

Memorandum 83-95

Subject: Study D-302 - Creditors' Remedies (Draft Recommendation)

Attached to this memorandum is a draft of a Recommendation Relating to Creditors' Remedies. Much of the material in this recommendation was approved by the Commission at the September meeting. The new material is discussed below.

§ 697.590. Priorities between judgment lien on personal property and security interest

A suggestion has come from two sources that the priority scheme for judgment liens on personal property should be modified to track more closely with the first-to-file or first-to-perfect rule of the UCC. (See letters from Professor Lloyd Tevis attached as Exhibits 1, 2, and 3; letter from Eldon C. Parr to Rick Schwartz attached as Exhibit 4.) There is some dispute about this subject as is evident from Professor Stefan A. Riesenfeld's letter attached as Exhibit 5. A rejoinder to that letter by Professor Tevis is attached as Exhibit 6.

An examination of the relevant statutes and a reading of these letters will support the conclusion that this is a complicated and technical subject. The staff believes that it boils down to a question of policy: should the filing of a judgment lien on personal property be treated as an execution levy for purposes of priority (Com. Code § 9301) or as a security interest perfected by filing (Com. Code § 9312). The essential difference in the two approaches involves a case where the secured party first files a financing statement, the judgment lien is filed, and then the security agreement is executed, giving the secured party a perfected security interest. Under the execution levy approach, the judgment lien would have priority over the later-perfected security interest (leaving aside any uncertainties about the interpretation of the relevant statutes). Under the first-to-file rule (Com. Code § 9312(5)) the security interest would have priority, just as it would generally against an intervening security interest.

The staff believes that the first-to-file rule is preferable here because of the nature of the judgment lien on personal property. A judgment creditor may file a notice of judgment lien to obtain a judgment lien on personal property without having any specific knowledge of

any property of the judgment debtor. This lien is a dragnet lien and should not necessarily be given the same status as an execution lien which requires a levy by seizing specific property or at least serving a specific garnishee. An execution also initiates an enforcement procedure against the property levied upon that is intended to result in the sale or collection of the property. A judgment lien on personal property is intended as a hold on the judgment debtor's financing which also inserts the judgment creditor into the filing system under the UCC as a way of protecting the creditor's priority position. We anticipate that the judgment creditors will tend to file judgment liens in order to establish and protect their priority positions while they find actual assets to levy upon, if a settlement is not forthcoming. Filing a notice of judgment lien with the Secretary of State may also be accomplished by the judgment creditor without the necessity of relying on a levying officer.

The staff thinks that the proposed revision represents a simplification in concept, since the judgment lien is analogous to a security interest perfected by filing at the same time. This is a concept that has been used frequently in the past in discussions of this lien and the more limited attachment lien on inventory and equipment. It should also be noted that the existing provision (Section 697.590) is a hybrid that relies on the execution levy rule in subdivision (a) but then adopts the first-to-file rule of Commercial Code Section 9312 in subdivision (b).

Professor Tevis suggests that it might be appropriate to put a limit on the interval between the filing of the financing statement and the attachment of the security interest. (See Exhibit 6, p. 6.) He suggests a 30-day grace period; the intervening judgment lien would have priority if the security interest attached more than 30 days after the filing of the financing statement. The staff is uncertain about how serious a problem this represents. We would prefer not to introduce this complication of a 30-day grace period unless there is a real problem to be solved.

§§ 695.010, 697.340. Execution levy on property transferred subject to attachment lien

Professor Riesenfeld has raised a problem with the procedure for reaching property which has been attached but then is transferred before judgment. (See Exhibit 7, p. 3.) A strict reading of Section 695.010 (all property of judgment debtor is subject to enforcement of

judgment) and Section 699.710 (property subject to enforcement is subject to execution levy with exceptions) indicates that the judgment creditor would have to bring an action to foreclose the attachment lien on the transferred property. Accordingly, the staff proposes that Section 695.010 be amended to make clear that the attached property is subject to enforcement, and by incorporation, subject to levy of execution.

A limitation on the scope of the judgment lien on real property is needed as a result of this change. Otherwise the recording of an abstract of judgment would create a judgment lien on the property conveyed by the debtor before judgment if it was subject to an attachment lien. This limitation is accomplished by an amendment of Section 697.340 (property subject to judgment lien on real property).

