8123–8124 (Purdon 1982).
tems. In enacting exemptions, legislatures were called on to assess the needs of their debtors and their assessments of these needs played a part in molding the exemption legislation. But surely legislatures could not have made these assessments in a vacuum. Evidence of debtor needs—indeed, the motivation to consider exemption reform at all—must come primarily from debtor groups within the political process. To some extent, at least, the preexisting collection system played a part in lawmakers’ perception and assessment of debtor need; an exemption package designed for a procedurally inefficient system might look very different from one designed for an efficient one. In view of the foregoing considerations, the first question a legislature might consider in connection with new judgment lien legislation is whether preexisting exemption provisions are substantively adequate in light of a more efficient collection regime.

Second, in a related vein, traditional exemption statutes may have been premised on the existence of only two distinct groups of debtors: consumer debtors who needed exemptions, and business debtors who did not need them. New data suggest that we might consider the small entrepreneurs who commingle business and personal assets and finances as a third group, one that has a disproportionately high rate of bankruptcy filings. A more efficient collection regime directed primarily at business debtors could exacerbate the exemption-related problems this third group might have. A policy maker might well conclude that in light of these research findings, this third group should be getting more exemption protection at the state level, and that making the collection system more efficient without addressing exemption protection will simply make matters worse.

California reconsidered its exemption provisions at the time it created its new judgment lien provisions. As the text makes clear, this comprehensive approach is desirable because of the interrelated nature of the collection process and exemption protection.


See id. at 111–12.

For example, given that this type of debtor uses her business (and its assets) to produce income and sustenance, might a state want to reconsider the breadth or size of its “tools-of-the-trade” exemption so that an executing creditor cannot through execution deprive the judgment debtor of her very livelihood by seizing nearly all the business assets?

The point here is not to advocate any particular resolution of the issue but rather to suggest that exemption protection may have been developed in a faulty conceptual environment.

Cf. T. Sullivan, E. Warren & J. Westbrook, supra note 131, at 121:
A second possible effect of more efficient procedure is an increased number of debtor demands on the exemption system. Indeed, exemption provisions and procedural inefficiency work in tandem in a given system to dispense protection to debtors. Reducing the costs of formal collection processes may well increase their use. If that is the case, exemption statutes will be pressed into service more often than they were before. But will a state's procedures for claiming exemption protection still be suitable in a more aggressive collection environment? Even if the exemption procedures are theoretically adequate, will the state's judicial apparatus for determining exemption-related issues be sufficient to handle an increased volume of exemption litigation? Finally, if there are extra burdens imposed on the judicial system, who will pay for them—debtors and creditors, or taxpayers? These are all questions a legislature might also consider in advance of improving collection system efficiency.

Third, an increase in the efficiency of collection will result in the decline of debtor protection which inefficient collection procedures, much like exemption provisions themselves, provide. Whether one labels it "corrective legislation" or "efficient procedure," it is likely that the reduction of collection process inefficiency results in a transfer of wealth from debtors to creditors. In other words, the promotion of efficiency has distri-
butional consequences. Thus, efficiency is not a politically neutral, but rather a politically loaded, proposition.

2. Impact on the Informal Collection System

It is widely known that debts are generally collected without resort to the legal process. With respect to the consumer system, for instance, it was stated in 1979:

The single most important fact about the consumer credit collection system is that, of the delinquent debts that are ultimately paid, the vast majority are collected through "consensual" debtor payments made after some kind of bargaining between creditor and debtor, and on occasion between the debtor's various creditors as well. Only a small percentage of delinquent debts are ever paid as a direct result of coercive execution.\footnote{Whitford, supra note 16, at 1051.}

One reason for preferring the informal system is that the costs of using the formal collection system are so great.\footnote{See Whitford, supra note 16, at 1053--55; Leff, supra note 3, at 5--18.}

a. Distributional Impact

1) Improved settlement value of judgments. The expense creditors must sustain in coercive collection tends to affect the settlements that creditors and debtors negotiate within the informal system. The debtor's leverage within the informal process depends, in part, on the extra expense she can force the creditor to sustain through formal means.\footnote{See Leff, supra note 3, at 5--10.} Conversely, the

\footnote{It seems doubtful that creditors will reduce their collection efforts in response to a more efficient collection regime; the text proceeds on the more likely assumption that creditors do not currently collect all available property from defaulting debtors because of system inefficiencies and that they will continue to invest the same resources in collection activities in a more efficient system as they did before.

