

#D-300

8/14/80

Second Supplement to Memorandum 80-59

Subject: Study D-300 - Enforcement of Judgments (Effect of Stay of Enforcement of Judgment)

Attached is a revised version of one section of the proposed enforcement of judgments statute (Section 697.040) relating to the effect of a stay of enforcement on a judgment lien. Also attached are the conforming revisions of the existing statutes relating to stays of enforcement. We suggest that you read this material with care prior to the meeting.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel

## EFFECT OF STAY OF ENFORCEMENT OF MONEY JUDGMENT

The proposed law includes provisions concerning the effect on the judgment creditor's enforcement remedies when enforcement of a money judgment is stayed. If an appeal is taken from the trial court judgment and a sufficient undertaking is provided, all enforcement proceedings must cease. Any property levied upon must be released, and no enforcement lien may thereafter be created or continued during the pending of the appeal. The same rules apply if a California judgment is entered on the basis of a sister state judgment and the enforcement of the California judgment is stayed. These rules continue existing California law.<sup>1</sup>

The proposed law also provides rules concerning enforcement of the judgment when the trial court stays enforcement of a money judgment. The proposed law makes clear that the trial court has authority to grant a stay for a limited time ending not later than 10 days after the last date on which a notice of appeal could be filed.<sup>2</sup> Such a stay may be granted, for example, to allow time to perfect the appeal if one is to be taken or to give the judgment debtor time to arrange for the payment of the judgment. The trial court's stay will not, unless the court otherwise expressly orders, affect the creation or continuance of a judgment enforcement lien or a levy in progress when the stay order is granted. These rules follow the existing rule which permits the creation of a judgment lien on real property during the period of a trial court stay.<sup>3</sup>

The proposed law also codifies the judicially developed rule permitting the court, in its discretion, to stay the enforcement of a judgment where the judgment debtor has another action pending on a

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1. See Sections 674, 916, 1710.50. See also Section 918.
  2. See Section 918. See also Section 681a which prescribes limitations inconsistent with later enacted Section 918.
  3. See *Industrial Indem. Co. v. Levine*, 49 Cal. App.3d 698, 122 Cal. Rptr. 712 (1975) (granting of stay by trial court under Section 681a and pursuant to stipulation does not prevent the recording of an abstract of judgment to create judgment lien on real property).

disputed claim against the judgment creditor.<sup>4</sup> The rationale for the rule is based on equitable principles that not to stay enforcement of the judgment unfairly deprives the judgment debtor of not only his right to set-off but also--with a judgment-proof creditor--the right to recover anything at all.

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4. See Erlich v. Superior Court, 63 Cal.2d 551, 407 P.2d 649, 47 Cal. Rptr. 473 (1965); Airfloor Co. of Calif., Inc., v. The Regents of the Univ. of Calif. 97 Cal. App.3d 739, \_\_\_ Cal. Rptr. \_\_\_ (1979).

§ 697.040. Effect of stay of enforcement of judgment

697.040. (a) A lien may not be created under this chapter during the time, and a lien created under this chapter is extinguished if, the enforcement of the judgment is:

(1) Stayed on appeal by the giving of a sufficient undertaking under Chapter 2 (commencing with Section 916) of Title 13.

(2) Stayed pursuant to Section 1710.50.

(b) Unless the court otherwise expressly orders, a stay of enforcement of the judgment under Section 918 does not prevent the creation or continuance of a lien under this chapter.

Comment. Subdivision (a) of Section 697.040 supersedes and generalizes portions formerly found in Section 674. Section 1710.50, which is referred to in subdivision (a), relates to enforcement of sister state money judgments. Subdivision (b) is a new provision which applies to the situation where the trial court stays enforcement of a judgment under Section 918 (stay for a limited time which cannot extend more than 10 days after the last date on which a notice of appeal could be filed). See that section and the Comment thereto. See also Sections 916 (release of property levied upon when money judgment is appealed), 918 (effect of trial court stay on levy to enforce money judgment).

34701

Code of Civil Procedure § 916 (amended). Stay on appeal

916. (a) Except as provided in Sections 917.1 through 917.9 and in Section ~~117.7~~ 117.7, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.

(b) ~~A stay of proceedings shall release from levy property which has been levied upon under execution issued upon such judgment.~~ When enforcement of the judgment or order has been stayed pursuant to Section 1710.50 or by the perfecting of an appeal and the giving of a sufficient undertaking as provided in this chapter, the levying officer shall release any property levied upon to enforce such judgment or order, and any proceeds from the sale of such property, as provided in Section 699.060.