§§ 697.340, 700.170, 708.510, 709.530. Remedies against rents

Professor Riesenfeld raises some questions about the procedures for reaching rents of real property. (See Exhibit 7, pp. 1-2.) Professor Riesenfeld states that the right to future rent is a real property interest and should be subject to a judgment lien on real property, assuming that the right has not been assigned by the judgment debtor. However, Section 697.340 provides that a judgment lien on real property does not reach a right to rents. This language should be revised so that a judgment lien reaches the debtor's right to assign the right to rents; the purpose of the limitation in Section 697.340 was to avoid the claim that the rental payments due from the tenant to the landlord were tied up by the judgment lien. Accordingly, the comment to Section 697.340 states that rents are reached by levy under Section 700.170 or by an assignment order under Section 708.510.

Professor Riesenfeld does not believe that levy under Section 700.170 is an appropriate remedy for reaching rental payments. He notes that Commercial Code Section 9104(j) excludes real property rents from Article 9 of the UCC. Section 700.170 treats the obligation to pay rent as a general intangible. This is within the meaning of "general intangibles", defined by Commercial Code Section 9106 as "any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money." The scope limitation of Commercial Code Section 9104(j) does not limit the coverage of the definition. Ultimately, we do not think there is a substantive dis-

agreement here since Professor Riesenfeld allows that accrued rent may be general intangibles. (See Exhibit 7, p. 2.) Accordingly, the comment to the proposed revision of Section 697.340 has been drafted to refer to the garnishment of rental payments as they accrue.

Professor Riesenfeld also suggests that since the debtor's right to rent is an interest in real property, the assignment of rent that may be ordered pursuant to Section 708.510 should be recordable. The staff agrees with this suggestion and we propose to so amend Section 708.530.

§ 701.020. Liability of garnishee for noncompliance with levy

Section 701.020 makes a garnishee liable for failure to comply with the levy by giving up possession of property or paying amounts to the levying officer. The comment to this section states:

The judgment creditor may seek to enforce compliance with the levy under Section 701.020 or to impose liability on the third person pursuant to Article 2 (commencing with Section 708.110) (examination proceedings) or Article 3 (commencing with Section 708.210) (creditor's suit) of Chapter 6.

Professor Riesenfeld is troubled by this language, which he reads as creating a remedy under Section 701.020 that is independent of the traditional remedies by way of examination or creditor's suits. (See Exhibit 7, pp. 2-3.)

This section is not intended to create a separate remedy. At some point the troublesome sentence was revised by insertion of the language "under Section 701.020"; if that phrase is omitted, the sentence is clearer. Unfortunately there is no way to revise a comment without amending the section.

§§ 488.080, 488.455-488.465, 699.080, 700.140-700.167. Joint account levies

At the September meeting the Commission decided to recommend the repeal of the requirement that the creditor furnish an undertaking when levying on joint accounts where an account holder is a nondebtor. For a letter supporting this decision and materials indicating the complexity under the existing scheme, see the letter from Lt. Gale D. Stroud, Santa Clara County Sheriff's Office, attached as Exhibit 8.

Respectfully submitted,

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Staff Counsel

RECOMMENDATION

relating to

CREDITORS' REMEDIES

Introduction

The Law Revision Commission has reviewed the experience thus far under the newly enacted Enforcement of Judgments Law¹ and the related changes in the Attachment Law,² both of which were enacted upon recommendation of the Commission.³ As a result of this review, the Commission proposes several substantive and technical revisions. The more important substantive changes are discussed below; recommended technical changes are explained in the comments to the provisions in the proposed legislation.

Creditors Undertaking for Levying on Joint
Deposit Accounts and Safe Deposit Boxes

The Attachment Law and Enforcement of Judgments Law continue in modified form a provision of former law requiring a creditor to furnish an undertaking as a prerequisite to levying on an account or safe deposit box standing in the name of a nondebtor.⁴ The undertaking was designed to protect the financial institution from the claims of the nondebtor joint account holder or box holder for damages resulting from the levy.

1. 1982 Cal. Stats. ch. 1364 (operative July 1, 1983). See also 1982 Cal. Stats. ch. 497 (conforming changes); 1983 Cal. Stats. ch. 155 (technical revisions).
2. 1982 Cal. Stats. ch. 1198 (operative July 1, 1983). See also 1983 Cal. Stats. ch. 155 (technical revisions).
3. See Tentative Recommendation Proposing the Enforcement of Judgments Law, 15 Cal. L. Revision Comm'n Reports 2001 (1980); Recommendation Relating to Attachment, 16 Cal. L. Revision Comm'n Reports 701 (1982); Recommendation Relating to Creditors' Remedies, 16 Cal. L. Revision Comm'n Reports 2175 (1982).
4. Code Civ. Proc. §§ 488.465 (attachment), 700.160 (execution). Exceptions to this requirement are provided where the judgment creditor seeks to levy execution on a deposit account in the name of the judgment debtor and his or her spouse (Section 700.165) or under a fictitious business name (Section 700.167).

