

Memorandum 82-63

Subject: Study D-300 - Enforcement of Judgments (Assembly Bill 707--
Comprehensive Enforcement of Judgments Law)

BACKGROUND

We have run into a major problem on AB 707. This bill was introduced to effectuate the Commission's recommendation relating to enforcement of judgments. A copy of the recommendation (blue covered book) is attached.

Assembly Bill 707 substituted one comprehensive procedure for the homestead exemption in place of various alternative provisions of existing law for protection of a dwelling from enforcement of a judgment. The bill eliminated various provisions of existing law that hampered the sale of a dwelling to satisfy a judgment but gave the judgment debtor the benefit of the homestead exemption when a judgment lien has been created by recording an abstract of the judgment and the dwelling is voluntarily sold. The existing law and the Commission's recommendations are set out on pages 2087-2095 of the attached recommendation. See also pages 2112-2119 (elimination of right of redemption).

All interested persons and organizations supported the bill (or did not object to the bill) in the form in which it was presented to the Senate Judiciary Committee except the California Association of Collectors. The Association objected to the protection of proceeds of a voluntary sale of a dwelling in the amount of the homestead exemption. The Association's objection probably could be satisfied by the elimination of Article 5 (Release of Judgment Liens on Homestead) set out on pages 129-134 of AB 707 (copy attached).

Representatives of judgment debtors (Western Center on Law and Poverty) would strongly object to the bill if only Article 5 (Release of Judgment Liens on Homestead) were eliminated from the bill. Their position is that if the protection afforded by the bill to proceeds of a voluntary sale of a dwelling is eliminated as a practical matter, then the protections provided by existing law against involuntary sale of a dwelling (some of which the bill would eliminate) should be restored.

ALTERNATIVES

At the hearing held by the Senate Committee on Judiciary on the bill, the Committee indicated that they wanted the objection of the California Association of Collectors satisfied. However, to satisfy that objection (to permit the judgment creditor to reach proceeds of a voluntary sale where the dwelling is subject to a judgment lien) would give rise to strong objections from groups that represent debtors. There appear to be three alternatives that are available under the circumstances:

Alternative 1

Delete the Article of the bill (commencing on page 129) that is designed to provide practical protection to proceeds of a voluntary sale of a dwelling when the dwelling is subject to a judgment lien. This alternative would give rise to strong objections from persons who represent judgment debtors and is not recommended by the staff.

Alternative 2

Present the bill to the Senate Judiciary Committee at a second hearing without the amendment that the Committee indicated that it wanted to be made to the bill. This alternative would retain the procedure for protection of proceeds of a voluntary sale of a dwelling. The Committee would be asked to vote either for or against the bill in the form in which the bill then existed (without the Committee's requested amendment to eliminate protection of proceeds of a voluntary sale). This is not a particularly desirable choice, since it represents a refusal to do what the Committee requested be done.

Alternative 3

Amend the bill to delete the article that protects proceeds of a voluntary sale of a dwelling and to add to the bill various protections provided by existing law in the case of an execution sale of a dwelling.

Specifically, Alternative 3 would add the following additional protections in the case of an execution sale:

(1) A provision would be added to the bill (i) to permit a person to record a homestead declaration and (ii) to preclude the creation of a judgment lien on real property with respect to which a homestead declaration has been recorded. These provisions would continue the substance of existing law, except that the provisions relating to the

homestead declaration would restrict the effect of the recording of a homestead declaration to debtor-creditor rights. Unlike the provisions of existing law, the recording would not in any way restrict the right to convey or encumber the property. The provisions for the declared homestead are set out in the amendments attached as Exhibit 1 as Amendment 25 on pages 4-7.

(2) A provision would be added to the bill that would preclude sale of the dwelling unless a bid is received at the execution sale that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy "all liens and encumbrances on the property." See Amendment 19 of the amendments attached as Exhibit 1. In its present form, in order to sell the dwelling, the bill requires only the satisfaction of the total of (1) preferred labor claims and state tax liens that are superior to the judgment creditor's lien and (2) the amount of the homestead exemption. See Section 701.620 on page 92 of the bill. The execution sale is not by itself grounds for acceleration of a lien or encumbrance superior to the judgment creditor's lien, notwithstanding any provision of the obligation, lien, or encumbrance; and the sale wipes out an inferior lien on the property sold. See Section 704.810 on page 128 of bill (protection of favorable financing secured by superior lien or encumbrance). See also Section 701.630 on page 92 of bill (inferior liens extinguished).