Of course, an economist might argue that enhancing collection efficiency will produce a net gain for the economy, which will trickle down to everyone and, as a result, is a good that all should embrace, both debtors and creditors. Moreover, an economic analysis does not purport to comment on the distributional fairness of enhanced efficiency. The point here is not to dispute the analysis but merely to observe: (1) that it is nearly certain that the creditor class will be the initial beneficiaries of the newly achieved efficiency; (2) that it seems fairly certain that the debtor class will directly finance of some gains in efficiency that the new statutes yield (assuming that creditors maintain the same level of collection activity); and (3) that it is uncertain how and whether the "newly acquired" wealth will trickle down from the creditor class to the broader population.}
creditor’s attraction to an offer of less-than-full payment depends in part on the added unrecoverable expenses and risk of coercive collection. If the new judgment lien provisions shift the leverage of one group or the other within the process, that shift will have economic consequences for both groups. Two examples from the earlier discussion should suffice to show that negotiating leverage will probably be changed by the new provisions.

Consider the judgment debtor engaged in ongoing secured financing in California. Before the legislature enacted the new provisions, a judgment creditor would have had to deploy execution and either attempt to levy on the collateral or search for other unencumbered assets. Absent unencumbered property, the judgment creditor’s main obstacle was the presence of the secured party who would assert prior rights to the collateral. The judgment creditor’s relatively high risk of getting nothing or, worse, of litigation with a secured party, gave the judgment creditor (or the creditor with a claim considering whether to get a judgment) a powerful reason to settle with the debtor for less than the claim or judgment.

Now that California’s new judgment lien provisions are in effect, that creditor’s need to negotiate or settle drops markedly. For the price of a simple U.C.C. filing, that judgment creditor can destroy the debtor’s secured financing and perhaps put her out of business. The process is cheap and involves almost no risk to the judgment creditor. The debtor must reorient priorities in the direction of the judgment creditor, risk loss of secured financing, or enter bankruptcy to avoid the judgment lien. It is likely that in many cases the path of least resistance is to settle with the judgment creditor. The settlement value of the judgment in this situation has soared.

The same dynamics hold when the debtor in California has unencumbered personal property. Before the advent of the new provisions, the creditor’s collection option was an actual levy on the targeted personal property. The debtor’s response could have been to avoid that execution as a preference by filing a bankruptcy petition within ninety days of the execution.\(^149\) The debtor’s power to thwart the creditor’s expensive collection efforts (and the chances that a seizure of property would prompt

---

\(^{149}\) See 11 U.S.C. § 547(b) (Supp. IV 1986).
the debtor to do so) gave the creditor a large incentive to work out a consensual resolution with the debtor.

The new provisions change that equilibrium. Because fixing a judgment lien is so cheap, the creditor is unlikely even to pause in response to the threat of the debtor's bankruptcy. Furthermore, once the lien is in place, the debtor does not have the same incentive to avoid it, because the lien has not deprived the debtor of possession. The threat of a bankruptcy filing does not carry the same leverage value for the debtor, because the creditor will not have much of a net loss (only filing fees and minimal effort) if the debtor files. Yet if the debtor does not file a petition within 90 days of the fixing of the lien, the lien will be unavoidable as a preference.\textsuperscript{150} The leverage value bankruptcy has for debtors both before and after the fixing of a lien on personal property has been substantially reduced with these new provisions. Once again, the settlement value of the judgment has risen.

(2) Distributional implications of more valuable judgments. So what's the problem, the reader may well ask. Is not easier collection the underlying rationale for the provisions? Is not the whole point to redistribute wealth from nonpaying debtors to judgment creditors who fought hard for their judgments? Are we not promoting with these provisions a central value in the law, that judgments should be paid? Will not the greater collection system efficiency that comes with these statutes benefit everyone? Questions like these cut to the heart of the problems that come with oversimplified analysis of innovation in the debtor-creditor field. Simply understanding that there can be different answers to such questions is central in assessing the merit of the new provisions.