The Commission has concluded that this special undertaking requirement should be repealed. It is the only situation where a nondebtor third person having an interest in property levied upon to satisfy the obligation of the debtor is required to be protected by a pre-levy undertaking. In all other situations the third person may protect rights in the property by making a third-party claim.⁵ There is no special factor that sets nondebtor joint account holders apart from other nondebtor joint interest holders.

Elimination of the undertaking requirement will smooth the levy process since the minimum 15-day delay built into the existing system will be unnecessary.⁶ The debtor is better off without the undertaking requirement since the debtor ultimately must pay the cost of the undertaking premium.⁷ The financial institution is protected since the new laws provide explicitly that the financial institution is not liable for complying with the levy.⁸ The nondebtor joint account holder is protected since the levying officer gives the nondebtor notice of the levy so that the nondebtor may make a third-party claim.⁹ In any event, the nondebtor does not forfeit his or her interest in the account by failure to make a third-party claim.¹⁰ Elimination of the undertaking requirement will also simplify the task of the levying officers who must give two notices to the financial institution under the existing scheme before the levy is complete.¹¹

5. See Code Civ. Proc. §§ 488.110 (third-party claims in attachment), 720.010-720.800 (general third-party claims procedure).
6. See Code Civ. Proc. §§ 488.465(d), 700.160(d).
7. See Code Civ. Proc. § 685.040.
8. Code Civ. Proc. §§ 488.455(d)(1), 448.460(e)(1), 700.140(d)(1), 700.150(e)(1).
9. Code Civ. Proc. §§ 488.455(b) (notice of attachment to third person), 700.140(b) (notice of execution levy to third person), 720.120 (time for making third-party claim).
10. Code Civ. Proc. § 720.150(b).
11. An execution levy is made by serving the financial institution with a writ of execution and notice of levy. Code Civ. Proc. § 700.140. The financial institution is not required to pay the levying officer in the case of a joint deposit account involving a nondebtor, however, until receiving notice to do so from the levying officer.

Priorities 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.¹² 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 title¹³--essentially the same types of property in which a security interest may be perfected by filing.¹⁴

The judgment lien on personal property is given the same priority against security interests as an execution lien would have under Commercial Code Section 9301.¹⁵ This approach works well in most situations, but it may not provide clear 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 consistent with the rules governing priorities between conflicting security interests.

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

Code Civ. Proc. § 700.160(f). The levying officer may not direct the financial institution to pay until expiration of the 15-day period afforded the nondebtor joint account holder to object to the creditor's undertaking or until completion of proceedings determining the objection. There is some uncertainty concerning how the levying officer is to know when to give this second notice. Some offices are requiring the judgment creditor to furnish the requisite information.

12. See Code Civ. Proc. §§ ~~697.510~~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).

13. Code Civ. Proc. § 697.530.

14. See Com. Code §§ 9302, 9304, 9305.

15. Code Civ. Proc. § 697.590.

created between the time that a secured party files a financing statement and the time the security interest attaches.¹⁶ The result may be unclear under existing law,¹⁷ 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.¹⁸

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.¹⁹ The proposed revision would also retain

16. 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). This situation is illustrated in the following example involving a debtor who has equipment:

First, a secured party files a financing statement before the security interest is created, as permitted by Commercial Code Section 9402(1). Two days later the judgment creditor files a judgment lien on personal property of the judgment debtor. Then two days later the debtor executes a security agreement granting a security interest in equipment to the secured party. If the first-to-file rule is not followed in this situation, the secured party who filed first will not with any confidence be able to rely on information in the filing system when the security agreement is finally executed since the intervening judgment lien on personal property would have priority, even though an intervening security interest would not.

17. 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.

18. See U.C.C. § 9-312 comment 5 (1977).

19. See Com. Code § 9301(1) (incorporated by Code Civ. Proc. § 697.590(a)).

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.²⁰ 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.²¹

Issuance of Earnings Withholding Order
by Registered Process Server

In order to garnish wages, a judgment creditor must first obtain a writ of execution and then apply to the levying officer for an earnings withholding order.²² For many other types of levy, the judgment creditor may choose to hire the services of a registered process server to speed the initial service which constitutes the levy.²³ However, in the case of a wage garnishment the levying officer must still issue the earnings withholding order before the registered process server can serve it.²⁴ This requirement reduces the utility of the provision allowing service by registered process servers which is intended to eliminate some delay and to relieve some of the paperwork burden on levying officers.

