

## Sixth Supplement to Memorandum 79-29

Subject: Study D-300 - Enforcement of Judgments (Costs and Interest)

Existing law provides for recovery of the costs of enforcing a judgment by the judgment creditor and allows the judgment creditor to recover interest on the judgment until it is satisfied. Attached to this memorandum is a staff draft of provisions relating to costs and interest. This memorandum discusses a number of policy issues raised by the staff draft.

Interest on Costs

The statutes are silent on the question whether interest accrues on costs that have been incurred during the enforcement process. Generally, interest accrues on "judgments." Costs may be taxed by the court or determined upon motion, and thereafter are entered "on the margin of the judgment" and are included in writs subsequently issued to enforce the judgment. Code Civ. Proc. § 1033.7. Whether this makes costs part of the judgment for purposes of interest is not clear. The Judicial Council form of the writ of execution, through a quirk of draftsmanship, provides for interest on costs if there has been a partial satisfaction of the judgment but for no interest on costs otherwise.

The staff believes that costs advanced by the judgment creditor and allowed by the court as reasonable and necessary should be considered part of the judgment and should draw interest. Interest compensates the judgment creditor (inadequately, perhaps, at the present legal rate of seven percent) for the loss of use of money, and collection costs advanced by the judgment creditor are actual expenditures whose use the judgment creditor has lost. The staff has drafted the attached provisions to include interest on costs.

Compound Interest

Prior to 1918, compounding of interest on judgments was statutorily prohibited. This provision was repealed in 1918 and neither the present statutes nor the Constitution preclude compounding of interest on judgments. Case law disfavors compound interest. See, e.g., Fuller v. White, 33 Cal.2d 236 (1948). Courts have occasionally awarded compound interest on judgments, usually in cases involving fraud. See, e.g.,

McNulty v. Copp, 125 Cal. App.2d 697 (1954). The Judicial Council writ of execution form, again through a drafting peculiarity, permits the compounding of interest from the date of issuance of the writ until the date of levy where there has been a partial satisfaction of the judgment, but not otherwise.

The staff believes that compound interest is not desirable. It is a way to avoid the legal rate of interest set by the Constitution. The Constitution now permits the Legislature by statute to vary the legal rate (not to exceed 10 percent), and this is the means that should be used to accommodate changes in the money market, if it appears desirable to do so. This issue is discussed below. The staff has drafted the attached provisions so as not to allow compound interest, and will draft the form of writ to conform.

#### Stopping Interest

Theoretically, the judgment creditor is entitled to interest up to the date the judgment is fully satisfied. As a practical matter, however, where there is a levy under a writ, the levying officer will need to stop accrual of interest at some point in order to compute the interest and make payments. This is particularly true where there are several items of property levied on and sold at different times.

Under existing practice, interest ceases to accrue at the date of levy. The staff has continued this in the attached draft as to levies on personal property. Stopping interest early gives the judgment creditor an incentive to have property that has been levied on sold promptly. Also, the interest lost between the time of levy and the time of sale is ordinarily quite small. This is not necessarily the case, however, under the Commission's recommendation since there is a statutory 140-day delay between the date of levy and sale of real property. The Commission should consider whether to continue interest in case of a levy on real property up to the date of sale. The staff draft does this; where there is a sale of real and personal property as a unit, interest would cease to accrue at the time of sale.

#### Legal Rate

The legal rate of interest on judgments in California is seven percent, set by the Constitution. Article XV, Section 1, was amended

last year to permit the Legislature to change the rate by statute or to provide a variable rate, not to exceed 10 percent, but absent legislative action the Constitution provides a rate of seven percent. The Legislature has not acted to change the seven-percent rate.

Postjudgment interest serves two important functions--it compensates the judgment creditor for the loss of use of the money until the judgment is paid, and it acts as an incentive for the judgment debtor to pay the judgment promptly. When the legal rate of interest approximates the prevailing interest rate on the money market, these two functions are in fact fulfilled. The judgment creditor is compensated at a rate that would be obtainable were the judgment satisfied and the funds available for investment; the judgment debtor has no incentive to delay payment since it would not be advantageous to invest the money elsewhere.