If the normative proposition is that these provisions that improve the settlement value of judgments are good simply because judgments should be paid, we are implicitly advancing the premise that full, complete payment of judgments is an unqualified good the law should seek to attain. But such a premise flies in the face of several hundred years of legal history: the law clearly does not do all it could do to secure the payment of its judgments. It does not execute defaulting judgment debtors; indeed, the legal system seldom imposes criminal sanctions

\textsuperscript{150} To the extent that the lien might reach exempt property, the lien is probably avoidable in bankruptcy under 11 U.S.C. § 522(f) (Supp. IV 1986).
New Judgment Liens

on debtors,151 and offers debtors the escape hatch of voluntary bankruptcy. "Judgments should be paid" sounds absolute and is difficult to quarrel with in the abstract; however, when we consider the lengths to which the law actually goes to advance the proposition, we find it is merely one of several competing values in this field that the law might advance. If the law had not qualified this proposition with bankruptcy, exemptions, limits on the collection process, and system inefficiency, we would have had to develop a different lexicon to express the complexity of our normative conclusions on paying judgments.152

If "judgments should be paid" does not supply a strong normative grounding, perhaps "efficiency" will. If some wasted energy from the debtor-creditor system can be eliminated, all participants in that system might be the beneficiaries and those resources might be put to better economic use. The new provisions will probably increase the settlement value of judgments because they are cheaper to deploy. Is not everyone in business a creditor and a debtor at various times and is not everyone thus going to benefit from improved efficiency in the system?

Some important data bear on these points. Recent field studies suggest that there may be a definable debtor group and a definable creditor group. The work by Professors Sullivan, Warren, and Westbrook mentioned earlier shows that small business debtors account for a disproportionately high percentage of defaults resulting in business bankruptcy.153 Small businessepeople default more often than large businesspeople, and one might therefore expect them to be on the debtor side more often than they will be on the creditor side. If this is actually the case, then to the extent that the new provisions increase the settlement value of a judgment, there will probably be a redistribution of wealth from small business debtors to their creditors.154 The

---


152 Professor Warren makes this same point in connection with the lexicon of contract doctrine. Warren, supra note 126, at 779.

153 In their study, the authors found that debtors with small businesses accounted for 10.4% of the bankruptcies but for only 7.3% of the general population. When they added debtors who formerly had small businesses, the total accounted for 20% of the total bankruptcy filings. T. SULLIVAN, E. WARREN & J. WESTBROOK, supra note 131, at 205.

154 Creditors could respond to the new provisions by reducing their collection efforts to net the same proceeds, thereby realizing a cost savings without improving the settlement value of judgments. It seems unlikely that creditors would respond in this way to the new provisions and the text proceeds on the assumption that they will not. The question is ultimately an empirical one and a definitive answer awaits the evidence.
point that a wealth redistribution will come with these provisions was made earlier in connection with exemption protection but the political content of the provisions is worth emphasizing again in the business context.

Yet it remains difficult to quarrel with legislation that will reduce legal waste, even if the immediate distributional effects are politically delicate. After all, one might argue, reduced collection costs will ultimately result in cheaper credit for business debtors and a bounty of sorts for the broader economy. Once again, however, one must be sensitive to other parts of the system to see if there may be undesirable side effects of improved ability to collect judgments.

One potential side effect is the impact the provisions might have on the personal finances of business debtors. The finding that small business debtors commingle their personal and business finances suggests, once again, that exemptions may take on enhanced importance with the new statutes. As the settlement value of a judgment increases with the new provisions, judgment debtors will need to divert resources previously allocated elsewhere to settling accounts with judgment creditors. Diversion of resources from family support and nutrition, for example, might be more likely to occur under the new provisions and might ultimately cost the broader economic system more than the new provisions save.

b. Implications of More Valuable Judgments for Creditors without Judgments

In traditional jurisdictions, both ordinary creditors and judgment creditors can lay claim to the debtor’s personal property only at considerable expense. The judgment creditor must de-