The Commission recommends that registered process servers be empowered to issue earnings withholding orders. This is essentially a clerical function; the information on the order is derived from the writ of execution issued by the court clerk and information supplied by the judgment creditor. Issuance of earnings withholding orders by registered process servers will result in more expeditious wage garnishments and reduce the workload on levying officers.

20. See Com. Code § 9301(2) (incorporated by Code Civ. Proc. § 697.590(a)).

21. See Code Civ. Proc. § 697.590(b).

22. See Code Civ. Proc. § 706.102.

23. See Code Civ. Proc. § 699.080.

24. See Code Civ. Proc. §§ 706.102, 706.101(e).

Procedures Involving Lien in
Defendant's Cause of Action

The Attachment Law permits a plaintiff to obtain a lien in an action of the defendant against another person and thereby tie up any rights to money or property the defendant may gain in the action.²⁵ There are some technical problems involving the issuance of a right to attach order where the plaintiff seeks to obtain a lien in a cause of action and also involving the appropriate exemption procedures. Accordingly the Commission recommends some revisions to clarify the applicable procedures.²⁶

Protection of Homestead from Creditors
After Death of Homestead Owner

Some doubt has arisen concerning the extent of the protection of the homestead from creditors of a homestead owner who dies.²⁷ In order to clarify the law, the Commission proposes enactment of a provision that continues the protection afforded the homestead before the owner's death in favor of a surviving spouse of the decedent or a member of the decedent's family. The amount of protection against claims of creditors would depend upon the normal rules as applied in the circumstances of the case at the time the exemption needs to be determined.²⁸

Defendant's Redelivery Undertaking in
Claim and Delivery Proceedings

In claim and delivery proceedings, the defendant may obtain redelivery of the property by giving an undertaking "in an amount equal to the amount of the plaintiff's undertaking."²⁹ The amount of the plaintiff's undertaking is based on the defendant's interest in the property, which

25. Code Civ. Proc. §§ 491.410-491.460.

26. See Code Civ. Proc. §§ 491.410, 491.415, 491.430, and 491.470 in the proposed legislation infra.

27. See Estate of Grigsby, 134 Cal. App.3d 611, 615, 184 Cal. Rptr. 886 (1982) (dictum stating "the declared homestead does not survive the death of one of the spouses"). See also Prob. Code § 667 (enacted by 1983 Cal. Stats. ch. 290, § 1, operative July 15, 1983), to be superseded by Prob. Code § 6528 (enacted by 1983 Cal. Stats. ch. 842, § 55, operative January 1, 1985) (homestead declaration remains effective as to survivor's interest).

28. See Code Civ. Proc. § 704.730 (amount of homestead exemption).

29. Code Civ. Proc. § 515.020(a).

may be nominal. As a result, the defendant may obtain redelivery of the property by giving a nominal undertaking even though the plaintiff's interest in the property and potential damages are great. The defendant's redelivery undertaking should be based on the plaintiff's interest in the property, just as the plaintiff's undertaking is based on the defendant's interest in the property. This will ensure that the plaintiff is adequately protected, which is the purpose of the redelivery undertaking.

Time for Making Objections to Undertakings

If a bond or undertaking is given in an action or proceeding, the beneficiary must make objections within 10 days or the objections are waived.³⁰ Although the 10-day period is appropriate in many cases and protects the beneficiary as well as the principal, in some cases it does not afford adequate time for the beneficiary. This may occur, for example, where a bond or undertaking is properly served on an entity, but by the time the bond or undertaking has been routed to the appropriate litigation department attorney, the time for making an objection has expired. In this situation the beneficiary should be permitted to make a late objection upon a showing of good cause.

Proposed Legislation

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Section 9301 of the Commercial Code, to amend Sections 485.610, 488.080, 488.455, 488.460, 489.210, 491.410, 491.430, 515.010, 515.020, 515.030, 681.030, 695.010, 697.340, 697.390, 699.080, 700.140, 700.150, 704.740, 706.101, 708.110, 708.530, and 995.930 of, to add Sections 491.415, 491.470, 697.590, 704.995, and 706.108 to, and to repeal Sections 488.465, 697.590, 700.160, 700.165, and 700.167 of, and Chapter 19 (commencing with Section 693.010) of Division 1 of Title 9 of Part 2 of, the Code of Civil Procedure, and to amend Section 26830 of the Government Code, relating to creditors' remedies.

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

30. Code Civ. Proc. § 995.930.

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

SECTION 1. 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).