When the legal rate of interest is below the market rate, however, neither of the functions of postjudgment interest is satisfied. The judgment creditor is not fully compensated for the loss of use of the money and the judgment debtor is inclined to defer payment of the judgment as long as possible in order to make money by investing at the market rate. This is the situation in California at present, with the legal rate at seven percent and the market rate at 12 percent or higher--the judgment debtor may delay payment as long as possible and make five percent interest during the period of delay.

Senate Bill 101 (Rains) was introduced in the Legislature this year to provide a variable interest rate based on the Federal Reserve Bank of San Francisco rate on advances to member banks. This rate would fluctuate monthly and thereby provide a constant corrective so that the legal rate of interest would approximate the market rate at the time of entry of judgment. The bill was defeated in the Judiciary Committee of the Senate due, as we understand it, to the opposition of the insurance industry.

The insurance industry is perhaps the most identifiable group having an interest in maintaining a below market legal rate of interest. Insurance companies must maintain large reserves, which can be invested at market, so that any delay in payment of a judgment that accrues interest at a low rate is advantageous. In fact, whenever an insurance

company loses a judgment, it invariably files a notice of appeal and obtains a stay of enforcement, thereby giving it the benefit of several months' delay in payment. Ordinarily the appeal is not pursued further unless there is a legitimate issue in the case. Prosecution of an appeal for the sole reason of delaying payment of the judgment is infrequent since the costs of appeal may outweigh any profit to be made by manipulation of the interest rate differential. Even so, where a large judgment is appealed by an insurer the appeals process can take several years and the loss of money to the creditor and the gain to the debtor by having a low legal rate can be substantial. And for less responsible debtors than insurance companies, there remains an incentive to avoid prompt and voluntary payment for as long as possible thereby forcing resort to execution with its delays.

For these reasons, most jurisdictions are raising their legal rates of interest on judgments. The following chart indicating the changes that have occurred in the various jurisdictions in the past decade is instructive.

<u>Rate</u>	<u>Number of States in 1968</u>	<u>Number of States in 1978</u>
4%	1	0
5%	5	1
6%	40	26
7%	4	5
8%	0	11
8.5%	0	1
9%	0	1
10%	0	5
	<u>50</u>	<u>50</u>

The staff believes it is desirable to increase California's legal interest rate to a point where it more nearly approximates market rate, notwithstanding the opposition of the insurance industry. One possible approach is to adopt a flexible or variable legal interest rate based on a standard such as the prime rate, Federal Reserve Bank discount rate, or treasury bill discount rate. Ideally, such a variable rate would be continuously revised by a state agency and the interest accruing on the judgment would continuously change. Such a scheme is too complex and impractical to administer, however.

An alternative is to allow the interest rate to vary from time to time, and have a single rate for each judgment based on the rate in

effect at the time of entry. This scheme would provide a rough approximation of market rate for judgments, although if the judgment took more than a brief period to satisfy it could easily become out of line with changing market rates. Also, this scheme would necessitate a procedure to preserve a record of the legal rate in effect at the time of entry of the judgment. The staff is inclined to think that there is too much administration for too little benefit in this scheme.

A third alternative, and one preferred by the staff, is to fix the rate high--at 10 percent--but to reserve the right of the Legislature to lower the rate at any time both as to currently and previously entered judgments. The virtues of this scheme are: (1) It is simple--there is no need for bureaucratic computations of market rates; there will be a single rate known by debtor, creditor, and levying officers. (2) It is accurate--it appears unlikely that the market rate will drop below 10 percent in the foreseeable future. (3) It satisfies the functions of postjudgment interest to compensate the judgment creditor as nearly as possible and give the judgment debtor an incentive for prompt payment. If the market rate drops below 10 percent, the incentive will be even greater. There is a danger of inequity where the market rate drops substantially below 10 percent and the debtor is in fact unable to pay the judgment. In this case, (4) the scheme allows the Legislature to act to lower the legal rate. It is unlikely that the Legislature will act unless the market rate falls substantially below 10 percent, thus eliminating the need to accommodate minor changes in the market rate. The attached draft incorporates the substance of this provision.