(3) A provision would be included in the bill to provide that, when a homestead is sold on an execution sale, the amount required to satisfy a lien or encumbrance shall not include any penalty for prepayment. A similar provision is found in the Eminent Domain Law.

(4) A provision is added for distribution of the proceeds of the sale of a homestead that provides for the payment of all liens and encumbrances, then the amount of the homestead exemption to the judgment debtor, then costs of the sale, before the judgment creditor receives any of the proceeds of sale. See Amendment 24 on pages 3 and 4 of Exhibit 1.

The above provisions will give an alert judgment debtor the means to avoid having a judgment lien attach to his or her dwelling and will give the judgment debtor substantial protection against having his or her dwelling sold on an execution sale:

(1) The provisions permit the judgment debtor (or the judgment debtor's spouse) to record a homestead declaration and this recording

will prevent a judgment lien from thereafter attaching to the property described in the homestead declaration. See Section 704.950 on page 6 of Exhibit 1. The judgment debtor may convey the property described in the homestead declaration free from any judgment lien and the proceeds of a voluntary sale of the property described in the homestead declaration are protected for a period of six months after the date of the sale and thereafter if invested in a new dwelling acquired within the six-month period. See Section 704.960 on page 6 of Exhibit 1. (The homestead exemption is also allowed in case of an involuntary sale pursuant to a writ of execution. See Section 704.970(b) at the top of page 7 of Exhibit 1.)

(2) The provisions require the payment of "all liens and encumbrances" as a part of the minimum bid for the property on an execution sale. The purchaser at the execution sale must pay in cash as a minimum bid the total of (a) the amount of all liens and encumbrances (except that the judgment creditor need not pay the amount of his or her judgment in cash) and (b) the amount of the homestead exemption. It is unlikely that any sales will actually occur since the required minimum bid will ordinarily leave nothing in addition for the judgment creditor on the sale.

There are four additional protections afforded judgment debtors by existing law that the staff does not propose to restore by the amendments attached as Exhibit 1:

(1) The amendments attached as Exhibit 1 do not restore the right of redemption. There is no doubt that the right of redemption hampers the sale of real property, because it delays the purchaser from obtaining a good title to the property until the time for redemption expires. For this reason, a purchaser will be unwilling to pay as much for the property as the purchaser would pay if a good title to the property is obtained at the sale. AB 707 delays the sale for 120 days after the time the notice of levy is served on the debtor, thus giving the debtor the opportunity to save the property by making some arrangement with the judgment creditor or the opportunity to obtain a higher price at the execution sale by obtaining other bidders in addition to the judgment creditor. The fact that the right of redemption does not really serve either the interest of the judgment creditor or judgment debtor and would restore complexity to the law causes the staff to recommend against restoring the redemption procedure in case of execution sale of a dwelling.

(2) Before a dwelling that is entitled to homestead protection under existing law may be sold on execution, it must be determined whether a portion of the land on which it is located can be divided without material injury to the dwelling and sold to satisfy the judgment. The amendments attached as Exhibit 1 do not restore the requirement. This requirement is time-consuming, costly, and burdensome, and results in few partitions in kind. It dates from an era when dwellings were commonly located on larger tracts. Today most dwellings are located on standard lots that cannot be divided.

(3) Under existing law, before a dwelling subject to the homestead exemption may be sold on execution, the court must determine that the judgment debtor's equity exceeds the amount of the exemption. The amendments attached as Exhibit 1 do not restore this requirement. This court determination is unnecessary, since the market place is a better determination of value, and the property cannot be sold under the amendments attached as Exhibit 1 unless the minimum bid exceeds the total of the amount of the homestead exemption and all liens and encumbrances. To ensure that the judgment creditor does not attempt to force sale of property where the required minimum bid will not be received, AB 707 provides that if the required minimum bid is not received, the judgment creditor is not entitled to recover the costs of the sale procedure. (A provision that the court is required to award to the judgment debtor reasonable attorney's fees where the required minimum bid is not received was deleted from the bill after its introduction.) In addition, the judgment debtor is precluded from again levying on the homestead for a period of one year.