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Code of Civil Procedure § 485.610 (technical amendment). Claim of exemption in attachment

SEC. __. Section 485.610 of the Code of Civil Procedure is amended to read:

485.610. (a) The defendant may claim an exemption as to real or personal property levied upon pursuant to a writ of attachment issued under this chapter by following the procedure set forth in Article 2 (commencing with Section 703.510) of Chapter 4 of Division 2 of Title 9, except that the defendant shall claim the exemption as to personal property not later than 30 days after the levying officer serves the defendant with the notice of attachment describing such property and may claim an exemption for real property within the time provided in Section 487.030. For this purpose, references in Article 2 (commencing with Section 703.510) of Chapter 4 of Division 2 of Title 9 to the "judgment debtor" shall be deemed references to the defendant, and references to the "judgment creditor" shall be deemed references to the plaintiff.

(b) The defendant may claim the exemption provided by subdivision (b) of Section 487.020 within the time provided by subdivision (a) of this section either (1) by following the procedure set forth in Article 2 (commencing with Section 703.510) of Chapter 4 of Division 2 of Title 9 or (2) by following the procedure set forth in subdivision (c) of

Section 482.100 except that the requirement of showing changed circumstances under subdivision (a) of Section 482.100 does not apply.

Comment. Subdivision (a) of Section 485.610 is amended to provide a cross-reference to Section 487.030 which provides a special time limit for claiming an exemption for real property. This amendment makes no substantive change.

Code of Civil Procedure § 488.080 (technical amendment). Attachment by registered process server

SEC. __. Section 488.080 of the Code of Civil Procedure is amended to read:

488.080. (a) A registered process server may levy under a writ of attachment on the following types of property:

- (1) Real property, pursuant to Section 488.315.
- (2) Growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from the sale thereof at the wellhead or minehead, pursuant to Section 488.325.
- (3) Personal property in the custody of a levying officer, pursuant to Section 488.355.
- (4) Equipment of a going business, pursuant to Section 488.375.
- (5) Motor vehicles, vessels, mobilehomes, or commercial coaches used as equipment of a going business, pursuant to Section 488.385.
- (6) Farm products or inventory of a going business, pursuant to Section 488.405.
- (7) Personal property used as a dwelling, pursuant to subdivision (a) of Section 700.080.
- (8) Deposit accounts, pursuant to Section 488.455 ~~or 488-465-~~
- (9) Property in a safe-deposit box, pursuant to Section 488.460

~~or 488-465-~~

- (10) Accounts receivable or general intangibles, pursuant to Section 488.470.
- (11) Final money judgments, pursuant to Section 488.480.
- (12) Interest of a defendant in personal property in the estate of a decedent, pursuant to Section 488.485.

(b) Before levying under the writ of attachment, the registered process server shall deposit a copy of the writ with the levying officer and pay the fee provided by Section 26721 of the Government Code.

(c) If a registered process server levies on property pursuant to subdivision (a), the registered process server shall do ~~all~~ both of the following:

- (1) Comply with the applicable levy, posting, and service provisions of Article 2 (commencing with Section 488.300).
- ~~(2) Deliver any undertaking required by Section 488-465-~~
- ~~(3) (2)~~ Request any third person served to give a garnishee's memorandum to the levying officer in compliance with Section 488.610.

(d) Within five days after levy under this section, all of the following shall be filed with the levying officer:

- (1) The writ of attachment.
- (2) An affidavit of the registered process server stating the manner of levy performed.
- (3) Proof of service of the copy of the writ and notice of attachment on other persons as required by Article 2 (commencing with Section 488.300).

(4) Instructions in writing, as required by the provisions of Section 488.030.

(e) If the fee provided by Section 26721 of the Government Code has been paid, the levying officer shall perform all other duties under the writ as if the levying officer had levied under the writ and shall return the writ to the court. The levying officer is not liable for actions taken in conformance with the provisions of this title in reliance on information provided to the levying officer under subdivision (d) except to the extent that the levying officer has actual knowledge that the information is incorrect. Nothing in this subdivision limits any liability the plaintiff or registered process server may have if the levying officer acts on the basis of incorrect information provided under subdivision (d).

(f) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost. If allowed, the amount of the fee to be allowed is governed by Section 1032.8.

Comment. Subdivisions (a) and (c) of Section 488.080 are amended to reflect the repeal of Section 488.465.

Code of Civil Procedure § 488.455 (technical amendment). Attachment of deposit accounts

SEC. ___. Section 488.455 of the Code of Civil Procedure is amended to read:

488.455. (a) To attach a deposit account, the levying officer shall personally serve a copy of the writ of attachment and a notice of attachment on the financial institution with which the deposit account is maintained. The attachment lien reaches only amounts in the deposit account at the time of service on the financial institution (including any item in the deposit account that is in the process of being collected unless the item is returned unpaid to the financial institution).

