

7/18/83

Memorandum 83-53

Subject: Study D-302 - Creditors' Remedies (Priorities Between Judgment Lien on Personal Property and Security Interest)

Professor Lloyd Tevis has raised some questions about the Enforcement of Judgments Law (enacted in 1982). See the letters attached to this memorandum as Exhibits 2 and 3. The questions concerning the priorities of judgment liens versus security interests merit attention. The staff has prepared a draft proposal to implement Professor Tevis' suggestions in this regard. See Exhibit 1 attached to this memorandum. After additional review, we propose to put this material in any clean-up legislation regarding the Enforcement of Judgments Law in the 1984 legislative session.

The proposal to change the priority rules involves some highly technical analysis and we are indebted to Professor Tevis for his help. The detailed analysis supporting the conclusions in the staff draft are set out in Professor Tevis' two letters and is not repeated here.

Professor Tevis' first letter (Exhibit 2) raises two additional concerns. One is technical--clarifying that the execution lien does not continue on inventory sold under a keeper levy--and was remedied in Assembly Bill 99 (1983 Cal. Stats. ch. 155, operative July 1, 1983). The other point raises some interesting theoretical and constitutional issues concerning the status of a renewed judgment under the full faith and credit clause. We understand that Professor Tevis is giving further consideration to this problem and we will report any suggestions he may have to the Commission. At this time the staff does not perceive any overriding need for legislation, nor is it clear whether a legislative solution (if there is a problem) would be possible in this constitutional realm.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

STAFF DRAFTPriorities Between Judgment Liens on Personal
Property and Security Interests

The Enforcement of Judgments Law permits a judgment creditor to obtain a judgment lien on personal property by filing a notice with the Secretary of State.¹ By using this procedure, a judgment creditor may obtain a lien on the judgment debtor's accounts receivable, chattel paper, equipment, farm products, inventory, and negotiable documents of title²--essentially the same types of property in which a security interest may be perfected by filing.³

The judgment lien on personal property is given the same priority against security interests as an execution lien would have under Commercial Code Section 9301.⁴ This approach works fairly well in most situations, but it does not provide answers to some priority questions that may arise. Accordingly, the Commission recommends that the rules governing the priority of a competing judgment lien and security interest be revised to adopt the first-to-file or first-to-perfect rule of Commercial Code Section 9312(5). This change will make the priority rules applicable to judgment liens on personal property more consistent with the rules governing priorities between conflicting security interests.

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1. See Code Civ. Proc. §§ 697.510-697.670. See also Code Civ. Proc. §§ 488.375, 488.405, 488.510(c) (attachment lien on equipment, farm products, and inventory of going business by filing with Secretary of State).
 2. Code Civ. Proc. § 697.530.
 3. See Com. Code §§ 9302, 9304, 9305.
 4. Code Civ. Proc. § 697.590.

The proposed priority rules would have the same result as the existing rules in most situations. The most important consequence of the proposed rules would occur in a situation where a judgment lien is created between the time that a secured party files a financing statement and the time the security interest attaches.⁵ The result is unclear under existing law,⁶ but under the proposed priority rules the security interest would have priority since it was filed first. This result is intended to preserve the integrity of the filing system; if judgment liens were given priority in this situation, secured parties would have to recheck the filing system before making advances.⁷

In other situations covered by the priority rules of existing law, the proposed rules would give the same result. For example, under both systems a judgment lien would have priority over a non-purchase money security interest that has attached to inventory but is unperfected when the judgment lien is created.⁸ The proposed revision would also retain some special rules of existing law. The judgment lien would still be subordinate to a purchase money security interest that is perfected within 10 days after the debtor receives possession of the property.⁹

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5. The Commercial Code permits the filing of a financing statement before the security agreement is made or the security interest attaches to collateral. See Com. Code § 9402(1).
 6. Commercial Code Section 9301(1), as incorporated by existing Code of Civil Procedure Section 697.590, provides in effect that a judgment lien has priority over an unperfected security interest (other than certain purchase money security interests). The argument can be made that this rule does not cover the situation discussed in the text since there is never an unperfected security interest over which the judgment lien can have priority. The security interest is perfected at the same time it is created, i.e., when the debtor obtains rights in the collateral. See Com. Code §§ 9203, 9303. By this view, a security interest that has not been created cannot be an unperfected security interest within the terms of Commercial Code Section 9301, leading to the conclusion that Section 9301 states no rule governing priorities in the situation under discussion.
 7. See U.C.C. § 9-312 comment 5 (19__).
 8. See Com. Code § 9301 (1) (incorporated by Code Civ. Proc. § 697.590(a)).
 9. See Com. Code § 9301(2) (incorporated by Code Civ. Proc. § 697.590(a)).

