

First Supplement to Memorandum 81-71

Subject: Study D-300 - Enforcement of Judgments (AB 707 and 798)

Attached to this supplement are copies of some additional amendments to Assembly Bills 707 (the proposed Enforcement of Judgments Law) (Exhibit 1 - yellow) and 798 (conforming changes) (Exhibit 2 - pink). Copies of AB 707 and 798 as amended on August 25 are attached to Memorandum 81-71.

Comments of a State Bar Committee and the Franchise Tax Board are discussed below. Some substantive changes are suggested by the staff as indicated below. Additional amendments of a technical nature are included in the attached amendments but are not discussed.

I. Report of UCC Committee of Business Law Section of State Bar

We have recently received the report of the UCC Committee of the State Bar Business Law Section. A copy is attached hereto as Exhibit 3 (blue). The following discussion takes the comments of the UCC Committee in order.

A. Effective date. The UCC Committee recommends that the procedure for obtaining judgment liens on personal property in AB 707 be made available only to enforce money judgments entered after the operative date. (See Exhibit 3, pp. 1-3.) The UCC Committee argues that on and after the operative date there would be a rush to file judgment liens that would swamp the Secretary of State's office and that attorneys would be subject to malpractice claims for failure to file judgment liens under old judgments. The staff agrees that the filing of judgment liens shortly after the operative date might swamp the office of Secretary of State and recommends the approval of Amendment 4 (AB 707 - Exhibit 1).

B. Proceeds. The UCC Committee recommends that Commercial Code Section 9306 be amended to make clear that proceeds of collection or sale in the hands of a levying officer are cash proceeds for the purpose of continuing a perfected security interest. (See Exhibit 3, pp. 3-4.) The staff accepts this suggestion and would amend Commercial Code Section 9306 as set forth in Amendment 3 (AB 798 - Exhibit 2) (see bill Section 82.8 within Amendment 3). We note however that this is a problem under existing law.

C. Notice to existing secured parties. The UCC Committee recommends that the judgment creditor be required to give notice to an existing secured party in order to obtain priority as to advances made by the secured party. (See Exhibit 3, pp. 4-6.) The UCC Committee is concerned that a judgment creditor can file a notice of judgment lien on personal property with the Secretary of State and thereby obtain lien creditor status under Commercial Code Section 9301 with the effect of obtaining priority as to advances made under a revolving financing arrangement. The problem arises in determining whether the secured party has acquired knowledge of the lien creditor's status sufficient to cut off the priority of advances or a commitment to make future advances. By requiring the judgment creditor to serve notice of the filing of the notice of judgment lien on the secured party, the secured party is in a better position to know of competing judgment liens. This recommendation would be accomplished by the addition of subdivision (5) to Commercial Code Section 9301 as set forth in the first portion of Amendment 3 (AB 798 - Exhibit 2).

D. Priorities in after-acquired inventory. The UCC Committee recommends that Section 697.590 in the proposed law be amended to take care of a technical problem regarding circular priorities. (See Exhibit 3, pp. 6-7.) The staff has drafted Amendment 5 (AB 707 - Exhibit 1) to deal with this problem.

E. Termination and removal of judgment liens. The UCC Committee suggests that the procedures for obtaining the satisfaction of record of a judgment lien on personal property (Section 697.640 in the proposed law) and for removing erroneous judgment liens (Section 697.660) be made available to secured parties and other lienholders. (See Exhibit 3, pp. 7-8.) As the proposed law now stands, only judgment debtors or owners of property subject to the lien may obtain satisfaction of record under Section 697.640 and only erroneously identified property owners may resort to Section 697.660. The staff has drafted Amendments 6-8, 10-16, and 42-45 (AB 707 - Exhibit 1) to accomplish this proposal.

F. Levy on general intangibles. The UCC Committee suggests a limitation on the term "general intangibles" to avoid including such things as patents and copyrights. (See Exhibit 3, pp. 8-9.) The staff proposes limiting the definition of the term as set forth in Amendment 1 (AB 707 - Exhibit 1).

G. Disposition of excess proceeds. The UCC Committee proposes additional clarification of the secured party's duties concerning the disposition of excess proceeds after the security interest is satisfied. (See Exhibit 3, p. 9.) The UCC Committee proposal would alter the priorities as currently structured in AB 707 by promoting junior secured parties ahead of a judgment creditor. The staff discussed this problem with two members of the UCC Committee and it is our understanding that the aim of the Committee is to clarify the priorities, rather than alter them. Accordingly, the staff recommends approval of Amendment 4 (AB 798 - Exhibit 2).

H. Perfection of security interest in instruments as noncash proceeds. The UCC Committee recommends providing a method of perfection of a security interest in an instrument constituting noncash proceeds in the possession of a levying officer. (See Exhibit 3, p. 10.) The staff would deal with this problem by amending Commercial Code Section 9304 as set forth in Amendment 3 (AB 798 - Exhibit 2) (see bill Section 82.7 within Amendment 3). We also note that this is a problem under existing law.

I. Third-party claims to fixtures. The UCC Committee suggests that secured parties should be able to use the summary third-party claims procedure to claim a security interest in fixtures under Division 9 of the Commercial Code. (See Exhibit 3, pp. 10-11.) The staff proposes Amendments 37 and 38 (AB 707 - Exhibit 1) to deal with this suggestion.

J. California address for third-party claimant. The UCC Committee suggests that a third person should not be required to give an address in this state when making a third-party claim. (See Exhibit 3, pp. 11-12.) Code of Civil Procedure Section 689b(2) in existing law requires the statement of an address in this state for a third-party claim by a chattel mortgagee or conditional seller. Section 689 applicable to claims ownership and right to possession does not contain this requirement. For the sake of consistency, the requirement of an address in this state provided in the newer enactment (Section 689b) was extended to all third-party claims as set forth in proposed Sections 720.130 and 720.230. The staff recommends that this requirement be retained since it is existing law insofar as security interests are concerned; hence, the dire consequences suggested by the UCC Committee are unlikely to follow enactment of AB 707.

II. Comments of Franchise Tax Board

The comments of the Franchise Tax Board are attached hereto as Exhibit 4. The following discussion considers these comments in order.

Section 701.510. Sale of property levied upon. Amendments 17 and 18 (AB 707 - Exhibit 1) are recommended by the staff to recognize that money in the form of a coin collection, for example, may be sold. (See Exhibit 4, p. 1.)

Section 701.590. Manner of payment. The Franchise Tax Board recommends that the minimum bid that may be treated as a credit transaction be lowered to \$2,500 in the case of personal property. (See Exhibit 4, p. 1.) The staff proposes Amendments 19-21 (AB 707 - Exhibit 1) to accomplish this recommendation.

Section 703.050. Exemptions in effect at time of lien govern. The Franchise Tax Board asks that we clarify the time of creation of a tax lien for purposes of determining the applicable exemptions (Sections 694.080 and 703.050) and the circumstances for qualification for an exemption (Section 703.100). (See Exhibit 4, pp. 1-2.) Typically, a tax liability is a "perfected and enforceable state tax lien" when it is due and unpaid. See, e.g., Rev. & Tax. Code §§ 18881, 26161. However, as against the lien of a judgment creditor obtained by levy or filing with the Secretary of State, a state tax lien (as defined in Government Code Section 7162) has priority only if notice of the state tax lien is recorded in the case of real property or filed with the Secretary of State in the case of personal property. See Gov't Code § 7170 as proposed to be amended in AB 798. Logically, the exemption determination date should be either when the tax liability arises or when the tax lien obtains priority status by filing, recording, or some other act. The staff proposes the second alternative and has drafted Amendment 3 (AB 707 - Exhibit 1) to implement it. The later date is selected because it avoids the problem of having an older set of exemptions applicable to the tax lien than is applicable to the judgment creditor's lien even though the tax lien is junior to the judgment creditor's lien. It should be noted that the date for determining applicable exemptions may be irrelevant, however, since the exemption is not applicable unless the tax liability is sought to be collected by a warrant or notice of levy. See Section 688.030(a)(1) in AB 707. See also the discussion under Section 704.720 infra.