Respectfully submitted,

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Assistant Executive Secretary

Article 4. Costs and Interest§ 702.410. Right to costs of enforcing judgment

702.410. The judgment creditor is entitled to reasonable and necessary costs of enforcing a judgment.

Comment. Section 702.410 supersedes former Section 1032.6. The reference to superior, municipal, and justice courts in former Section 1032.6 is not continued because it is unnecessary. Recoverable costs may be limited by statute. See, e.g., Section 703.260(d) (cost of registered process server).

Defined terms:

Costs § 701.140  
 Court § 701.150  
 Judgment § 701.190  
 Judgment creditor § 701.200

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§ 702.420. Memorandum of costs of enforcing judgment

702.420. (a) The judgment creditor may claim under this section the following costs of enforcing a judgment:

(1) Statutory fees for preparing and issuing, and recording and indexing, an abstract of judgment.

(2) Statutory fees for issuing a writ for the enforcement of the judgment.

(3) Statutory costs of the levying officer for performing the duties under a writ.

(4) Costs incurred in connection with any proceeding under Chapter 5 (commencing with Section 705.110) (special procedures for enforcement of a money judgment) which have been approved as to amount, reasonableness, and necessity by the judge or referee conducting the proceeding.

(b) Before the judgment is fully satisfied but not later than six months after the costs have been incurred, the judgment creditor claiming costs under this section shall file a memorandum of costs with the court clerk and serve a copy on the judgment debtor in the manner provided in Section \_\_\_\_\_. The memorandum of costs shall be executed under oath by a person who has knowledge of the facts and shall state

that to the person's best knowledge and belief the costs are correct, are reasonable and necessary, and have not been satisfied.

(c) Within 10 days after the memorandum of costs is served on the judgment debtor, the judgment debtor may apply by noticed motion to have the costs taxed by the court. The court shall make an order allowing or disallowing the costs to the extent justified under the circumstances of the case.

Comment. Section 702.420 continues the substance of the first paragraph of former Section 1033.7, with the exception of the references in former law to the fee for issuance of a writ of prohibition. A motion under this section may be determined at chambers. See Section 166.

The costs of issuance of a writ and the levying officer's costs are automatically added to the amount to be satisfied as provided by Section 702.460. If the property levied upon under the writ is insufficient to satisfy the accrued costs, the judgment creditor must resort to the memorandum of costs procedure in this section in order to have the unsatisfied costs added to the judgment. See Section 702.440 (addition of costs to judgment).

Defined terms:

Costs § 701.140  
Court § 701.150  
Judgment § 701.190  
Judgment creditor § 701.200  
Judgment debtor § 701.210  
Levying officer § 701.220  
Writ § 701.290

368/240

§ 702.430. Motion for costs of enforcing judgment

702.430. (a) The judgment creditor may claim costs, other than those that may be claimed under Section 702.420, by noticed motion. The motion shall be made before the judgment is satisfied in full, but not later than six months after the costs have been incurred. The costs that may be claimed under this section include costs incurred, but not approved by the court or referee, in a proceeding under Chapter 5 (commencing with Section 705.110) (special procedures for enforcement of a money judgment).

(b) The notice of motion shall describe the costs claimed, shall state their amount, and shall be supported by an affidavit of a person

who has knowledge of the facts stating that to the person's best knowledge and belief the costs are correct, are reasonable and necessary, and have not been satisfied.

(c) The court shall make an order allowing or disallowing the costs to the extent justified under the circumstances of the case.

Comment. Section 702.430 continues the substance of the second paragraph of former Section 1033.7.

Defined terms:

Costs § 701.140

Court § 701.150

Judgment § 701.190

Judgment creditor § 701.200

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§ 702.440. Addition of costs to judgment

702.440. (a) Costs are added to and become a part of the judgment:

(1) Upon the filing of an order allowing the costs pursuant to this article.