In the case of future advances under a security interest that was perfected when the judgment lien was created, both schemes give the secured party priority only to the extent that the advances were made before the judgment lien attached or within 45 days thereafter or made without knowledge of the judgment lien or pursuant to a commitment entered into without knowledge of the judgment lien.¹⁰

10. See Code Civ. Proc. § 697.590(b).

Code of Civil Procedure § 697.590 (repealed). Priority of judgment lien against security interests

SEC. ____ . Section 697.590 of the Code of Civil Procedure is repealed.

~~697.590. (a) As against a security interest, a judgment lien on personal property has priority to the extent provided in Section 9301 of the Commercial Code.~~

~~(b) For the purpose of this section, a judgment lien on personal property under subdivision (b) of Section 697.530 (after/acquired property) has priority over a security interest in the property if the date the financing statement was filed with respect to the security interest is after the date the notice of judgment lien was filed under this article unless the secured party files a financing statement with respect to a purchase money security interest (Section 9107 of the Commercial Code) in the property subject to the judgment lien before or within 10 days after the debtor receives possession of the property.~~

~~(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.~~

Comment. Former Section 697.590 is superseded by a new Section 697.590.

Code of Civil Procedure § 697.590 (added). Priorities between conflicting judgment liens and security interests

SEC. ____ . Section 697.590 is added to the Code of Civil Procedure, to read:

697.590. (a) As used in this section:

(1) "Filing" means:

(A) With respect to a judgment lien on personal property, the filing of a notice of judgment lien in the office of the Secretary of State to create a judgment lien on personal property under this article.

(B) With respect to a security interest, the filing of a financing statement pursuant to Division 9 (commencing with Section 9101) of the Commercial Code.

(2) "Perfection" means perfection of a security interest pursuant to Division 9 (commencing with Section 9101) of the Commercial Code.

(3) "Personal property" means:

(A) With respect to a judgment lien on personal property, the property to which the judgment lien has attached pursuant to this article.

(B) With respect to a security interest, the collateral to which the security interest has attached pursuant to Division 9 (commencing with Section 9101) of the Commercial Code.

(4) "Purchase money security interest" means "purchase money security interest" as defined in Section 9107 of the Commercial Code.

(b) Except as provided in subdivisions (d) and (e), priority between a judgment lien on personal property and a conflicting security interest in the same personal property shall be determined according to the following rules:

(1) Conflicting interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the personal property or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.

(2) Except as provided in subdivision (d), an unperfected security interest is subordinate to a judgment lien.

(c) For the purposes of subdivision (b), a date of filing or perfection as to personal property is also a date of filing or perfection as to proceeds.

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

(e) If a purchase money security interest in inventory has priority over a judgment lien pursuant to subdivision (d) 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 the inventory subject to the purchase money security interest notwithstanding that the conflicting security interest would not otherwise have priority over the judgment lien.

(f) A judgment lien that attaches to personal property and that is also subordinate to a security interest under subdivision (b) is subordinate to the security interest only to the extent that the security interest secures advances made before the judgment lien attached or within 45 days thereafter or made without knowledge of the judgment lien or pursuant to a commitment entered into without knowledge of the judgment lien. For the purpose of this subdivision, a secured party shall be deemed not to have knowledge of a judgment lien on personal property until the time the judgment creditor serves a copy of the notice of judgment lien on the secured party. Service shall be made personally or by mail. If service is by mail, it shall be sent to the secured party at the address shown in the financing statement or security agreement.

Comment. Section 697.590 supersedes former Section 697.590. This section in general treats a judgment lien on personal property as a perfected security interest perfected by filing on the date when the notice of judgment lien was filed with the Secretary of State. See Section 697.510.