Section 703.550. Opposition to exemption claim. This problem (see Exhibit 4, pp. 2-3) has been dealt with in the amended version of AB 707.

Section 704.720. Homestead exemption. The Franchise Tax Board expresses concern that tax liens may be subject to a homestead exemption when a dwelling is voluntarily sold (See Exhibit 4, pp. 3-5.) The staff proposes Amendments 22-32 and 34 (AB 707 - Exhibit 1) to deal with this problem.

Section 708.630. Receiver to transfer alcoholic beverage license. The Franchise Tax Board notes a technical problem with the scheme for applying liquor licenses to the satisfaction of a judgment. (See Exhibit 4, pp. 5-6.) The staff proposes Amendment 35 (AB 707 - Exhibit 1) to recognize the priority of taxes set forth in Business and Professions Code Section 24049.

III. Other Amendments

Section 681.050. Severability provision. Amendment 2 (AB 707 - Exhibit 1) would provide a severability provision comparable to the ones found in other codes.

Section 703.130. Exemptions in bankruptcy. Amendment 33 (AB 707 - Exhibit 1) is recommended to continue and clarify the substance of a bill enacted at this session of the Legislature. See AB 1857 (attached hereto as Exhibit 5 - white). This clarifying revision of the 1981 enactment is being reviewed by the California Bankers Association and, if the association suggests any revisions in the amendment, we will note them in a later supplement.

Section 720.260. Amount of undertaking. Amendment 41 (AB 707 - Exhibit 1) would permit the judgment creditor to give an undertaking in response to a third-party claim by a secured party or lienholder in an amount less than the flat amount. This amendment is consistent with an earlier amendment to Section 720.160 (undertaking in response to third-party claim of ownership or right to possession).

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

STAFF DRAFT

AMENDMENTS TO ASSEMBLY BILL NO. 707

Amendment 1

On page 6, line 27, of the printed bill, as amended in Assembly August 25, 1981, after "Code" insert:
consisting of rights to payment

Amendment 2

On page 8, after line 38, insert:
681.050. If any provision or clause of this title or application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this title which can be given effect without the invalid provision or application, and to this end the provisions of this title are severable.

Amendment 3

On page 30, between lines 10 and 11, insert:
688.050. For the purpose of applying Section 694.080, 703.050, or 703.100, the date of creation of a tax lien is the earliest of the following times:

- (a) When a notice of state tax lien is filed pursuant to Chapter 14 (commencing with Section 7150) of Division 7 of Title 1 of the Government Code.
- (b) When the property is levied upon pursuant to a warrant or notice of levy issued by the state or by a department or agency of the state.
- (c) When any other act is performed that creates or perfects a lien on specific property as distinguished from a lien on the debtor's property generally.

Amendment 4

On page 45, line 37, after the period, insert:
A judgment lien may be created under this article only if the judgment is a money judgment that was first entered in this state after June 30, 1983.

Amendment 5

On page 49, between lines 30 and 31, insert:

(c) If a perfected purchase money security interest in inventory has priority over a judgment lien on after-acquired inventory pursuant to subdivision (b) and a conflicting security interest has priority over the purchase money security interest in the same inventory pursuant to subdivision (3) of Section 9312 of the Commercial Code, the conflicting security interest also has priority over the judgment lien on after-acquired inventory notwithstanding that the conflicting security interest would not otherwise have priority over the judgment lien.

Amendment 6

On page 50, strike out lines 35 to 40, inclusive

Amendment 7

On page 51, strike out lines 1 to 40, inclusive

Amendment 8

On page 52, strike out line 1 and insert:

697.640. (a) The judgment creditor, judgment debtor, owner of property subject to a judgment lien on personal property created under the judgment, or a person having a security interest in or a lien on the property may file in the office of the Secretary of State an acknowledgment of satisfaction of judgment executed as provided in Section 724.060 or a court clerk's certificate of satisfaction of judgment issued pursuant to Section 724.100. Upon such filing, the judgment lien created under the judgment that has been satisfied is extinguished as a matter of record. The fee for filing the acknowledgment or certificate is the same as the fee for filing a termination statement under Section 9404 of the Commercial Code.

(b) The filing officer shall treat an acknowledgment of satisfaction of judgment,

Amendment 8.5

On page 52, strike out lines 6 to 11, inclusive

Amendment 9

On page 52, line 20, strike out the comma and insert:
and

Amendment 10

On page 52, line 37, after "owner" insert:
or a person having a security interest in or a lien on the property

Amendment 11

On page 53, lines 6 and 7, strike out "property owner's"

Amendment 12

On page 53, line 15, strike out "property owner" and insert:
person who made the demand

Amendment 13

On page 53, line 17, strike out "the property owner" and
insert:
such person

Amendment 14

On page 53, lines 19 and 20, strike out "property owner" and
insert:
person who made the demand

Amendment 15

On page 53, line 32, strike out "by the property owner" and
insert:
under subdivision (a)

Amendment 16

On page 54, line 4, strike out ", the termination statement,"

Amendment 17

On page 83, line 28, strike out "or its equivalent"

Amendment 18

On page 83, line 28, after "sold" insert:
unless it has a value exceeding its face value

Amendment 19

On page 90, line 7, strike out "item, group, or lot of" and
insert:
interest in real

Amendment 20

On page 90, line 17, strike out "A person who" and insert:

(d) If the highest bid for an item, group, or lot of personal property sold exceeds two thousand five hundred dollars (\$2,500), the highest bidder may elect to treat the sale as a credit transaction. A person who makes the election shall deposit at least two thousand five hundred dollars (\$2,500) or 10 percent of the amount bid, whichever is greater, and within 10 days after the date of the sale shall pay the balance due plus costs accruing with regard to the property sold and interest accruing at the rate on money judgments on the balance of the amount bid from the date of sale until the date of payment.

(e) A person who

Amendment 21

On page 90, line 18, after "election" insert:
under subdivision (c) or (d)

Amendment 22

On page 91, between lines 37 and 38, insert:

(2) The amount of any state tax lien (as defined in Section 7162 of the Government Code) that is superior to the judgment creditor's lien.

Amendment 23

On page 91, line 38, strike out "(2)" and insert:

(3)

Amendment 24

On page 92, line 11, after the comma, insert:
any state tax lien (as defined in Section 7162 of the Government Code)
on the property sold and

Amendment 25

On page 94, between lines 14 and 15, insert:
(b) The amount of any state tax lien (as defined in Section
7162 of the Government Code) that is superior to the judgment creditor's
lien.

Amendment 26

On page 94, line 15, strike out "(b)" and insert:
(c)

Amendment 27

On page 94, line 22, strike out "(c)" and insert:
(d)

Amendment 28

On page 94, line 26, after "satisfy" insert:
any state tax lien (as defined in Section 7162 of the Government Code)
and

Amendment 29

On page 94, line 31, strike out "(d)" and insert:
(e)

Amendment 30

On page 94, line 35, strike out "(e)" and insert:
(f)

Amendment 31

On page 95, line 2, strike out "(f)" and insert:
(g)

Amendment 32

On page 95, line 14, strike out "(g)" and insert:

(h)

Amendment 33

On page 103, between lines 34 and 35, insert:

703.130. (a) Pursuant to the authority of paragraph (1) of subsection (b) of Section 522 of Title 11 of the United States Code, the exemptions set forth in subsection (d) of Section 522 of Title 11 of the United States Code (Bankruptcy) are not authorized in this state.