---

155 Cf. T. Sullivan, E. Warren & J. Westbrook, supra note 131, at 118–19. 156 One can imagine many ways these statutes could wind up costing more than they save. Suppose the increased leverage supplied by these statutes and the tenacity of small business debtors to hang on resulted in nutritional or shelter deficiencies for the debtor and her family that the state ultimately had to remedy at high expense. Or suppose the provisions turned out to hasten the financial demise of small businesses which, in turn, resulted in lost jobs and unnecessary economic costs like moving expenses, job search fees, and unemployment. It is easy to imagine these latter items costing the overall economy more than the resources that are saved by the new statutes. The counterpoint, of course, is that some debtors hang on longer than they “should” and that it is indeed better that losing enterprises fail sooner rather than later. We do not currently know where the optimal “failure point” is. The point here is that one’s opinions on the subject no doubt depend in part on the number of potential effects one considers in assessing the facts.
ploy execution procedures to get a lien; the person with a mere claim must first get a judgment and then execute on it. Partly because of expense and partly because the debtor can undo execution with a bankruptcy petition, in many cases neither ordinary creditor nor judgment creditor has considerable leverage to force payment when the debtor has no real estate. In those situations, extra-legal leverage may well play a larger role than legal leverage in the debtor's decision to pay one creditor before the next. Debtors may base priority in paying creditors on their need for continued service or financing, for example, rather than on the nature of the creditor's claim.

In judgment lien reform jurisdictions like California, the additional legal leverage held by a creditor with a new judgment lien may change the way the debtor allocates her inadequate resources. That is precisely what makes these reform statutes attractive in the first place: debtors will begin paying judgment creditors sooner than they would otherwise—before they pay others. Yet what impact will such a reordering of priorities have on the debtor's economic survival? Might the reordering squeeze the debtor in a way that accelerates financial demise? As suggested earlier, unsecured creditors in these jurisdictions seem less likely to benefit as much from bankruptcy, including reorganization under Chapter 11, as they might have under more traditional systems. They might therefore be less tolerant of late payments and less flexible in working through difficult periods with the debtor. The resulting increased pressure on the debtor combined with a less viable bankruptcy process could yield an unpredictable economic impact. Legislatures ought to consider carefully whether the new statutes will lessen the chances for economic survival of shaky businesses and, if so, whether that is desirable as a policy matter.

The improved position of the judgment creditor in relation to other creditors in the new systems raises yet another potentially undesirable consequence: claimants' increased use of formal judicial procedures to collect their debts. As developed earlier, in most jurisdictions, creditors with judgments have substantial disincentives to use the judicial process to enforce their judgments. The judicial process is expensive, the results are uncertain, and the debtor can file a bankruptcy petition and render the efforts worthless in any event. The enforcement problems no doubt work their way backwards in many cases to the point where a claimant decides whether or not to bother to get a
judgment. It makes little sense under the present systems to begin a legal action in the first place if it will ultimately yield little or no money. Additionally, in the old systems, claimants and judgment holders are both unsecured creditors without claims to specific personal property. In a case of difficult enforceability, a competing claimant need not worry much about the judgment creditor. Indeed, if the judgment creditor attempted enforcement, the claimant without a judgment might file an involuntary bankruptcy petition and thereby nullify the short-lived competitive advantage.

As suggested earlier, one expects that most creditors with judgments will get liens on personalty under the new systems, because doing so is so inexpensive. Yet the very fact that those with judgments will get liens as a matter of course upsets a kind of equilibrium formerly held by ordinary claimants and judgment creditors without liens. A creditor with a mere claim might have to be more legally competitive in the new jurisdictions because if a second creditor were to get a judgment first, that second creditor could easily get a decisive competitive advantage in the form of an earlier lien. Put another way, because judgments have become more valuable both as against debtors and as against other creditors, one expects the inter-creditor competition for judgments to increase.

If the new statutes will prompt an increased use of the judicial system in debt collection, the value of the provisions comes into serious question at two levels. The first is a question of redistribution of debtor assets, this time among competing claimants. The distributional problem is suggested by the observation that some creditors are able to obtain judgments more easily than others and that the ease in getting judgments seems to have little to do with the nature of the underlying claim. For example, suppose the debtor assaulted claimant one, an individual, and failed to pay a loan installment to claimant two, a finance company. Which of the two seems more likely to get the first judgment and lien? Do we want a system that, in fact, will create a high priority in relation to other creditors for those that, because of the strength of their claims or the size of their legal staffs, can most easily get judgments? As suggested earlier, priority statutes typically award liens to creditors on the basis of a policy judgment that the claimant is somehow deserving.