Subdivision (b) of Section 697.590 provides the general rule governing priority between conflicting judgment liens and security interests in the same property. Subdivision (b) is analogous to Commercial Code Section 9312(5). Subdivision (c) is the same in substance as Commercial Code Section 9312(6). See also Section 697.620 (lien on identifiable cash proceeds of transferred property).

Subdivision (d) is consistent with Commercial Code Section 9312(4) and continues the substance of part of former Section 697.590(b).

Subdivision (e) continues the substance of former Section 697.590(c). This provision resolves a circular priority problem that could arise where, for example, a secured party (SP #1) with a perfected security interest in after-acquired inventory has priority over a secured party

(SP #2) with a purchase money security interest in the inventory because SP #2 failed to take a step necessary under Commercial Code Section 9312(3) to obtain priority over SP #1. In this situation, a creditor who filed a notice of judgment lien before SP #1 filed a financing statement would have priority over SP #1 pursuant to subdivision (b). The judgment lien would not have priority over SP #2, however, if SP #2 filed within 10 days after the debtor received possession of the inventory, even though SP #1 has priority over SP #2. See subdivision (d). To resolve this problem, under subdivision (e), the judgment lien creditor is demoted to last place after SP #2 even though the judgment lien creditor would normally have priority over SP #1 under subdivision (b).

Subdivision (f) continues the substance of former law. See former Code Civ. Proc. § 697.590(a) (incorporating lien creditor rules of Com. Code § 9301); Com. Code § 9301(4) (future advance rule), (5) (notice requirement and manner of service).

As provided in the introductory clause of subdivision (b), this section governs priority where there is a conflict between a judgment lien on personal property and a security interest in the property. These rules are also incorporated by the Attachment Law for the purpose of determining priorities between attachment liens on equipment, farm products, and inventory of a going business obtained by filing with the Secretary of State and conflicting security interests in the same property. See Sections 488.475 (equipment of going business), 488.405 (farm products and inventory of going business), 488.500(c) (attachment lien priority). This section does not apply in a situation where, by operation of another provision, there is no conflict because the judgment lien or attachment lien has expired or does not continue. See, e.g., 488.510 (duration of attachment lien generally), 697.030 (duration of enforcement liens generally), 697.510(b) (five-year duration of judgment lien on personal property), 697.610 (continuation of judgment lien on transferred property), 697.620 (limitations on judgment lien on proceeds).

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Commercial Code § 9301 (amended). Priority of lien creditor

SEC. ____ . Section 9301 of the Commercial Code is amended to read:

9301. (1) Except as otherwise provided in subdivision (2), an unperfected security interest is subordinate to the rights of:

(a) Persons entitled to priority under Section 9312.

(b) A person who becomes a lien creditor before the security interest is perfected.

(c) In the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected.

(d) In the case of accounts and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.

(2) If the secured party files with respect to a purchase money security interest before or within 10 days after the debtor receives possession of the collateral, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like, ~~or by filing a notice of judgment lien on personal property~~, 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 from the time of appointment. "Lien creditor" does not include a creditor who by filing a notice with the Secretary of State has acquired only an attachment or judgment lien on personal property, or both.

(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.

~~(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 Title 9 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.~~

Comment. Section 9301 is revised to conform to a new Code of Civil Procedure Section 697.590. Subdivision (3) is amended to exclude from the definition of "lien creditor" a creditor who has only a judgment lien on personal property (see Code Civ. Proc. §§ 697.510-697.670) or attachment lien on equipment, farm products, or inventory (see Code Civ. Proc. §§ 488.475, 488.405) by filing with the Secretary of State. Special provisions govern priorities between these judgment and attachment liens and security interests. See Code Civ. Proc. §§ 488.500(c), 697.590. The substance of former subdivision (5) of Section 9301 is continued in Code of Civil Procedure Section 697.590(f).



LOYOLA LAW SCHOOL

April 19, 1983

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

Re: The Enforcement of Judgments Law

Dear John:

It seems like old times to be writing to you concerning this subject. I have taught my course on Debtor/Creditor Relations based on the new law and I must say that, except for those mentioned below, I haven't found any serious problems. I do have a few concerns that I thought I should bring to your attention in case others have not.