(b) Notwithstanding subdivision (a), if a husband and wife are joined in a petition filed under Title 11 of the United States Code (Bankruptcy), they jointly may elect to utilize the applicable exemption provisions under this chapter or to utilize the applicable exemptions set forth in subsection (d) of Section 522 of Title 11 of the United States Code, but not both.

(c) Notwithstanding subdivision (a), if a petition under Title 11 of the United States Code (Bankruptcy) is filed individually, and not jointly, for a husband or a wife, the exemptions set forth in subsection (d) of Section 522 of Title 11 of the United States Code are authorized in this state if the husband and wife each effectively waive in writing the right to claim, during the period the case commenced by filing such petition is pending, the exemptions provided by the applicable exemption provisions of this chapter in any case commenced by filing a petition for either of them under Title 11 of the United States Code.

(d) Notwithstanding subdivision (a), if a petition is filed under Title 11 of the United States Code (Bankruptcy) for an unmarried person, the unmarried person may elect to utilize the applicable exemption provisions under this chapter or to utilize the applicable exemptions set forth in subsection (d) of Section 522 of Title 11 of the United States Code, but not both.

Amendment 34

On page 125, between lines 14 and 15, insert:

(d) The exemptions provided by this article do not apply to the amount of unpaid tax that is a lien under Article 2 (commencing with

Section 7170) of Chapter 14 of Division 7 of Title 1 of the Government Code in either of the following cases:

(1) Where the property subject to the lien is voluntarily sold.

(2) Where the property subject to the lien is sold pursuant to levy of execution by another creditor.

Amendment 35

On page 176, line 27, after "that" insert:
the amount of delinquent taxes described in Section 24049 of the Business and Professions Code and

Amendment 36

On page 192, strike out lines 39 and 40, and insert:

(b) The time allowed the

Amendment 37

On page 195, line 17, after "720.210." insert:

(a)

Amendment 38

On page 195, between lines 23 and 24, insert:

(b) A secured party claiming a security interest in fixtures may make a third-party claim pursuant to this chapter if the security interest claimed is superior to the creditor's lien on the property. For this purpose, references in this division to "personal property" shall be deemed references to fixtures.

Amendment 39

On page 196, strike out lines 30 and 31, and insert:

(b) The time allowed the

Amendment 40

On page 197, strike out lines 37 to 40, inclusive

Amendment 41

On page 198, strike out lines 1 and 2, and insert:

(1) If the action is pending or the judgment was entered in the superior court, seven thousand five hundred dollars (\$7,500), or twice the amount of the execution lien as of the date of levy or other enforcement lien as of the date it was created, whichever is the lesser amount.

(2) If the action is pending or the judgment was entered in a municipal or justice court, two thousand five hundred dollars (\$2,500), or twice the amount of the execution lien as of the date of levy or other enforcement lien as of the date it was created, whichever is the lesser amount.

Amendment 42

On page 210, line 9, strike out "or" and insert a comma

Amendment 43

On page 210, line 11, after "judgment" insert:
, or a person having a security interest in or a lien on personal property subject to a judgment lien created under the judgment

Amendment 44

On page 210, line 36, strike out "judgment debtor or"

Amendment 45

On page 210, strike out lines 37 and 38 and insert:
person making the demand may apply to

EXHIBIT 2

STAFF DRAFT

AMENDMENTS TO ASSEMBLY BILL NO. 798

Amendment 1

In line 20 of the title of the printed bill, as amended in Assembly August 25, 1981, strike out "and 9409" and insert:
, 9304, 9306, 9409, and 9504

Amendment 2

On page 2, in line 9 of the title, after "Sections" insert:
205, 660, 663, 704.2, 704.4,

Amendment 3

On page 64, between lines 17 and 18, insert:

(5) For the purpose of subdivision (4), a secured party shall be deemed not to have knowledge of a judgment lien on personal property acquired pursuant to Section 697.510 of the Code of Civil Procedure until the time the judgment creditor serves a copy of the notice of judgment lien on the secured party personally or by mail pursuant to Chapter 4 (commencing with Section 684.010) of Division 1 of Part 2 of the Code of Civil Procedure. If service on the secured party is by mail, it shall be sent to the secured party at the address shown in the financing statement or security agreement.

SEC. 82.7. Section 9304 of the Commercial Code is amended to read:

9304. (1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in subdivisions (4) ~~and 5~~ (5) 2 and (7) of this section and subdivisions (2) and (3) of Section 9306 on proceeds.

(2) During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods

is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during such period is subject thereto.

(3) A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.

(4) A security interest in instruments or negotiable documents is perfected without filing or the taking of possession for a period of 21 days from the time it attaches to the extent that it arises for new value given under a written security agreement.

(5) A security interest remains perfected for a period of 21 days without filing where a secured party having a perfected security interest in an instrument, a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor

(a) Makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests in the goods is subject to subdivision (3) of Section 9312; or

(b) Delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal or registration of transfer.

(6) After the 21-day period in subdivisions (4) and (5) perfection depends upon compliance with applicable provisions of this division.

(7) If an instrument claimed as proceeds (other than cash proceeds) under Section 9306 is in the custody of a levying officer, a secured party may perfect a security interest in such instrument by filing a third-party claim with the levying officer pursuant to Chapter 3 (commencing with Section 720.210) of Division 4 of Title 9 of Part 2 of the Code of Civil Procedure.

SEC. 82.8. Section 9306 of the Commercial Code is amended to read:

9306. (1) "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are "cash proceeds." All other proceeds are "noncash proceeds."

(2) Except where this division otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected 10 days after receipt of the proceeds by the debtor unless

(a) A filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds; or

(b) A filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds; or

(c) The security interest in the proceeds is perfected before the expiration of the 10-day period.

Except as provided in this section, a security interest in proceeds can be perfected only by the methods or under the circumstances permitted in this division for original collateral of the same type.

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds

(a) In identifiable noncash proceeds and in a separate deposit account containing only proceeds;

(b) In identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings;

(c) In identifiable cash proceeds in the form of checks and the like which are not deposited in a deposit account prior to the insolvency proceedings; and

(d) In all cash and deposit accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (d) is

(i) Subject to any right of setoff; and

(ii) Limited to an amount not greater than the amount of any cash proceeds received by the debtor within 10 days before the institution of the insolvency proceedings less the sum of (I) the payments to the secured party on account of cash proceeds received by the debtor during such period and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under paragraphs (a) through (c) of this subdivision (4).

(5) If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the goods are returned to or are repossessed by the seller or the secured party, the following rules determine priorities:

(a) If the goods were collateral at the time of sale, for an indebtedness of the seller which is still unpaid, the original security interest attaches again to the goods and continues as a perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must file.

(b) An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest asserted under paragraph (a) to the extent that the transferee of the chattel paper was entitled to priority under Section 9308.

(c) An unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under paragraph (a).

(d) A security interest of an unpaid transferee asserted under paragraph (b) or (c) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods.

(6) Cash proceeds retain their character as cash proceeds while in the possession of a levying officer pursuant to Title 6.5 (commencing with Section 481.010) or Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure.

Amendment 4

On page 64, between lines 37 and 38, insert:

SEC. 83.5. Section 9504 of the Commercial Code is amended to read:

9504. (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the division on sales (Division 2). The proceeds of disposition shall be applied in the order following to

(a) The reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorney's fees and legal expenses incurred by the secured party;

(b) The satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) The satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed and to the satisfaction of any subordinate attachment lien or execution lien pursuant to subdivision (b) of Section 701.040 of the Code of Civil Procedure if notice of the levy of execution is received before distribution of the proceeds is completed . If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus except as provided in Section 701.040 of the Code of Civil Procedure , and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides and the provisions of Section

701.040 of the Code of Civil Procedure relating to payment of proceeds and the liability of the secured party apply only if the security agreement provides that the debtor is entitled to any surplus .