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of attachment and a notice of attachment on any third person in whose name the deposit account stands.

(c) ~~Subject to Section 488.465, during~~ During the time the attachment lien is in effect, the financial institution shall not honor a check or other order for the payment of money drawn against, and shall not pay a withdrawal from, the deposit account that would reduce the deposit account to an amount less than the amount attached. For the purposes of this subdivision, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(d) During the time the attachment lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the attachment.

(2) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where the nonpayment is pursuant to the requirements of subdivision (c).

(3) Refusal to pay a withdrawal from the deposit account where the refusal is pursuant to the requirements of subdivision (c).

(e) When the amount attached pursuant to this section is paid to the levying officer, the attachment lien on the attached deposit account terminates.

(f) For the purposes of this section ~~and Section 488.465~~, neither of the following is a third person in whose name the deposit account stands:

- (1) A person who is only a person named as the beneficiary of a Totten trust account.
- (2) A person who is only a payee designated in a pay-on-death provision in an account pursuant to Section 852.5, 7604.5, 11203.5, 14854.5, or 18318.5 of the Financial Code or other similar provision.

Comment. Subdivisions (c) and (f) of Section 488.455 are amended to reflect the repeal of Section 488.465.

Code of Civil Procedure § 488.460 (technical amendment). Attachment of safe-deposit boxes

SEC. __. Section 488.460 of the Code of Civil Procedure is amended to read:

488.460. (a) To attach property in a safe-deposit box, the levying officer shall personally serve a copy of the writ of attachment and a notice of attachment on the financial institution with which the safe-deposit box is maintained.

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of attachment and a notice of attachment on any third person in whose name the safe-deposit box stands.

~~(c) Subject to Section 488.465, during~~ During the time the attachment lien is in effect, the financial institution shall not permit the removal of any of the contents of the safe-deposit box except pursuant to the attachment.

(d) The levying officer may first give the person in whose name the safe-deposit box stands an opportunity to open the safe-deposit box to permit the removal pursuant to the attachment of the attached property. The financial institution may refuse to permit the forcible opening of the safe-deposit box to permit the removal of the attached property unless the plaintiff pays in advance the cost of forcibly opening the safe-deposit box and of repairing any damage caused thereby.

(e) During the time the attachment lien is in effect, the financial institution is not liable to any person for any of the following:

- (1) Performance of the duties of a garnishee under the attachment.
- (2) Refusal to permit access to the safe-deposit box by the person in whose name it stands.
- (3) Removal of any of the contents of the safe-deposit box pursuant to the attachment.

Comment. Subdivision (c) of Section 488.460 is amended to reflect the repeal of Section 488.465.

Code of Civil Procedure § 488.465 (repealed). Attachment of deposit accounts and safe-deposit boxes not exclusively in name of defendant

SEC. __. Section 488.465 of the Code of Civil Procedure is repealed.

488.465. (a) The provisions of this section apply in addition to the provisions of Sections 488.455 and 488.460 if any of the following property is attached:

(1) A deposit account standing in the name of a third person or in the names of both the defendant and a third person.

(2) Property in a safe-deposit box standing in the name of a third person or in the names of both the defendant and a third person.

(b) The plaintiff shall provide, and the levying officer shall deliver to the financial institution at the time of levy, an undertaking for not less than twice the amount of the attachment or, if a lesser amount in a deposit account is sought to be levied upon, not less than twice the lesser amount. The undertaking shall indemnify any third person rightfully entitled to the property against actual damage by reason of the attachment of the property and shall assure to the third person the return of the property upon proof of the person's right thereto. The undertaking need not name the third person specifically but may refer to the third person generally in the same manner as in this subdivision. If the provisions of this subdivision are not satisfied, the attachment is ineffective and the financial institution shall not comply with the requirements of this section or with the attachment.

(c) Upon delivery of the undertaking to the financial institution, the financial institution shall immediately mail or deliver a notice of the delivery of the undertaking to the third person in whose name the deposit account or safe-deposit box stands. If mailed, the notice shall be sent by registered or certified mail addressed to the person's last address known to the financial institution. The financial institution shall deliver the undertaking as directed by the third person.

(d) Notwithstanding Article 4 (commencing with Section 488.600), from the time of levy and delivery of the undertaking to the financial institution until 15 days after the notice is mailed or delivered under subdivision (c) if no objection to the undertaking is made or, if such objection is made, until the court determines that the undertaking is sufficient, the financial institution shall not do any of the following:

(1) Honor a check or other order for the payment of money drawn against, or pay a withdrawal from, the deposit account that would reduce the deposit account to less than the amount attached. For the purposes of this paragraph, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(2) Permit the removal of any of the contents of the safe-deposit box except pursuant to the writ.