1. My first and major concern is with §697.590 which deals with priorities between security interests and judgment liens on personal property. I think I can best express it by means of a series of illustrations. In all these illustrations I use the following abbreviations:

S/A = security agreement
S/I = security interest
PMSI = purchase money security interest
S/P = secured party
F/S = financing statement
D = judgment debtor and debtor under the security agreement
C = creditor who files a notice of judgment lien
J/L = notice of judgment lien

- A. 2/1/84 - D executes S/A granting S/I in equipment to S/P
2/3/84 - C files J/L
2/5/84 - S/P files F/S

Under §697.590(a) C's judgment lien has priority because under UCC §9301(1)(b) C became a lien creditor before the S/I was perfected.

- B. 2/1/84 - D executes a S/A granting a PMSI in new equipment to S/P. D obtains possession of the collateral.
2/3/84 - C files J/L
2/5/84 - S/P files F/S.

Under §697.590(a) the PMSI has priority because it was perfected within 10 days after the debtor received possession of the collateral. UCC §9301(2).

- C. 2/1/84 - D executes a S/A granting a PMSI in new equipment to S/P. D obtains possession of the collateral.
- 2/3/84 - C files J/L
- 2/12/84- S/P files F/S

Under §697.590(a) C's judgment lien has priority pursuant to UCC §9301(1)(b) because the PMSI does not qualify for priority under §9301(2) in that it was not perfected within the 10 day grace period after the debtor received possession.

- D. 2/1/84 - C files J/L
- 2/3/84 - D executes S/A granting S/I to S/P
- 2/5/84 - S/P files F/S

In my opinion §697.590(a) does not state a rule governing priority in this situation because UCC §9301 similarly does not state a rule governing priority. As originally enacted in California §9301(1)(b) provided that a S/I is subordinate to "a person who becomes a lien creditor before the security interest attaches." Thus it applied to this fact situation. The quoted language was deleted by the 1974 amendment to the section. As it now reads §9301(1)(b) applies only to a contest between a person who becomes a lien creditor after the S/I has attached but before it has been perfected. In this illustration the judgment lien attached before the S/I attached. As I see it, C wins because the security interest attached only to D's interest as of 2/3/84. On that date D's interest was already subject to C's judgment lien and therefore the later created security interest is subordinate to it. In my opinion the only way that §9301(1)(b) can be said to apply to this fact situation is if the word "unperfected" is understood to include a security interest which has not yet attached. Since the draftsmen were very clear as to the difference between the words "attached" and "perfected", I cannot ascribe that meaning to the language. I think that a rule should be stated to cover this situation.

The problem presented in this Illustration D becomes more difficult in the next Illustration.

- E. 2/1/84 - S/P files F/S in advance of the creation of a S/I as permitted by UCC §9402(1)
- 2/3/84 - C files J/L.
- 2/5/84 - D executes a S/A granting S/I in equipment to S/P

In this fact situation analogous to Illustration D? At the time security interest was created the collateral was already subject to a judgment lien, as in illustration D. However, here the secured party was the first-to-file. In this case should the first-to-file rule of U.C.C. §9312(5)(a) apply to give the security interest priority? I think it should in order to preserve the integrity of the filing system. However §697.590 does not, in my opinion, state a rule of priority in this situation.

§697.590(b), by its terms states only a first-to-file rule of priority between judgment liens and security interests as to afteracquired property. As I read it, it appears to imply that if C is the first-to-file (as in Illustrations A, B, C, and perhaps D, above) then C has priority as to existing collateral. It then goes on to provide that C also has priority as to

afteracquired collateral except as to certain purchase money security interests. But what of the situation where the S/P is the first-to-file as in this illustration? Is there an implication that if the secured party has priority as to after-acquired property as, the first-to-file, that it also has priority as to the original collateral?

In the Official Comments to U.C.C. §9312 we find various examples of how the first-to-file rule is intended to operate. In Comment (5) there appears Example 1 which is essentially as follows:

- 2/1 - S/P#1 files F/S
- 2/3 - S/P#2 files F/S. D executes a S/A granting S/I to S/P#2.
- 2/5 - D executes S/A granting a S/I to S/P#1.

Under U.C.C. §9312(5)(a), S/P#1 has priority over S/P#2 as the first-to-file. As explained in Comment(5) this result is necessary to protect the integrity of the filing system. It seems clear to me that the same result should occur in Illustration E, above.