(3) A sale or lease of collateral may be as a unit or in parcels, at wholesale or retail and at any time and place and on any terms, provided the secured party acts in good faith and in a commercially reasonable manner. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, the secured party must give to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale, and to any other person who has a security interest in the collateral and who has filed with the secured party a written request for notice giving his address (before that secured party sends his notification to the debtor or before debtor's renunciation of his rights), a notice in writing of the time and place of any public sale or of the time on or after which any private sale or other intended disposition is to be made. Such notice must be delivered personally or be deposited in the United States mail postage prepared addressed to the debtor at his address as set forth in the financing statement or as set forth in the security agreement or at such other address as may have been furnished to the secured party in writing for this purpose, or, if no address has been so set forth or furnished, at his last known address, and to any other secured party at the address set forth in his request for notice, at least five days before the date fixed for any public sale or before the day on or after which any private sale or other disposition is to be made. Notice of the time and place of a public sale shall also be given at least five days before the date of sale by publication once in a newspaper of general circulation published in the county in which the sale is to be held. Any public sale shall be held in a county or place specified in the security agreement, or if no county or place is specified in the security agreement, in the county in which the collateral or any part thereof is located or in the county in which the debtor has his residence or chief place of business, or in the county in which the secured party has his residence or a place of business if the debtor does not have a residence or chief place of business within this state. If the collateral is located outside of this state or has been removed from this state, a public sale may be held in the locality in which the

collateral is located. Any public sale may be postponed from time to time by public announcement at the time and place last scheduled for the sale. The secured party may buy at any public sale and if the collateral is customarily sold in a recognized market or is the subject of widely or regularly distributed standard price quotations he may buy at private sale. Any sale of which notice is delivered or mailed and published as herein provided and which is held as herein provided is a public sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interest even though the secured party fails to comply with the requirements of this chapter or of any judicial proceedings

(a) In the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) In any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this division.

Amendment 5

On page 95, between lines 14 and 15, insert:

SEC. 141.1. Section 205 of the Probate Code is amended to read:

205. (a) Except as provided by Section 951.1, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the community property and the debts of the deceased spouse chargeable against the separate property of the deceased spouse to the extent such separate property is characterized as quasi-community property under Section 201.5 by the

provisions of Title 8 (commencing with Section 5100) of Part 5 of Division 4 of the Civil Code, unless the interests of both spouses in the community property or quasi-community property, or both, are administered under Division 3 (commencing with Section 300). The personal liability shall not exceed the value at the date of death, less the amount of any liens and encumbrances, of the interest of the surviving spouse (1) in the community property immediately prior to the death and (2) in quasi-community property arising by virtue of the death which is not exempt from ~~execution~~ enforcement of a money judgment plus the interest of the deceased spouse in such property passing to the surviving spouse without administration.

(b) If proceedings are commenced in this state for the administration of the estate of the deceased spouse and notice to creditors has been given by the personal representative, any action upon the liability of the surviving spouse pursuant to subdivision (a) shall be barred to the same extent as provided for claims under Article 1 (commencing with Section 700) of Chapter 12 of Division 3 except as to the following:

(1) Creditors who had commenced judicial proceedings for the enforcement of the debts and had served the surviving spouse with process prior to the date of the last publication of the notice to creditors.

(2) Creditors who secure the acknowledgment in writing of the liability of the surviving spouse for the debts.

(3) Creditors who file a timely claim in the proceedings.

(c) Except as provided by subdivision (b), any debt described in subdivision (a) may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died. In any action based upon the debt, the surviving spouse may assert any defenses, counterclaims, or setoffs which would have been available to the deceased spouse if the deceased spouse had not died.

SEC. 141.3. Section 660 of the Probate Code is amended to read:

660. (a) Until the inventory is filed and for a period of 60 days thereafter or such other period as is ordered by the court for good cause, the decedent's surviving spouse and minor children are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture and other property of the decedent exempt from ~~execution~~ enforcement of a money judgment .

(b) Upon the filing of the inventory or at any subsequent time during the administration, the court, on petition therefor, may in its discretion:

(1) Set apart to the surviving spouse, or, in case of his or her death, to the minor children of the decedent, all or any part of the property of the decedent exempt from ~~execution~~ enforcement of a money judgment other than the dwelling.

(2) Select and set apart one homestead in the manner provided in this article.

SEC. 141.5. Section 663 of the Probate Code is amended to read:

663. (a) Property of the decedent set apart as a homestead is liable for claims against the estate of the decedent, subject to the homestead right. The homestead right in property of the decedent is liable for claims that are secured by liens and encumbrances on the property at the time of the decedent's death but is exempt to the extent of the ~~dwelling~~ homestead exemption provided by Article 4 (commencing with Section 704.710) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure as to any claim that would have been subject to a ~~dwelling~~ such homestead exemption at the time of the decedent's death.

(b) The homestead right in the property of the decedent is not liable for claims against the person for whose use the homestead is set apart.

(c) Property of the decedent set apart as a homestead is liable for claims against the testate or intestate successors of the decedent or other successors to the property after administration, subject to the homestead right.

SEC. 141.7. Section 704.2 of the Probate Code is amended to read:

704.2. A claim may be filed by the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse for the payment of the debts of the deceased spouse described in Section 205. The claim must be filed prior to the filing of a petition for final distribution. It shall set forth the reason why the debts are not barred by subdivision (b) of Section

205 and a statement whether the debts remain unpaid or have been paid by the surviving spouse. If the surviving spouse is personally liable for the debts, the claim shall also include an inventory of the separate property of the surviving spouse and any community property not administered in the estate and a statement of the value of the property less the amount of the liens and encumbrances upon the property as of the date of death of the deceased spouse. The statement may identify any property which is exempt from ~~execution~~ enforcement of a money judgment .

SEC. 141.9. Section 704.4 of the Probate Code is amended to read:

704.4. If any community property is administered in the estate, the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may file a claim against the estate for the payment of the debts of the surviving spouse for which the community property is liable. The claim must be filed prior to the filing of a petition for final distribution. It shall include a statement whether the debts remain unpaid or have been paid by the surviving spouse. It shall also include an inventory of the separate property of the surviving spouse and any community property not administered in the estate and a statement of the value of the property less the amount of the liens and encumbrances upon the property as of the date of death of the deceased spouse. The statement may identify any property which is exempt from ~~execution~~ enforcement of a money judgment .

EXHIBIT 3

REPORT OF THE UCC COMMITTEE
ON A.B. NOS. 707 AND 798
REGARDING THE ENFORCEMENT OF JUDGMENTS

I. Introduction

This memorandum states the recommendations of the UCC Committee of the Business Law Section of the State Bar of California (the "Committee") to the Executive Committee concerning various sections of the proposed Enforcement of Judgments Law (the "Act") which in our opinion should be revised.

Our comments are generally presented in the order in which the subjects are raised by the numerical sections of A.B. No. 707. Unless otherwise indicated the section numbers relate to sections in A.B. No. 707.

This memorandum does not address issues which we have previously discussed with the Law Revision Commission and on which the Commission has already accepted our suggestions. However, certain of these matters are described in the correspondence between Lloyd Tevis and the Law Revision Commission which is attached to this memorandum.