(e) The financial institution is not liable to any person for any of the following during the period prescribed in subdivision (d):

(1) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where the nonpayment is pursuant to the requirements of subdivision (d).

(2) Refusal to pay a withdrawal from the deposit account where the refusal is pursuant to the requirements of subdivision (d).

(3) Refusal to permit access to the safe-deposit box by the person in whose name it stands.

(4) Removal of any of the contents of the safe-deposit box pursuant to the attachment.

(f) Upon the expiration of the period prescribed in subdivision (d), the financial institution shall comply with the attachment and Sections 488.455 and 488.460 apply.

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Comment. The requirement of providing an undertaking as a prerequisite for attachment of a deposit account or safe-deposit box not exclusively in the name of the defendant provided in Section 488.465 is repealed. See Sections 488.455(d), 488.460(c) (nonliability of financial institution for complying with levy). The nondefendant holder of the deposit account or safe-deposit box may assert rights by way of a third-party claim. See Section 488.110.

2958

Code of Civil Procedure § 489.210 (amended). Undertaking required

SEC. __. Section 489.210 of the Code of Civil Procedure is amended to read:

489.210. Before issuance of a writ of attachment ~~or~~, a temporary protective order, or an order under subdivision (b) of Section 491.415, the plaintiff shall file an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff in the action.

Comment. Section 489.210 is amended to require the giving of an undertaking as a prerequisite to obtaining an order permitting creation of a lien in a cause of action.

2959

Code of Civil Procedure § 491.410 (amended). Plaintiff's lien in pending action or proceeding

SEC. __. Section 491.410 of the Code of Civil Procedure is amended to read:

491.410. (a) ~~If the plaintiff has obtained a right to attach order and~~ the defendant is a party to a pending action or special proceeding, the plaintiff may obtain a lien under this article, to the extent required to secure the amount to be secured by the attachment, on both of the following:

(1) Any cause of action of the defendant for money or property that is the subject of the other action or proceeding, if the money or property is of a type described in Section 487.010.

(2) The rights of the defendant to money or property under any judgment subsequently procured in the other action or proceeding, if the money or property is of a type described in Section 487.010.

(b) To obtain a lien under this article, the plaintiff shall file a notice of lien and a copy of the right to attach order all of the following in the other pending action or special proceeding:

(1) A notice of lien.

(2) A copy of the right to attach order.

(3) A copy of an order permitting creation of a lien under this article made by the court that issued the right to attach order.

(c) At the time of the filing under subdivision (b) or promptly thereafter, the plaintiff shall serve on all parties who, prior thereto, have made an appearance in the other action or special proceeding a copy of the notice of lien and a statement of the date when the notice of lien was filed in the other action or special proceeding. Failure to serve all parties as required by this subdivision does not affect the lien created by the filing under subdivision (b), but the rights of a party are not affected by the lien until the party has notice of the lien.

(d) For the purpose of this article, an action or special proceeding is pending until the time for appeal from the judgment has expired or, if an appeal is filed, until the appeal has been finally determined.

Comment. Subdivision (a) of Section 491.410 is amended to provide that a lien may not be created under this article if the money or property the defendant seeks would not be subject to attachment should the defendant prevail in the action or special proceeding. Subdivision (b) is amended to require the plaintiff to file a court order permitting creation of a lien under this article.

2960

Code of Civil Procedure § 491.415 (added). Procedure for obtaining orders and determining exemptions

SEC. __. Section 491.415 is added to the Code of Civil Procedure, to read:

491.415. (a) For the purpose of applying for a right to attach order, the defendant's pending cause of action and rights to money or property under a judgment procured in the action or proceeding shall be treated as property subject to attachment.

(b) At the time the plaintiff applies for a right to attach order, the plaintiff may apply for an order permitting creation of a lien under this article. If the plaintiff has already obtained a right to attach order, an application for an order permitting creation of a lien under this article may be applied for in the same manner as a writ of attachment.

As a prerequisite to obtaining an order under this subdivision, the plaintiff shall file an undertaking as provided by Sections 489.210 and 489.220.

(c) The defendant may, but is not required to, claim an exemption in a proceeding initiated by the plaintiff for an order permitting creation of a lien under this article. An exemption may be claimed if the money or property sought by the defendant would be exempt from attachment should the defendant prevail in the other action or proceeding. The exemption shall be claimed and determined pursuant to this subdivision in the same manner as an exemption is claimed and determined upon application for a writ of attachment.