It seems to me that the difficulties I have pointed out stem from uncertainty as to whether the judgment lien on personal property is to be treated in the same way as an attachment or execution lien or as a competing security interest. §697.590(a) treats it as the former by reference to UCC §9301 as the rule governing priority. §697.590(b), however, treats it much like a competing security interest by establishing a first to file rule as the rule of priority.

The Law Revision Commission Comment which introduces the Article on Judgment Liens on Personal Property seems to me to use the analogy to security interests. It speaks of the procedure for obtaining such liens as "analogous to the procedure for perfecting a security interest by filing with the Secretary of State." In the third paragraph of this comment it is said: "The judgment creditor may use the procedure provided in this article in order to establish a priority dating from the creation of the lien filing with the Secretary of State."

In all of the above illustrations it seems to me that problems arise because §675.590 reflects two fundamentally different views as to the nature of the judgment lien on personal property. If, as I beleive, it is more in the nature of a security interest than a lien created by levy, then the rules for priority should be those of UCC §9312(5) together with a priority rule for purchase money security interests. In all of the illustrations given above the first-to-file rules of UCC §9312(5)(a) would give an appropriate result without reference to UCC§9301. In addition, if a security interest is perfected by a means other than filing prior to the date a notice of judgment lien is filed, UCC §9312(5)(a) would also give an appropriate result.

Based upon the foregoing it is my opinion that consideration be given to amending §697.590 to state a rule of priority analogous to that obtaining between conflicting security interests in the same collateral.

2. A second concern of mine relates to §700.070(a). Under that section a debtor may continue to operate his/her business despite the presence of a keeper. Sales may be made in the ordinary course of business for cash or its equivalent. I presume that it is intended that such buyers will take title free of the execution lien created by the levy. However, the section does not explicitly so state. Under §697.730 it could be said that since this is

tangible personal property in the custody of a levying officer it remains subject to the execution lien after transfer. §697.740 protects buyers in the ordinary course of business only in those cases where the property is not in the custody of a levying officer. Hence it will not assist this buyer.

The same problem exists under The Attachment Law where a keeper is placed in the defendant's place of business. See §§488.395(a) and 488.500(b).

It seems to me that this situation could easily be rectified by making it clear that in these situations a buyer in the ordinary course of business will take free of the execution or attachment lien.

3. My third concern is not yet ready for discussion, but I will mention it. It is whether a judgment renewed pursuant to §683.110 et.seq. will be treated as a new judgment or a revived judgment for purposes of enforcement by a sister-state under the full faith and credit clause. I have had some preliminary discussions about this question with some of my colleagues who are more knowledgeable than I about this subject. As yet I have not come to any conclusion. If and when I do I will write to you if I think you would be interested in my doing so.

I apologize for making this such a long letter. I am sending copies of it to several members of the U.C.C. Committee of the Business Law Section to see if they share my concern about §697.590. If they disagree with me I hope that they will give you and me the benefit of their views.

Cordially,



Lloyd Tevis
Professor of Law

cc: Ronald M. Bayer, Esq.
G. Larry Engel, Esq.
Professor Janice E. Kosel
Harry C. Sigman, Esq.

LT:jh



LOYOLA LAW SCHOOL

June 6, 1983

Mr. Stan G. Ulrich, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

Re: CCP §697.590 (Priority of Judgment Liens Against Security Interests)

Dear Mr. Ulrich:

This letter is in response to our telephone conversation of April 29, 1983 in which you asked me if I would suggest new wording for CCP §697.590 to overcome the problems which I mentioned in my letter of April 19, 1983.

I enclose a suggested new §697.590. It takes as its starting point the idea that for most purposes, a judgment lien which has attached to personal property should be treated as though it were a perfected security interest in determining priority as against a conflicting security interest in the same property. There are two exceptions to this premise which I will discuss below.

What I have done is to use applicable language from UCC §9312 with minor adaptations to match the terminology of the Enforcement of Judgments Law. The idea is to eliminate the analogy to an execution lien and to adopt the first-to-file or first-to-perfect rules of UCC §9312(5) except where a purchase money security interest has attained priority. One exception is proposed subdivision (c) which follows present subdivision (c). The other exception is proposed subdivision (f) which follows subdivisions (4) and (5) of UCC §9301, as amended effective July 1, 1985, rather than UCC §9312(7). In subdivision (f) I treat a judgment lien as though it were an execution lien. My reason for doing so is to avoid confusion when a judgment lien is enforced by levy under a writ of execution. As a matter of policy it does not seem appropriate for the judgment lien to have a permanently inferior position as regards future advances. The judgment lienor, unlike a subordinate secured party, does not knowingly take the risk of future advances. Cf. UCC §9312(7).