II. Discussion of Particular Provisions of the Act

A. Effective Date Discussion

1. Background: Sections 694.010 et seq. of the Act provide that, with the exception of the adoption of Judicial Counsel forms and court rules, the Act becomes operative on January 1, 1983. The Act does not expressly address itself to the problem of whether it is operative prospectively or retroactively. It appears to apply retroactively.

2. Recommendation: The Committee recommends the Act be amended to provide that, with respect to the procedure of filing notices of judgment liens with the Secretary of State, it apply only to judgments obtained on or after the operative date of the Act (January 1, 1983). Prior judgments (and subsequent renewals of prior judgments) should not be collected by means of such judgment liens.

3. Discussion: The Act provides a new procedure for obtaining a judgment lien on certain types of personal property, as discussed later in this memorandum. The judgment lien is obtained by filing a notice of judgment lien in the office of the Secretary of State. The judgment lien is

effective for not more than five years, and the filed notice of judgment lien is to be reported, upon request, by a certificate issued by the Secretary of State. The lien will have priority over certain UCC security interests as discussed later in this memorandum.

Although the majority of the Committee does not object to the basic concept of being able to file a notice of judgment lien with the Secretary of State, the Committee has grave concerns with respect to the impact that such a filing procedure may have if the Act is to be applied retroactively to all judgments now in existence or to renewals of such judgments.

There are presently thousands upon thousands of unsatisfied judgments in the State of California. If, on a specific date, these judgments can in effect become a perfected lien upon the personal property of a judgment debtor simply by filing a notice of the judgment with the Secretary of State, a veritable flood of such filings could be expected.

An initial concern of this Committee with respect to this potential filing deluge is the effect on the office of the Secretary of State. At the present time the Secretary of State's office is already confronted with a massive filing demand in connection with filings under the Uniform Commercial Code and the various federal and state tax lien statutes. A massive filing of notices of judgment liens would cause serious problems for secured financing both within and without this State simply through the backlog that could be expected in the Secretary of State's office for a considerable period of time. The benefit to judgment creditors in existence prior to the operative date of the Act simply does not justify the substantial disruption of the existing financial business in this State.

A second area of concern by this Committee is the effect that a retroactive application of the judgment lien notice filing procedure would have on existing business in this State. This is a new remedy and one which has been enacted in very few states. The sudden existence of thousands of judgment liens filed and perfected against various judgment debtors could have an immediate chilling effect on financing in this State.

A further concern of this Committee is the effect of the Act on the legal community in this State. The failure to file notices of judgment liens with the Secretary of State, when appropriate, would constitute malpractice. In order for an attorney to be safe he would be expected to review

all his files over the last ten years to determine which files resulted in judgments to which this filing law would apply. The attorney would have to contact clients (a number of whom may no longer be readily available), he would have to ascertain whether old judgments have been satisfied or renewed, etc. To expect each attorney in this State to review matters handled over the past ten years is unreasonable and probably impracticable.

The filing of a notice of judgment lien with the Secretary of State is a new procedure. It is a procedure that is not available in the vast majority of the states. It would not work an injustice upon existing judgment creditors to only apply this portion of the Act prospectively. To apply this law only to judgments obtained after the operative date would, however, provide an orderly transition period and would significantly lessen the potential negative effects on the office of the Secretary of State, the business community and the legal profession.

Therefore, it is recommended that with respect to notices of judgment liens on personal property the Act be effective and apply only to judgments obtained on or after the operative date of the Act (January 1, 1983).

B. Proceeds Discussion (§§687.020 and 700.070)

1. Background: Section 687.020 empowers a levying officer to endorse and present for payment certain demand instruments. These might well be identifiable proceeds of collateral subject to a perfected UCC security interest. Section 700.070 deals with the continuation of a business after a keeper has been placed in charge of it. Sales may be made, but the keeper will take custody of the proceeds of any sales. These may well be identifiable proceeds of collateral subject to a perfected UCC security interest. It will be important to a secured party with a security interest in such proceeds that they remain identifiable cash proceeds while in the hands of the levying officer.

2. Recommendation: The UCC §9306(1) should be amended to include all such funds held by a levying officer or keeper within the definition of "cash proceeds."

3. Discussion: UCC §9306(1) defines "cash proceeds" as "money, checks, deposit accounts, and the like." There is a risk that proceeds which would be cash proceeds in the hands of the debtor will not be considered as such when removed from the possession of the debtor. If so, the

secured party's interest would become unperfected after the lapse of 10 days under UCC §9306(3), and there is no method by which the secured party could perfect as to the proceeds within this 10-day period so as to continue perfection. Unless resolved by statute, the result of this dilemma will be needless litigation and interference with commercial financing arrangements.

C. General Discussion of Judgment Lien
Priority On Personal Property (§697.590)

1. Background: Section 697.590(a) of the Act provides that a judgment lien has the same priority over a UCC security interest that is given a lien creditor under UCC §9301. A lien creditor is defined in UCC §9301 as a creditor who has acquired a lien on the property involved by attachment, levy or the like. However, under the new Act a judgment creditor could become a "lien creditor" simply by filing a notice of judgment lien with the Secretary of State. Without some type of express notice procedure to creditors, however, this could cause considerable problems for creditors in connection with revolving lines of credit (e.g., accounts receivable and inventory financing) and other common commercial financing arrangements.

2. Recommendation: The Committee recommends that, in order for a judgment creditor to obtain a priority with respect to subsequent advances by an existing UCC secured creditor, the Act be amended to require the judgment lien creditor to give actual written notice to that existing secured party. The filing of the judgment lien notice with the Secretary of State by itself should be insufficient to confer such priority.

3. Discussion: UCC §9301(4) provides:

"(4) 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."

UCC §9301(3) defines a lien creditor as:

". . . a creditor who has acquired a lien on the property involved by attachment,

levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity to the time of appointment."

If a judgment creditor can become a "lien creditor" under the UCC simply by filing a notice of the judgment with the Secretary of State, serious problems could arise with respect to revolving financing and other common commercial financing arrangements in the State of California. The recommendation of this Committee is that in order to affect the priority of an existing secured party's continuing advances, actual written notice of the filing of the notice of judgment lien would have to be given to the secured party.

To accomplish this, UCC §9301(4) should be amended to read as follows:

"(4) 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; provided, however, that with respect to a person who becomes a lien creditor by creation of a judgment lien pursuant to Section 697.510 of the Code of Civil Procedure, said person shall not be deemed a lien creditor for purposes of this subsection until:

(a) The judgment lien is properly filed with the Office of the Secretary of State; and

(b) The judgment creditor gives notification in writing to the holder of the perfected security interest, addressed to the secured party at his address as set forth in the financing statement or as set forth in the Security Agreement; and

(c) The notification shall contain a copy of the notice of judgment lien filed with the Secretary of State and state that the person giving the notice has filed its notice of judgment lien with the Secretary of State."

To allow priority under UCC §9301(4) to a "lien creditor" who simply files a notice of judgment lien with the Secretary of State and does not more places UCC secured creditors with existing lines of credit in the untenable position of conducting continuous lien searches in order to ensure priority. Not only would such searches be an unfair burden on UCC secured creditors, but the current operational difficulties in the Secretary of State's office also make such searches impractical. Since that office continually has a substantial backlog of filings and search requests, it would not be possible for UCC secured creditors to obtain current search reports in a reasonable time without substantial changes in the UCC filing and reporting system.

Creditors have had to accept the risks of levy, assignment for the benefit of creditors and tax lien filings. However, to give priority to judgment creditors who simply file with the Secretary of State is too much of a burden on UCC secured creditors and may cause serious problems in revolving financing and other transactions. The suggested revision of the Act to place a formal notice requirement on the judgment creditor would be a major step in alleviating that burden.