(2) If a memorandum of the costs is filed pursuant to Section 702.430 and no motion to tax is made, upon the expiration of the time for making the motion.

(b) The costs added to the judgment pursuant to this section are included in the amount of the judgment remaining unsatisfied.

Comment. Section 702.440 supersedes the last paragraph of former Section 1033.7.

Defined terms:

Costs § 701.140

Judgment § 701.190

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§ 702.450. Interest on judgment

702.450. (a) Interest accrues at the rate of 10 percent per annum on the amount of a judgment remaining unsatisfied. The Legislature reserves the right to change this rate at any time and set the rate at not less than seven percent per annum and not more than 10 percent per



annum for any judgment regardless of the date of entry of the judgment or the date any obligation upon which the judgment is based was incurred.

(b) Interest commences to accrue on the date of entry of judgment and ceases to accrue at the earliest of the following times:

(1) The date the judgment is satisfied in full or the date the judgment debtor tenders or deposits in court the amount of the judgment remaining unsatisfied.

(2) The date of levy on personal property or the date of sale of real property or real and personal property under the writ if the judgment is satisfied pursuant to a writ under this title.

(c) If the judgment is partially satisfied pursuant to a writ or otherwise, interest ceases to accrue as to the part satisfied on the date it is satisfied.

Comment. Subdivision (a) of Section 702.450 alters the legal rate of interest on judgments from seven to 10 percent as permitted by Article XV, Section 1 of the California Constitution. The Legislature reserves the right to alter the interest rate as to both past and future judgments at any time. Subdivision (a) also recognizes that the judgment on which interest accrues may include subsequently added costs in addition to any court costs and prejudgment interest included in the judgment as entered. See Section 702.440 (subsequent costs included in amount of judgment remaining unsatisfied).

The introductory portion of subdivision (b) codifies the rule as to the time postjudgment interest commences to run. See, e.g., *Dixon Mobile Homes, Inc. v. Walters*, 48 Cal. App.3d 964, \_\_\_ Cal. Rptr. \_\_\_ (1975).

Subdivision (b)(1) codifies the common law rule on the time interest ceases to accrue. See, e.g., *Beeler v. American Trust Co.*, 28 Cal.2d 435, \_\_\_ P.2d \_\_\_ (1946) (tender of amount due); *Pinecrest Prods., Inc. v. RKO Teleradio Pictures, Inc.*, 14 Cal. App.3d 6 (1970) (deposit with court). See also Section \_\_\_\_\_ (judgment deemed satisfied in full if judgment creditor accepts different performance in full satisfaction).

Subdivision (b)(2) is drawn in part from former Section 682.1 (writ form--interest under writ to date of levy). Subdivision (b)(2) provides for the running of interest to the date of sale in the case of a sale of real property in recognition of the delay in such a sale under Section 703.630.

Subdivision (c) makes clear that the provisions of subdivision (b) only apply to cases where a judgment is satisfied in full. In case of a partial satisfaction interest continues to accrue as to the part satisfied until the date the part is actually satisfied.

Defined terms:

Court § 701.150  
Judgment § 701.190  
Judgment creditor § 701.200  
Judgment debtor § 701.210  
Writ § 701.290

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§ 702.460. Costs and interest under writ

702.460. (a) If a writ is issued pursuant to this title to enforce a judgment, the costs and interest to be satisfied in a levy under the writ are:

(1) The statutory fee for issuance of the writ.

(2) If the judgment creditor has filed an affidavit with the court clerk stating the amount of interest that has accrued from the date of entry of the judgment to the date of issuance of the writ, the amount of the accrued interest.

(3) The amount of interest that accrues on the amount of the judgment remaining unsatisfied from the date of issuance of the writ until the date of levy under the writ.

(4) The levying officer's statutory costs for performing the duties under the levy.