(4) Existing law requires that a dwelling be sold at a price not less than 90 percent of its fair market value as determined by the court; but, if no such bid is received, the court, upon motion, may accept the highest bid exceeding encumbrances and the amount of the homestead exemption or may order a new sale. This requirement is not restored by the amendments attached as Exhibit 1. This requirement is intended to protect the judgment debtor against sacrifice sales of the dwelling. But it necessitates the added expense of an appraisal and a court determination of market value. Moreover, the authority of the court to waive the 90-percent requirement limits its usefulness. A more effective means of protecting the interest of the judgment debtor is

provided in the provisions of AB 707 which defer the execution sale for a period of 120 days during which time the judgment debtor may find a buyer for the dwelling willing to bid a satisfactory price. The judgment debtor receives the proceeds exemption (in the amount of homestead exemption) and the rest of the equity will be available to satisfy the judgment. Under the amendments, the bidder is required to bid enough not only to cover the homestead exemption but also all liens and encumbrances on the property. The 90-percent value limitation, with its attendant procedural expenses, is eliminated in favor of such a scheme.

STAFF RECOMMENDATIONS

The Senate Judiciary Committee directed that AB 707 be amended to satisfy the Association of Collectors. The amendments attached as Exhibit 1 would meet the objection of the Association by restoring existing law. The amendments are objected to by the State Bar Subcommittee on Debtor-Creditor Relations; the State Bar Subcommittee prefers the bill in its present form. The California Bankers Association also supports the bill in its present form and probably will object to the amendments. The California Center on Law and Poverty (representing debtors) did not object to the bill in its present form, and we do not know whether the amendments set out in Exhibit 1 give the debtors enough benefits to cause the California Center on Law and Poverty not to object to the bill as amended. Both the Association of Collectors and the California Bankers Association would be happy with the bill if only the provisions protecting proceeds of a voluntary sale of a dwelling subject to a judgment lien were deleted; but that solution would cause strong objections from organizations representing debtors.

Because of the directive of the Senate Committee on Judiciary, the staff recommends that AB 707 be amended by adopting the amendments attached as Exhibit 1. At the hearing on the bill as amended, the various persons and organizations will be free to urge that the bill be passed without those amendments, and the staff recommends that the Commission support enactment of the bill without the amendments.

If prior to the hearing, the California Association of Collectors determines to withdraw its objections to the bill, we would delete the amendments.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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Exhibit 1

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RECORD # 100 BF:

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Substantive

AMENDMENTS TO ASSEMBLY BILL NO. 707
AS AMENDED IN SENATE April 29, 1982

Amendment 1

On page 35, line 5, of the printed bill, as amended in Senate April 29, 1982, strike out "ineffective for any purpose" and insert:

effective only to the extent provided in Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2

Amendment 2

On page 41, strike out line 12 and insert:

697.340. Except as provided in Section 704.950:
(a) A judgment lien on real property

Amendment 3

On page 91, line 26, after "701.810" insert:

or Section 704.850, whichever is applicable

Amendment 4

On page 91, line 35, after "701.810" insert:

or Section 704.850, whichever is applicable

Amendment 5

On page 92, line 23, after the comma insert:

or

Amendment 6

On page 92, line 24, strike out "or 704.720 (homestead),"

Amendment 7

On page 95, line 6, after the first comma, insert:

or

Amendment 8

On page 95, lines 6 and 7, strike out "or 704.720 (homestead),"

Amendment 9

On page 95, line 14, strike out "Sections" and
insert:

Section

Amendment 10

On page 95, lines 14 and 15, strike out "and
subdivision (d) of Section 704.720"

Amendment 11

On page 123, strike out line 19 and insert:
damaged

Amendment 12

On page 123, line 24, strike out "sale in the
case"

Amendment 13

On page 123, strike out line 25

Amendment 14

On page 123, line 26, strike out "proceeds in all other
cases" and insert:

time the proceeds are actually received by the judgment
debtor

Amendment 15

On page 123, strike out lines 34 to 40,
inclusive

Amendment 16

On page 124, strike out lines 1 and 2

Amendment 17

On page 126, line 1, strike out the period and
insert:

, and a statement whether or not the records of the county
recorder indicate that a homestead declaration under
Article 5 (commencing with Section 704.910) that describes
the dwelling has been recorded by the judgment debtor or
the spouse of the judgment debtor.