D. Discussion of Priorities Regarding After-Acquired Inventory (§697.590(b))

1. Background: Section 697.590(b) relates to the priority of a judgment lien on personal property over a UCC security interest in the same property. In general this section provides that in such a case the first to file or first to perfect rule of UCC §9312(5) will govern priority. This appears to be the appropriate rule. However, there is an exception made in favor of a secured party who files a financing statement with respect to a purchase money security interest in the property before or within 10 days after the debtor receives possession of the property. This is designed to give priority to the purchase money security interest over a pre-existing judgment lien with regard to after-acquired property of the debtor, and it follows the rule of UCC §9312(4), which will work well in cases to which that rule applies.

However, a difficulty arises in applying this rule to after-acquired inventory. Under UCC §9312(3), which states the rule for priority of a purchase money security interest in inventory, the purchase money secured party must give notice in writing to the holder of a conflicting security interest of record, and the purchase money security interest must be perfected at the time the debtor receives possession of the inventory. This is a more stringent rule than that of §697.590(b).

It could occur that a purchase money security interest in inventory would fail to qualify for priority over a conflicting regular security interest, if, for example, the notice were not given or perfection occurred after the debtor received possession. So long as this purchase money security interest in inventory is perfected within 10 days, it has priority over a judgment lien. If the judgment lien should have priority over the earlier nonpurchase security interest, a circular priority would result: the judgment lien is prior to the first nonpurchase money security interest; the first security interest is prior to the purchase money security interest; the purchase money security interest is prior to the judgment lien.

2. Recommendation: §697.590(b) should be revised to provide a separate rule of priority for a purchase money security interest in inventory in those cases where there is a conflicting UCC security interest which is junior to a judgment lien but superior to the purchase money security interest. In order to remain consistent with existing law and commercial financing arrangements, both the first non-purchase money security interest and the purchase money security interest should have priority over the judgment lien in such cases.

3. Discussion: The factual situation described here would be an unusual one. However, it seems appropriate to draft provisions which would avoid the possibility of circular priorities.

E. Correction of Judgment Lien Mistakes
(§§697.640 and 697.660)

1. Background: Sections 697.640 and 697.660 establish procedures to eliminate judgment liens that have been satisfied or which were inadvertently placed against property of the wrong person. The general procedure in cases of a satisfied money judgment is that the "judgment debtor" or the "owner of personal property" serves a demand upon the

judgment creditor to have the lien released. If this is not done within a certain number of days, a court proceeding may then be held and appropriate orders will be issued.

If a notice of judgment lien on personal property is filed which appears to create a judgment lien on property of a person who is not the judgment debtor then that erroneously identified property owner may deliver to the judgment creditor a written demand that the judgment creditor file a statement releasing the lien against such owner. If the judgment creditor improperly fails to file a statement of release within 15 days, the judgment creditor is liable to the owner of the property for all damages sustained by reason of such failure and also forfeits \$100 to the property owner. The property owner may apply to the court on noticed motion for an order releasing the property, and the court will award reasonable attorneys' fees to the prevailing party.

Unfortunately, these statutes would not give standing to the UCC secured creditor whose security interest is clouded by the improper judgment lien.

2. Recommendation: Sections 697.640 and 697.660 should be revised to provide that, in addition to a judgment debtor or owner of the property, a third person claiming a security interest in or lien on the personal property may also proceed to have the incorrect judgment lien eliminated.

3. Discussion: Section 697.640 limits the right of seeking such corrective action to, in the case of the satisfied judgment, the "judgment debtor" or the "owner of the property." Section 697.660, in the case of an erroneous filing, limits such rights to the "owner of the property." Persons with security interest or liens against the property apparently are not authorized to avail themselves with these relatively simple and timely procedures. Such secured parties and other lien claimants appear to be left to either third party claim rights provided in §§720.110 et seq. after a levy on the property or an action for declaratory relief. Both of these two remedies are more expensive and time consuming, and the Act should attempt to prevent, rather than encourage, needless litigation.

F. Discussion of Levies On General Intangibles
(§§700.170 and 701.520)

1. Background: In §680.210 the term "general intangibles" is defined by reference to UCC §9106. As thus defined it includes not only rights to the payment of money,

but also other intangibles, such as copyrights and patents. In §700.170(a) provision is made for levying upon a general intangible by service of a copy of the writ of execution and a notice of levy upon the "account debtor." In §701.520 provision is made for the levying officer to collect, rather than sell, certain property including general intangibles.

2. Recommendation: These sections should be revised to refer to "general intangibles consisting of any right to payment."

3. Discussion: The distinction drawn here is one that is presently made in Civil Code §955.1. This revision will make clear the intent of these sections and avoid confusion.

G. Discussion of Disposition of Excess Proceeds
(§701.040(b))

1. Background: Subsection 701.040(b) requires that a secured party having priority over an execution lienor shall pay any excess payments or proceeds of property to the levying officer. This would include a secured party who has disposed of the collateral by foreclosure sale. The proposed section appears to conflict with the UCC secured party's duty under UCC §9504(1)(c). This latter section requires, in certain cases, that the secured party shall apply such surplus proceeds to the satisfaction of subordinate security interests. It is only after this has been done, if required, that the secured party must account to the debtor for any surplus. See UCC §9504(2).

2. Recommendation:

a. Section 701.040 should be revised to require payment to the levying officer of proceeds of a foreclosure sale only in those cases where there is a surplus to which the debtor would be entitled under UCC §9504(2); and

b. UCC §9504(2) should be amended to provide for payment to a levying officer instead of to the debtor when required by §701.040.

3. Discussion: There appears no good reason why the order of distribution of surplus funds provided for by the UCC should be disturbed. If payment is made to the levying officer, junior secured parties would be put to the additional expense of filing third party claims. As now written, the Act would provide a trap for the unwary creditor who follows the provisions of the UCC.

H. Discussion of Levies On Instruments
(§701.060)

1. Background: Under §700.110 the method of levying upon an instrument is for the levying officer to take possession of it if it is in the hands of the debtor. In such a situation §701.060 requires the obligor under the instrument to make payments to the levying officer. A promissory note thus coming into the levying officer's custody could be proceeds of collateral subject to a perfected security interest. Under UCC §9306(3) the security interest in such proceeds would become unperfected 10 days after receipt by the debtor unless the secured party perfects by taking possession of it. With the levying officer in possession there is no way to perfect. Some mechanism for perfection in such a case seems appropriate to protect the diligent secured party who might have perfected but for the levy.

2. Recommendation: UCC §9304, which provides for the method of perfecting a security interest in an instrument, should be amended to provide that, when an instrument which is claimed as proceeds (other than cash proceeds) and such instrument is in the custody of a levying officer, perfection may be accomplished by filing a third party claim with the levying officer.

3. Discussion: Many secured parties might not learn of the levy in time to file a third party claim within the 10-day period required by UCC §9306(3), and such fact situations may not be common. However, the fortuitous event of a levy ought not to block a secured party who diligently polices the collateral. Sales of collateral which will generate unsecured promissory notes probably would be for substantial sums of money. The inability of a secured party to perfect would, after the lapse of ten days, result in a senior security interest becoming junior to the execution lien. This is clearly unjust.

I. Discussion of Third Party Claims to Fixtures
(§§720.110 and 720.210)

1. Background: Sections 720.110 and 720.210 deal with third party claims and related procedures when property has been levied upon under a writ of attachment, writ of execution, or a prejudgment writ of possession of personal property. Persons who claim ownership or the right to possession of real or personal property may make a third party claim to the property under §720.110. Pursuant to §720.210 a third person claiming a security interest in or

lien on personal property may make a third party claim if the security interest or lien is superior to the creditor's lien. "Real Property" is defined in §680.320 as including "any right in real property, including but not limited to a leasehold interest in real property." Division 9 of the UCC applies to security interests in fixtures, and UCC §9313 defines "fixtures" as follows: "Goods are 'fixtures' when they become so related to particular real estate that an interest in them arises under real estate law." Thus, a security interest in true fixtures appears to be a security interest in real property as defined in §680.370. There appears to be no provision enabling a person with a security interest in fixtures to file a third party claim when either the fixture or the underlying real property has been levied upon.