It seems to me that it might be useful to run through the various illustrations contained in my letter of April 19, 1983 to see how they come out under proposed §697.590. If you will refer to that letter, I will not have to repeat the facts of each illustration but merely state what I understand to be the result. I will follow this with a few additional illustrations to demonstrate further my understanding of what I propose.

Example A (p.1) - Here C is the first-to-file. Under subdivision (d) the judgment lien has priority over the security interest.

Example B (p.1) - Here, although C filed first, the purchase money security interest was perfected by filing within 10 days after the debtor received possession of the property. Under subdivision (b) the purchase money security interest has priority.

Example C (p.2) - Here C filed first. The purchase money security interest was not perfected within 10 days after the debtor received possession of the property. Therefore the security interest is not entitled to priority under subdivision (b). Under subdivision (d) the judgment lien has priority under the first-to-file rule.

Example D (p.2) - C is the first to file. Under subdivision (d) the judgment lien has priority over the security interest since the financing statement was filed later. As stated in my earlier letter, present §697.590 appears not to state a rule of priority in this situation.

Example E (p.2) - Here the security interest has priority over the judgment lien under the first-to-file rule of proposed subdivision (d). This gives what I believe to be the proper result, as indicated in my earlier letter. It preserves the integrity of the filing system and gives an expected result to those using the filing system.

Now for a few more illustrations of the operation of proposed §697.590. In these examples I will use the same abbreviations as in my letter of April 19, 1983.

Example F -

- 2/1/84 - C files J/L
- 3/1/84 - D executes a S/A granting a S/I in presently owned and after-acquired inventory to S/P #1. F/S filed.
- 4/1/84 - D executes a S/A granting a PMSI in new inventory to S/P #2. S/P #2 complies with UCC §9312(3) requirements for priority; including filing a F/S.
- 4/15/84- D obtains possession of the inventory subject to the PMSI.

As to the new inventory covered by the PMSI, under subdivision (b) the PMSI of S/P #2 has priority over the J/L of C; under UCC §9312(3), the PMSI has priority over S/P #1's S/I; under subdivision (d) the J/L has priority over S/P #1's S/I.

As to other inventory not affected by the PMSI, the J/L has priority over S/P #1's S/I pursuant to subdivision (d).

If the new inventory is sold the combination of §697.590(b) and §697.620 (2)(b) provide that the PMSI would have priority over the J/L. UCC §9312 provides the rule for priority between the two S/I's. §697.590(e), together with §697.620, will supply the rules for priority between the J/L and S/P #1's S/I.

Example G -

2/1/84 - C files J/L

3/1/84 - D executes a S/A granting a S/I in presently owned and after-acquired inventory to S/P#1. F/S filed.

4/1/84 - D executes a S/A granting a PMSI in new inventory to S/P #2, who fails to take one or more of the steps necessary under UCC §9312(3) to obtain priority over S/P #1. D obtains possession of the property.

Without subdivision (c), there would be a circular priority: S/P #2 has priority over C under subdivision (b); C has priority over S/P #1 under subdivision (d); S/P #1 has priority over S/P#2 under UCC §9312(3) and (5). Subdivision (c) resolves this circular priority problem. It provides that S/P #1 will have priority over C. Thus S/P #1 has first priority; S/P #2 has second priority; and C is in last place. This, of course, continues the present rule of § 697.590(c).

Example H -

2/1/84 - D grants a S/I to S/P in a negotiable document which is temporarily perfected for 21 days under UCC §9304(4).

2/6/84 - C files J/L

2/10/84- S/P files F/S

The S/I was perfected prior to the date of filing of the J/L. Under subdivision (d), S/P #1 ranks from the date of perfection since there was no period in which there was neither filing nor perfection. The J/L ranks from the date of filing. Thus the S/I has priority over the J/L. Present §697.590 does not state a rule to cover this situation. It is my opinion that the same result would be reached under UCC §9201. However, here the judgment lien is treated like a subsequent perfected security interest. This example is adapted from Example 3 in Official Comment (3) to UCC §9312.