(c) A statement of the amount of any liens or
encumbrances on the dwelling, the name of each person
having a lien or encumbrance on the dwelling, and the
address of such person used by the county recorder for the
return of the instrument creating such person's lien or
encumbrance after recording.

Amendment 18

On page 127, line 3, after the period insert:

The order for sale shall specify the amount of the proceeds of the sale that is to be distributed to each person having a lien or encumbrance on the dwelling and shall include the name and address of each such person.

Amendment 19

On page 128, lines 14 and 15, strike out "the requirements of Section 701.620 (minimum bid)" and insert:

all liens and encumbrances on the property

Amendment 20

On page 128, strike out lines 19 to 21, inclusive, and insert:

704.810. Levy on a homestead that is subject to a lien or encumbrance

Amendment 21

On page 128, line 22, strike out "homestead"

Amendment 22

On page 128, line 25, after "encumbrance" insert:

and if the homestead is sold pursuant to court order under this article the amount payable to satisfy a lien or encumbrance shall not include any penalty for prepayment

Amendment 23

On page 129, lines 10 and 11, strike out "the requirements of Section 701.620 (minimum bid)" and insert:

all liens and encumbrances on the property

Amendment 24

On page 129, between lines 13 and 14 insert:

704.850. (a) The levying officer shall distribute the proceeds of sale of a homestead in the following order:

- (1) To the discharge of all liens and encumbrances, if any, on the property.
- (2) To the judgment debtor in the amount of any

applicable exemption of proceeds pursuant to Section 704.720.

(3) To the levying officer for the reimbursement of the levying officer's costs for which an advance has not been made.

(4) To the judgment creditor to satisfy the following:

(A) First, costs and interest accruing after issuance of the writ pursuant to which the sale is conducted.

(B) Second, the amount due on the judgment with costs and interest, as entered on the writ.

(5) To the judgment debtor in the amount remaining.

(b) Sections 701.820 and 701.830 apply to distribution of proceeds under this section.

Amendment 25

On page 129, strike out lines 15 to 40, inclusive, strike out pages 130 to 133, inclusive, and on page 134, strike out lines 1 to 3, inclusive, and insert:

Article 5. Declared Homesteads

704.910. As used in this article:

(a) "Declared homestead" means the dwelling described in a homestead declaration.

(b) "Declared homestead owner" includes both of the following:

(1) The owner of an interest in the declared homestead who is named as a declared homestead owner in a homestead declaration recorded pursuant to this article.

(2) The declarant named in a declaration of homestead recorded prior to July 1, 1983, pursuant to former Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code and the spouse of such declarant.

(c) "Dwelling" means any interest in real property (whether present or future, vested or contingent, legal or equitable) that is a "dwelling" as defined in Section 704.710, but does not include a leasehold estate with an unexpired term of less than two years or the interest of the beneficiary of a trust.

(d) "Homestead declaration" includes both of the following:

(1) A homestead declaration recorded pursuant to

this article.

(2) A declaration of homestead recorded prior to July 1, 1983, pursuant to former Title 5 (commencing with former Section 1237) of Part 4 of Division 2 of the Civil Code.

(e) "Spouse" means a "spouse" as defined in Section 704.710.

704.920. A dwelling in which an owner or spouse of an owner resides may be selected as a declared homestead pursuant to this article by recording a homestead declaration in the office of the county recorder of the county where the dwelling is located. From and after the time of recording, the dwelling is a declared homestead for the purposes of this article.

704.930. (a) A homestead declaration recorded pursuant to this article shall contain all of the following:

(1) The name of the declared homestead owner. A husband and wife both may be named as declared homestead owners in the same homestead declaration if each owns an interest in the dwelling selected as the declared homestead.

(2) A description of the declared homestead.

(3) A statement that the declared homestead is the principal dwelling of the declared homestead owner or such person's spouse, and that the declared homestead owner or such person's spouse actually resides in the declared homestead on the date the homestead declaration is recorded.