2. Recommendation: Section 720.210 should be revised to permit a third party claiming a security interest in a fixture pursuant to Division 9 of the UCC to make a third party claim.

3. Discussion: UCC Division 9 deals with security interests in personal property and in fixtures. It provides the requirements for perfection of such security interests including those in fixtures. UCC §9313 provides the rules relating to priority in contests between the holder of a security interest in fixtures and others who have an interest in such fixtures, including one who has obtained a lien on the real estate by legal or equitable proceedings. There is no apparent reason why such a security interest should be treated differently in the context of a levy. If the secured party is not permitted to file a third party claim, the secured party will be forced to follow more expensive and less efficient procedures, such as filing an action to enjoin a sale on execution or else proceed with his remedies against the purchaser on execution sale. The less expensive and speedier procedures available to a third party claimant seem preferable.

J. Discussion of California Service of Third Party Claims (§§720.130 and 720.230)

1. Background: Sections 720.130 and 720.230 deal with the contents of a third party claim. Both specify that the claim shall give "an address in this state where service by mail may be made on the third person."

2. Recommendation: Sections 720.130 and 720.230 should be revised to delete the words "in the state" from subdivision (a) thereof.

3. Discussion: Presumably many out-of-state lenders do not have an address in this state. This provision would require the appointment of an agent to receive service by mail or the retention of local counsel for that purpose. This seems to be a provision that may create additional expense without any apparent justification. Furthermore, because choice of law considerations may be important in financing transactions regarding matters such as usury and taxes, some out-of-state lenders might decline to make loans secured by California property, if the Act required them to appoint local agents.



STATE OF CALIFORNIA

FRANCHISE TAX BOARD

SACRAMENTO, CALIFORNIA 95867

(916) 355-0729

September 10, 1981

Mr. John H. DeMouly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear Mr. DeMouly:

Our staff has completed its analysis of Assembly Bill 707 and the planned amendments thereto. The provisions with which we have concerns are set forth in the enclosed attachment. We may have further comments once the planned amendments are into print.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'G. H. Goldberg'.

Gerald H. Goldberg
Executive Officer

Attachment

Section 694.080 - Transitional Provisions, Exemptions

See discussion under Section 703.050.

Section 701.510 - Sale of Property Levied Upon

This section includes an unqualified statement that "cash or its equivalent may not be sold." However, the CLRC comments to proposed Section 701.555 concerning advertising sales indicate that certain types of property with a specialized market such as stamps or coins may be sold. We suggest that proposed Section 701.510 be amended to make clear that collectable coins and stamps may be sold. In the alternative, we suggest that the term "cash or its equivalent" be defined.

Section 701.590 - Manner of Payment

This section would permit the highest bidder at an execution sale to treat the sale as a credit transaction if the bid exceeds \$5,000.00. The bidder making this election would be required to make a deposit of \$5,000 or 10 percent of the amount bid, whichever is greater, and pay the balance within 20 days.

In prior comments to the CLRC, the department recommended that the amount of the bid necessary to treat the sale as a credit transaction be reduced for sales of personal property. We believe the intent of this section is to increase the number of potential buyers at execution sales, and, thereby promote a fair price for the property. In our experience with sales of personal property such as vehicles, the high bid frequently ranges below \$5,000.00. Consequently, we feel that present \$5,000.00 requirement will do little to encourage more bidders to attend sales of personal property. We recommend that the bid amount be reduced to \$2,500.00.

Section 703.050 - Exemptions in Effect at Time of Lien Govern

This section would provide that the determination of whether property is exempt and the amount of an exemption shall be made by application of the exemption statutes in effect at the time a judgment creditor's lien on the property is created. Similar expressions of liens being a determinative factor in fixing the

nature and amount of exemptions available to a debtor are contained in proposed Sections 694.080 and 703.100. None of these sections nor the CLRC comments appended thereto address state tax liens.

Sections 18881 and 26161 of the Revenue and Taxation Code create state tax liens for personal income tax and bank and corporation tax, respectively, at specific points in time, generally when the tax becomes due and payable. Government Code Sections 7150 et. seq., define the force and effect of state tax liens after their creation and after a notice of state tax lien has been recorded in the office of a county recorder or filed with the Secretary of State. In order to apply proposed Sections 694.080, 703.050 and 703.100 to cases involving the collection of state tax debts, it will be necessary to know whether the sections will operate on the date the state tax lien was created or the date notice of the state tax lien was recorded or filed.

Each of the proposed sections in question refers to the time a lien is "created." Consequently, we believe that the date a state tax lien is created will be determinative. We recommend that these sections be clarified to reflect that result.

Section 703.100 - Time for Determination of Exemptions

See discussion under Section 703.050.

Section 703.550 - Opposition to Exemption Claim

The provisions of this section would apply in cases where property has been levied upon pursuant to a warrant and the tax debtor or tax debtor's spouse has filed a claim of exemption with the levying officer. Promptly, after filing of the claim of exemption, the levying officer will serve notice of the claim of exemption on the department. In order to prevent release of the property taken under levy, the proposed section would require the department to do all the following within five days after service of the notice of claim of exemption:

1. File a notice of opposition to the claim of exemption with the court.
2. File a notice of motion for an order determining the claim of exemption with the court.
3. File a copy of the notice of opposition and a copy of the notice of motion with the levying officer.

The current procedure for opposing a claim of exemption is codified in CCP §690.50. Under the same circumstance as described in the preceding paragraph, the department can oppose the claim of exemption and prevent release of the property under levy by doing the following:

1. Within five days after service of the notice of claim of exemption, file a counter affidavit opposing the claim of exemption with the levying officer.
2. Within five days after the counter affidavit is filed, move for a hearing to determine the claim of exemption.
3. Within ten days after the counter affidavit is filed, serve a copy of the notice of hearing on the levying officer.

The procedures set forth in the proposed section impose additional burdens on the department and the Attorney General's Office, our legal representative in all judicial proceedings. Under the proposed procedure, the Attorney General's Office must make a filing with a court within five days after service of the notice of claim of exemption. This is also the timeframe within which the department must contact the Attorney General's Office to arrange representation and to communicate information necessary to make such a filing. Under the current procedure, approximately five additional days are available for contact and communication because the department is able to file the counter affidavit with the levying officer and the initial court filing is not required until five days after the counter affidavit is filed.

Even under the current procedures, the department and the Attorney General's Office are hard-pressed to meet statutory deadlines. A further shortening of the timeframes would appear to only penalize government for its large scale and complex organization which contributing little to the debtor's recognized need for a speedy determination of the claim of exemption. Absent some compelling policy or inequity, we strongly urge that the timeframe in the proposed section be amended from five days to ten days after service of the notice of claim of exemption. Such an amendment would not delay a determination of the claim of exemption beyond the current timeframe and would help assure that such claims are determined on their merits rather than on the nature of government. (Note: We thus support planned amendment No. 203.)

Section 704.720 - Homestead Exemption

This section would make a homestead exemption applicable to all sales of homesteads whether such sales are involuntary or voluntary. A homestead is defined in proposed Section 704.710. Generally, it

is the principal dwelling of the debtor or the debtor's spouse. The homestead exemption would be \$60,000 for a person 65 years of age or older or a member of a family unit and \$30,000 for other persons.