Example I -

2/1/84 - C files J/L

3/1/84 - D executes a S/A granting a S/I to S/P is presently owned and after-acquired equipment. F/S filed.

10/1/84- D purchases additional equipment for cash.

12/1/84- D sells some old equipment for cash. (Assume this is identifiable cash proceeds now in a deposit account.)

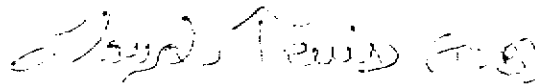
12/1/84- D sells an item of equipment and receives a S/I in it to secure an unpaid balance of the purchase price.

Under subdivision (d) the judgment lien has priority over the S/I as to both the remaining original equipment and the new equipment purchased for cash. Under subdivisions (d) and (e) together with §697.620(1)(b), the judgment lien has priority over the S/I as to the identifiable cash proceeds. The judgment lien does not attach to the chattel paper proceeds. §§697.530(c) and 697.620. Thus the S/I alone continues perfected in the chattel paper proceeds under UCC §9306(2) and (3)(a). Under §697.610 the judgment lien would continue in the equipment sold. Whether the S/I would continue would depend upon whether the S/P consented to the sale. UCC §9306(2). If the S/I continued despite the sale, priority between the J/L and the S/I in such items would continue to be governed by subdivision (d).

I look forward to hearing from you as to your reaction to this suggested revision. I think it simplifies the approach to priority and fills in gaps in the present statute. This proposal may create problems that I don't foresee. I am sure that the wording can be improved. I make no claim to expertise in legislative drafting, but at least this may be a start.

If this approach were adopted it would be necessary to repeal UCC §9301(5) and amend §9301(3) to eliminate judgment lienors from the definition of a lien creditor.

Cordially,



Lloyd Tevis
Professor of Law

Enclosure

cc: Ronald M. Bayer, Esq.
G. Larry Engel, Esq.
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LT:jh

§697.590 Priority of judgment lien against security interests

697.590. (a) As used in this section:

(1) "Filing" means:

(A) With respect to a judgment lien on personal property, the creation of a judgment lien under Section 697.510;

(B) With respect to a security interest, the filing of a financing statement pursuant to the provisions of Division 9 of the Commercial Code.

(2) "Conflicting interests" refers to a conflict between a judgment lien and a security interest in the same personal property.

(3) "Perfection" means perfection of a security interest pursuant to the provisions of Chapter 3 of Division 9 of the Commercial Code.

(4) "Personal property" means:

(A) with respect to a security interest, the collateral to which the security interest has attached pursuant to the provisions of Division 9 of the Commercial Code;

(B) with respect to a judgment lien, the property to which a judgment lien has attached pursuant to the provisions of this Article.

(b) A purchase money security interest (Section 9107 of the Commercial Code) has priority over a conflicting judgment lien on the same personal property or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the property or within 10 days thereafter.

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

(d) Except as provided in subdivisions (b) and (c) of Section 697.610, in all cases not governed by other rules stated in this section [including cases of security interests which do not qualify for the special priorities set forth in subdivisions (b) and (c)], priority between a judgment lien on personal property and a security interest in the same personal property shall be determined according to the following rules:

(1) Conflicting interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the personal property or the time the security interest is first perfected, whichever is earlier, provided there is no period thereafter when there is neither filing nor perfection.

(2) Except as provided in subdivision (b), an unperfected security interest is subordinate to a judgment lien.

(e) For the purposes of subdivision (d), a date of filing or perfection as to personal property is also a date of filing or perfection as to proceeds.

(f) A judgment lien which attaches to personal property and is also subordinate to a security interest under subdivision (d) is subordinate to the security interest only to the extent the security interest secures advances made before the judgment lien attached or within 45 days thereafter or made without knowledge of the judgment lien or pursuant to commitment entered into without knowledge of the judgment lien. For the purposes of this subdivision, a secured party shall be deemed not to have knowledge of a judgment lien on personal property until the time the judgment creditor serves a copy of the notice of judgment lien on the secured party personally or by mail. 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.