(c) When there is a stay of proceedings other than the enforcement of the judgment, the trial court shall have jurisdiction of proceedings related to the enforcement of the judgment as well as any other matter embraced in the action and not affected by the judgment or order appealed from.

Comment. Subdivision (b) of Section 916 has been revised to conform to the Enforcement of Judgments Law. See also Sections 697.040 (effect of stay of enforcement on enforcement liens), 917.1 (undertaking required as condition of stay of enforcement of money judgment), and 918 (stay of enforcement by trial court). Subdivision (a) has been revised to substitute the correct cross-reference.

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Code of Civil Procedure § 918 (amended). Stay of enforcement of judgment by trial court

918. ~~The~~ (a) Subject to subdivision (b) the trial court may, in its discretion, stay the enforcement of any judgment or order, provided that if

(b) If the enforcement of such the judgment or order would be stayed on appeal only by the giving of an undertaking, a trial court shall not have the power, without the consent of the adverse party, to stay the enforcement thereof pursuant to this section for a period which extends for more than 10 days beyond the last date on which a notice of appeal could be filed.

(c) Unless the court otherwise expressly provides in the stay order or in a subsequent order, an order under this section does not affect:

(1) The creation of an enforcement lien to enforce a judgment or order requiring the payment of money under Chapter 2 (commencing with Section 697.010) of Division 2 of Title 9 or under any other provision of that title or other statute, or the continuance of such a lien.

(2) Any levy made prior to the time the stay order takes effect to enforce a judgment or order requiring the payment of money, or the proceedings under such levy.

(d) Nothing in subdivision (c) applies where the enforcement of the judgment or order has been stayed pursuant to Section 1710.50 or

has been stayed by the perfecting of an appeal and the giving of a sufficient undertaking as provided in this chapter.

(e) This section applies whether or not an appeal will be taken from the judgment or order and whether or not a notice of appeal has been filed.

Comment. Subdivision (c) is added to Section 918 to make clear that the granting of a stay under Section 918 does not affect the creation or continuance of an enforcement lien or affect a levy in progress unless the court granting the stay otherwise expressly orders. This rule is consistent with prior law. See *Industrial Indem. Co. v. Levine*, 49 Cal. App.3d 698, 122 Cal. Rptr. 712 (1975) (granting of stay by trial court under former Section 681a and pursuant to stipulation did not prevent the recording of an abstract of judgment to create a judgment lien on real property). Subdivision (c) of Section 918 generalizes the rule of this case and extends it to a levy in progress. The section, however, authorizes the court to make an order expressly providing another rule appropriate to the circumstances of the particular case. Such an order might provide, for example, that the stay of enforcement shall prevent the creation of a lien, that a lien in existence shall terminate, that property levied on shall be released, or that property levied on shall continue to be subject to the levy lien but that further proceedings under the levy shall be deferred during the period of the stay.

Subdivision (d) is included to make clear that the rule set out in subdivision (c) does not apply in the case described in subdivision (d). In the described cases, the stay of enforcement prevents the creation or continuance of a lien (see Section 697.040) and requires the release of property levied upon (see Section 916).

Subdivision (e) makes clear that, subject to the limitations specified in Section 918, the court is authorized to stay the enforcement of a judgment whether or not an appeal has been or will be taken. In this respect, Section 918 supersedes former Section 681a, which granted the court authority similar to that granted by Section 918 but prescribed limitations that were inconsistent with later enacted Section 918.

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Code of Civil Procedure § 918.5 (added). Stay to protect possible set-off

918.5. (a) The trial court may, in its discretion, stay the enforcement of a judgment or order where the judgment debtor has another action pending on a disputed claim against the judgment creditor.

(b) In exercising its discretion under this section, the court shall consider all of the following:

(1) The likelihood of the judgment debtor prevailing in the other action.

(2) The amount of the judgment of the judgment creditor as compared to the amount of the probable recovery of the judgment debtor in the action on the disputed claim.

(3) The financial ability of the judgment creditor to satisfy the judgment if a judgment is rendered against the judgment creditor in the action on the disputed claim.

Comment. Section 918.5 codifies a judicially developed rule. See *Erich v. Superior Court*, 63 Cal.2d 551, 407 P.2d 649, 47 Cal. Rptr. 473 (1965); *Airfloor Company of California, Inc. v. The Regents of the University of California*, 97 Cal. App.3d 739, \_\_\_ Cal. Rptr. \_\_\_ (1979). The rationale for the rule is based on equitable principles that not to stay enforcement of the judgment unfairly deprives the judgment debtor of not only his right to set-off but also--with an impecunious creditor--the right to recover at all.