Section 1.5 of Article XX of the Constitution of California provides,

"The Legislature shall protect, by law from forced sale a certain portion of the homestead and other property of all heads of families."

Current statutes providing the protection mandated by the Constitution include Title V of Part 4 of Division II of the Civil Code entitled Homesteads (Homestead Law) and CCP Sections 690.3 and 690.31 (Dwelling Exemption Laws). The Homestead Law is operative when the debtor has recorded a Declaration of Homestead. Basically, it preserves a portion of the proceeds of involuntary or voluntary sale for the debtor. The Dwelling Exemption Laws are operative whenever the Homestead Law is not applicable. Essentially, these statutes preserve a portion of the proceeds of involuntary sale for the debtor. The Dwelling Exemption Laws do not apply to voluntary sales.

As a matter of collection policy, this department has never levied upon and sold a tax debtor's bona fide personal residence. Instead, the department has relied upon liens to secure payment of state tax obligations and patiently awaited voluntary sale of the property rather than initiate extreme collection measures. This policy has adequately protected the revenue base of the state because the great majority of voluntary sales have not involved property subject to the Homestead Law.

The proposed Homestead Law would create a condition where the department would be compelled to abdicate its current policy and seek the forced sale of personal residences. The circumstances creating this condition are:

1. The proposed Homestead Exemption would significantly decrease this department's revenue production if the current collection policy is maintained. Upon every voluntary sale of a debtor's principal dwelling, a state tax lien would be subordinate to not only consensual liens and encumbrances for labor or materials created before notice of state tax lien was recorded, but also \$30,000 to \$60,000 in exempt proceeds. It is doubtful that the revenue lost to the exemption could be recovered. The lien is a passive collection tool and the department would not be relying on it if other means of collection were available.
2. Rather than risk the loss of substantial revenues as a result of the application of the Homestead Exemption upon voluntary sale, the department may initiate an action to foreclose its lien under Section 2931c of the Civil Code. Proposed Section 703.010 and the CLRC comments to proposed Section 704.720 affirm

that the Homestead Exemption would not apply where the lien is being foreclosed. Presumably, the action could be commenced at any time after a notice of state tax lien is recorded.

As an alternative to creating a condition where the department is compelled to initiate a large number of foreclosure actions, it would appear most reasonable and beneficial to amend the proposed statute to provide that the Homestead Exemption would not apply to state tax liens upon voluntary sale. The department could then maintain its current policy and rely on its liens to protect state revenues. In addition, the department and the tax debtor would benefit by avoiding numerous court actions and the forced sale of personal residences. Since such provisions would not appear to violate the directive of the California Constitution, we recommend such an amendment be adopted.

Section 708.630 - Receiver to Transfer Alcoholic Beverage License

This section would provide for the forced sale of a debtor's alcoholic beverage license. In order to prevent a situation where the creditor forces the sale of the debtor's license but does not receive any proceeds to be applied toward the debt, subdivision (b) precludes transfer if the debtor shows that it is unlikely that the sale of the license would yield any excess over the amount required to satisfy claims of creditors with priority over the levying creditor under Business and Professions Code Section 24074.

The language of subdivision (b) fails to contemplate the impact of Business and Professions Code Section 24049. Pursuant to this section, certain state tax agencies, including the Franchise Tax Board, enforce payment of their claims prior to distribution of any proceeds to priority creditors enumerated in Business and Professions Code Section 24074. If the state tax claims are not paid, the Department of Alcoholic Beverage Control does not permit transfer of the license.

In order to determine whether or not the creditor seeking the forced sale of the license will receive any proceeds to apply to the debt, the state tax claims enforceable under Business the Professions Code Section 24049 must be considered in addition to the priority of creditors provided in Business and Professions Code Section 24074. Consequently, we recommend an amendment to subdivision (b) to provide that the transfer may take place unless the debtor shows in the proceeding to appoint a receiver that claims of creditors that must be paid prior to the levying creditor's claim pursuant to Sections 24049 and 24074 of the Business and Professions Code exceed the probable sale price of the license.

According to the proposed CCP §688.020, the remedy provided by this section is available to state tax agencies that have claims enforceable under Business and Professions Code Section 24049. These agencies may choose to commence proceedings to appoint a receiver

rather than await a future voluntary or involuntary transfer to enforce such claims. In these circumstances, it is conceivable that the probable sale price of the license would be sufficient to contribute to payment of the state tax claim but insufficient to contribute to payment of any claims of creditors with priority under Section 24074 of the Business and Professions Code. We believe that allowing sale to proceed in such circumstances is in keeping with the general policy expressed in subdivision (b), i.e., the expected proceeds of the sale should be sufficient to apply at least some of the proceeds to the satisfaction of the debt owed the creditor seeking the appointment of a receiver. The amendment to the language in subdivision (b) should make clear that appointment of a receiver and sale may proceed in the circumstances described above.

EXHIBIT 5

AMENDED IN ASSEMBLY MAY 28, 1981

AMENDED IN ASSEMBLY MAY 12, 1981

CALIFORNIA LEGISLATURE—1981-82 REGULAR SESSION

ASSEMBLY BILL

No. 1857

Introduced by Assemblyman Lancaster

March 30, 1981

An act to amend Section 690 of the Code of Civil Procedure, relating to bankruptcy.

LEGISLATIVE COUNSEL'S DIGEST

AB 1857, as amended, Lancaster. Exemptions: bankruptcy.

Existing federal bankruptcy law provides that an individual debtor may exempt from property of the estate, for purposes of a bankruptcy proceeding, among other classes of property, certain property designated by federal law, unless state law specifically does not so authorize.

This bill would specifically ~~not~~ authorize this property designated by federal law to be claimed as exempt *but would not authorize exemptions of both federal law and state law to be claimed, as specified.*

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 690 of the Code of Civil
- 2 Procedure is amended to read:
- 3 690. (a) Except as otherwise specifically provided,
- 4 the property mentioned in Sections 690.1 to 690.31,
- 5 inclusive, is exempt from execution when claim for
- 6 exemption is made to the same by the judgment debtor

1 or defendant as provided in Section 690.50.

2 *(b)* Pursuant to the authority of paragraph (1) of
3 subsection (b) of Section 522 of Title 11 of the United
4 States Code, the exemptions set forth in subsection (d) of
5 Section 522 of Title 11 of the United States Code are ~~not~~
6 authorized in this state *as follows*:

7 *(1) When a husband and wife are joined in a petition*
8 *filed under Title 11 of the United States Code, they jointly*
9 *may elect to utilize the applicable exemption provisions*
10 *under this chapter or under subsection (b) of Section 522*
11 *of Title 11 of the United State Code, but not both.*

12 *(2) When a petition under Title 11 of the United States*
13 *Code is filed individually, and not jointly, for a husband*
14 *or a wife, one spouse shall not claim any exemption under*
15 *this chapter if the other spouse has claimed any*
16 *exemption under subsection (b) of Section 522 of Title 11*
17 *of the United States Code, and one spouse shall not claim*
18 *any exemption under Title 11 of the United States Code*
19 *if the other spouse claimed any exemption under this*
20 *chapter.*

21 ~~(b)~~

22 *(c)* Whenever it is specifically provided in Sections
23 690.1 to 690.31, inclusive, that the filing of a claim of
24 exemption is not required, the property so mentioned in
25 each such section shall not be subject to levy of
26 attachment or execution in any manner.

27 ~~(e)~~

28 *(d)* As used in Sections 690.1 to 690.31, inclusive,
29 "debtor" means debtor, claimant, defendant,
30 cross-defendant, or judgment debtor.

31 ~~(d)~~

32 *(e)* As used in Sections 690.1 to 690.31, inclusive,
33 "creditor" means the plaintiff or the person in whose
34 favor the writ runs.