(b) In a levy under the writ, the levying officer shall collect the amount of costs and interest entered on the writ pursuant to paragraphs (1) and (2) of subdivision (a), compute and collect the amount of additional interest required to be collected by paragraph (3) of subdivision (a) by reference to the daily interest entered on the writ, and determine and collect the amount of additional costs pursuant to paragraph (4) of subdivision (a).

Comment. Section 702.460 supersedes former Section 682.2 and a portion of former Section 1033.7. This section applies not only to writs of execution, but to other writs as well.

Defined terms:

Costs § 701.140  
Court § 701.150  
Judgment § 701.190

Judgment creditor § 701.200  
Levying officer § 701.220  
Writ § 701.290

Cross-references:

Contents of writ of execution § 703.130

368/245

§ 702.470. Motion to tax costs collected by levying officer

702.470. Within six months after a writ is returned, the judgment debtor may apply by noticed motion to have the costs collected by the levying officer pursuant to Section 702.460 taxed by the court. The court shall make an order allowing or disallowing the costs collected to the extent justified under the circumstances of the case. The judgment debtor has the burden of showing that the costs collected were not reasonable or were not necessary. If costs collected are disallowed, the court shall order the entry of judgment against the judgment creditor in the amount of disallowed costs or shall order the amount of disallowed costs to be set off against any amount of the judgment against the judgment debtor remaining unsatisfied.

Comment. Section 702.470 is intended to provide a remedy for the judgment debtor in a case where costs are collected by the levying officer pursuant to Section 702.460. If the costs of issuing a writ and the levying officer's costs are not collected under the writ, the judgment creditor must resort to the memorandum procedure provided by Section 702.420 and the objections of the judgment debtor may be asserted by way of a motion to tax pursuant to Section 702.420(c).

Defined terms:

Costs § 701.140  
Court § 701.150  
Judgment § 701.190  
Judgment creditor § 701.200  
Judgment debtor § 701.210  
Levying officer § 701.220  
Writ § 701.290

405/463

§ 702.480. Deposit of levying officer's costs

702.480. (a) Except as otherwise provided by law:

(1) As a prerequisite to the performance by the levying officer of a duty under this title, the judgment creditor shall deposit a sum of

money with the levying officer sufficient to pay the costs of performance of the duty.

(2) As a prerequisite to the taking of property into custody by the levying officer, whether by keeper or otherwise, the judgment creditor shall deposit with the levying officer a sum of money sufficient to pay the costs of taking the property and keeping it safely for a period not to exceed 15 days. In the event that continuation of the custody of the property is required, the levying officer shall, from time to time, demand orally or in writing that the judgment creditor deposit additional amounts to cover estimated costs for periods not to exceed 30 days each. A written demand may be mailed to the judgment creditor. The judgment creditor shall be given not less than three business days after receipt of the demand within which to comply with the demand. In the event that the money so demanded is not paid within the time specified in the oral or written demand, the levying officer shall release the property in the manner provided by Section 703.240.

(b) The levying officer is not liable for failure to take or hold property unless the judgment creditor has fully complied with the provisions of this section.

Comment. Subdivision (a)(1) of Section 702.480 makes more specific the requirement that costs of the levying officer be paid in advance. See Gov't Code §§ 6100, 24350.5.

Subdivision (a)(2) is comparable to Section 488.050 (expenses in attachment). Subdivision (a)(2) recognizes the practice under former law of making an oral demand for costs.

The introductory clause of subdivision (a) recognizes that there are exceptions to the general rule stated in Section 702.480, such as where certain governmental agencies are judgment creditors. See Labor Code § 101 (Labor Commissioner). Similarly, certain creditors may not be required to prepay costs. See Section 1677 (collection of support payments under Uniform Reciprocal Enforcement of Support Act); *Martin v. Superior Court*, 176 Cal. 289, 296-97, 168 P. 135, \_\_\_ (1917) (actions in forma pauperis).

Subdivision (b) is comparable to Section 488.060(a) (attachment).

Defined terms:

Costs § 701.140  
Judgment creditor § 701.200  
Levying officer § 701.220