(b) The homestead declaration shall be executed and acknowledged in the manner of an acknowledgment of a conveyance of real property by at least one of the following persons:

(1) The declared homestead owner.

(2) The spouse of the declared homestead owner.

(3) The guardian or conservator of the person or estate of either of the persons listed in paragraph (1) or (2). The guardian or conservator may execute, acknowledge, and record a homestead declaration without the need to obtain court authorization.

(4) A person acting under a power of attorney or otherwise authorized to act on behalf of a person listed in paragraph (1) or (2).

(c) The homestead declaration shall include a statement that the facts stated in the homestead declaration are known to be true as of the personal knowledge of the person executing and acknowledging the

homestead declaration. If the homestead declaration is executed and acknowledged by a person listed in paragraph (3) or (4) of subdivision (b), it shall also contain a statement that the person has authority to so act on behalf of the declared homestead owner or the spouse of the declared homestead owner and the source of the person's authority.

704.940. A homestead declaration does not restrict or limit any right to convey or encumber the declared homestead. A homestead declaration, when properly recorded, is prima facie evidence of the facts therein stated, and conclusive evidence thereof in favor of a purchaser or encumbrancer in good faith and for a valuable consideration.

704.950. (a) Except as provided in subdivision (b), a judgment lien on real property created pursuant to Article 2 (commencing with Section 697.310) of Chapter 2 does not attach to a declared homestead if both of the following requirements are satisfied:

(1) A homestead declaration describing the declared homestead was recorded prior to the time the abstract or certified copy of the judgment was recorded to create the judgment lien.

(2) The homestead declaration names the judgment debtor or the spouse of the judgment debtor as a declared homestead owner.

(b) This section does not apply to a judgment lien created under Section 697.320 by recording a certified copy of a judgment for child or spousal support.

704.960. (a) If a declared homestead is voluntarily sold, the proceeds of sale are exempt in the amount provided by Section 704.730 for a period of six months after the date of sale.

(b) If the proceeds of a declared homestead are invested in a new dwelling within six months after the date of a voluntary sale or within six months after proceeds of an execution sale or of insurance or other indemnification for damage or destruction are received, the new dwelling may be selected as a declared homestead by recording a homestead declaration within the applicable six-month period. In such case, the homestead declaration has the same effect as if it had been recorded at the time the prior homestead declaration was recorded.

704.970. Whether or not a homestead declaration has been recorded:

(a) Nothing in this article affects the right of levy pursuant to a writ of execution.

(b) Any levy pursuant to a writ of execution on a dwelling (as defined in Section 704.710) and the sale pursuant thereto shall be made in compliance with Article 4 (commencing with Section 704.710) and the judgment debtor and the judgment creditor shall have all the rights and benefits provided by that article.

704.980. (a) A declared homestead may be abandoned by a declaration of abandonment under this section, whether the homestead declaration was recorded pursuant to this article or pursuant to former Title 5 (commencing with former Section 1237) of Part 4 of Division 2 of the Civil Code.

(b) A declaration of abandonment shall be executed and acknowledged in the manner of an acknowledgment of a conveyance of real property. It shall be executed and acknowledged by a declared homestead owner or by a person authorized to act on behalf of a declared homestead owner. If it is executed and acknowledged by a person authorized to act on behalf of a declared homestead owner, the declaration shall contain a statement that the person has authority to act on behalf of the declared homestead owner and the source of the person's authority.

(c) The declaration of abandonment does not affect the declared homestead of any person other than the declared homestead owner named in the declaration of abandonment.

704.990. (a) A declared homestead is abandoned by operation of law as to a declared homestead owner if the declared homestead owner or a person authorized to act on behalf of the declared homestead owner executes, acknowledges, and records a new homestead declaration for the declared homestead owner on different property. An abandonment under this subdivision does not affect the declared homestead of any person other than the declared homestead owner named in the new homestead declaration.

(b) Notwithstanding subdivision (a), if a homestead declaration is recorded which includes property described in a previously recorded homestead declaration, to the extent that the prior homestead declaration is still valid, the new homestead declaration shall not be considered an abandonment of the prior declared homestead.