The statutes under consideration here have made that kind of distinction between those that get judgments and all others. It seems very naive indeed to assume that all claimants have equal access to judgments and that the most deserving of special priority will be the ones who will obtain them.

The second level of questions goes to the tendency these statutes may have to encourage formal, over informal, debt collection itself. Under the traditional systems, a creditor, with or without a judgment, can get a non-possessory lien on the debtor's personal property by acquiring a consensual Article 9 security interest. To obtain that under the traditional procedures, the debtor and creditor negotiate informally over debt collection. To what extent will the incentives to make use of informal measures decrease under the new provisions? To what extent do the incentives actually encourage resort to the legal system as a first, rather than last, move? Would we want to move away from the present system in which nearly all debts are settled informally and consensually? If use of formal processes increases, would the filing fees associated with increased use of formal processes fully cover the legal system's expanded costs? Might not the total system losses, given enhanced creditor competitiveness, exceed those under more traditional systems?

Indeed, can one even consider the new statutes "efficient" when viewed in the context of the larger system? A seldom used judicial system combined with a heavily used informal collection system (the old system) may well be cheaper and more "efficient" than a frequently used judicial system combined with less reliance on the informal system. Once other values, such as consensual dispute resolution as the preferred approach to debt collection and the policy proposition that the most deserving claimants ought to be the first paid from limited assets, are taken into account, the conclusions that these statutes will yield a bounty in saved costs are open to serious question.

None of the costs of informal dispute resolution are directly imposed on citizens as taxes. If the filing and associated fees do not cover the system costs within the formal system, an increased use of that system (and decreased use of the informal system) would redistribute some dispute resolution costs now borne by creditors (and their customers) to taxpayers. While one could develop a policy argument favoring a redistribution of costs from creditors and their customers to taxpayers, the point here is that a legislature should not implicitly decide to redistribute those costs without considering the policy implications.
Those who practice or preach state collection law routinely condemn state collection statutes as cumbersome, expensive, and inefficient. As with modern architecture, in judgment collection, lean and trim—efficient—is often thought of as inherently better. The new statutes examined here offer possibly drastic reductions in the inefficiency of the state collection machinery, and one’s first instinct is to applaud and embrace the new legislation. The impulse is to see the new provisions as efficient, cost-saving, and innovative legislation that is desirable within the debt collection system.

Yet, further examination of the statutes, particularly within the larger context of the debtor-creditor system, produces ambivalence. It seems likely that the new statutes will have an impact on the bankruptcy process as well as secured lending under Article 9 of the U.C.C., that they will redistribute wealth between debtor and creditor classes in the same way that changing exemption laws redistributes wealth, that they will set priorities among creditors in ways that might not be desirable, that they may have a substantial impact on the informal collection process, that they may shift some costs of dispute resolution from debtors and creditors to taxpayers, and that they may even provoke lawsuits by a debtor’s claimants who are fearful that others will use these new provisions first. Indeed, when viewed in this larger context, the statutes have remarkable political implications, and there are serious questions about whether they will produce the increased efficiency we first imagine or whether, in fact, total system losses will be greater.

Even if one believes that “efficient” is “better,” that a clean facade is inherently superior to a decorated one, deciding whether a proposal is “efficient” is enormously more complicated than deciding whether a building is in the Second Empire or International Style. In the debtor-creditor field, one cannot simply look to outward appearances: determining whether a proposal is “efficient” requires more than simply seeing whether a procedural innovation will reduce the immediate legal costs.

A review of judgment lien reform statutes illustrates major problems with easy conclusions about legal efficiency based on too narrow a view of impact and too rigid an idea of those things to which we might attach value. It also demonstrates the central need in this area of the law for extensive field work to assess
the actual effects of legal change. These statutes have numerous potential side effects that are not readily apparent and which, if they occur, may not be desirable. The statutes' impact requires close monitoring by both federal and state policy makers. Until we have a better idea of their actual impact, legislatures would be wise to move slowly in embracing these statutes.