Comment. Subdivision (a) of Section 491.415 facilitates applying for a right to attach order in a situation where the plaintiff seeks to create a lien under this article. See Section 484.020 (application for right to attach order). Subdivision (b) imposes a new requirement that the plaintiff obtain a court order permitting creation of the lien; this requirement is analogous to obtaining a writ of attachment which describes the property to be attached. See Section 488.010 (contents of writ of attachment). Subdivision (b) also makes clear that an undertaking is required. If an undertaking has already been given to obtain a writ of attachment, this provision does not require another undertaking.

Subdivision (c) permits the defendant to make an exemption claim in the proceedings initiated by the plaintiff to obtain a right to attach order and an order permitting creation of a lien in a cause of action. This subdivision incorporates the procedures applicable to claiming attachment exemptions generally. The defendant may also claim exemptions pursuant to the procedure provided in Section 491.470, if the exemption has not been determined under subdivision (c) of Section 491.415. Proceedings under this section are in the court where the plaintiff's action against the defendant is pending, whereas proceedings under Section 491.470 are in the court where the action involving the defendant's right to money or property is pending.

2961

Code of Civil Procedure § 491.430 (technical amendment). Plaintiff deemed a party for certain purposes

SEC. __. Section 491.430 of the Code of Civil Procedure is amended to read:

491.430. (a) The court in which the action or special proceeding subject to the lien under this article is pending may permit the plaintiff who has obtained the lien to intervene in the action or proceeding pursuant to Section 387.

(b) For the purpose purposes of subdivision (a) of Section 491.460 and of Section 491.470, a plaintiff shall be deemed to be a party to the

action or special proceeding even though the plaintiff has not become a party to the action or proceeding under subdivision (a).

Comment. Subdivision (b) of Section 491.430 is amended to take account of the enactment of Section 491.470 (exemption claim in court where action pending).

2962

Code of Civil Procedure § 491.470 (added). Defendant's claim of exemption

SEC. __. Section 491.470 is added to the Code of Civil Procedure, to read:

491.470. (a) If a lien is created under this article, the defendant may claim that all or any portion of the money or property that the defendant may recover in the action or special proceeding is exempt from attachment under subdivision (a), (b), or (c) of Section 487.020. The claim shall be made by application on noticed motion to the court in which the action or special proceeding is pending, filed and served on the plaintiff not later than 30 days after the defendant has notice of the creation of the lien. The defendant shall execute an affidavit in support of the application that includes the matters set forth in subdivision (c) of Section 484.070. No notice of opposition to the claim of exemption is required. The failure of the defendant to make a claim of exemption under this section constitutes a waiver of the exemption.

(b) Unless continued for good cause shown, the court shall determine the exemption claim at any time prior to the entry of judgment in the action or special proceeding and may consolidate the exemption hearing with the hearing on a motion pursuant to Section 491.460.

(c) If the defendant establishes to the satisfaction of the court that the right of the defendant to money or property under the judgment in the action or special proceeding is all or partially exempt from attachment under subdivision (a), (b), or (c) of Section 487.020, the court shall order the termination of the lien created under this article on the exempt portion of the money or property.

Comment. Section 491.470 provides the procedure for the making and determination of an exemption claimed for the defendant's prospective recovery that is subject to a lien created under this article. This procedure is drawn from Section 708.450. The plaintiff is deemed to be a party for the purposes of this section. See Section 491.430(b). See also Section 482.070 (manner of service).

An exemption claim may also be made and determined as provided in Section 491.415(c). See the Comment to Section 491.415(c).

Code of Civil Procedure § 515.010 (amended). Plaintiff's undertaking

SEC. __. Section 515.010 of the Code of Civil Procedure is amended to read:

515.010. The court shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed with the court an undertaking. The undertaking shall provide that the sureties are bound to the defendant ~~in the amount of the undertaking~~ for the return of the property to the defendant, if return of the property is ordered, and for the payment to the defendant of any sum recovered against plaintiff. The undertaking shall be in an amount not less than twice the value of defendant's interest in the property. The value of the defendant's interest in the property is determined by the market value of the property less the amount due and owing on any conditional sales contract or security agreement and all liens and encumbrances on the property, and such other facts as may be necessary to determine the defendant's interest in the property.

Comment. The reference in Section 515.010 to the limitation of liability to the amount of the undertaking is deleted as unnecessary. See Section 996.470 (limitation on liability of surety).

28035/NZ

Code of Civil Procedure § 515.020 (amended). Defendant's undertaking

SEC. __. Section 515.020 of the Code of Civil Procedure is amended to read:

515.020. (a) The defendant may prevent the plaintiff from taking possession of property pursuant to a writ of possession or regain possession of property so taken by filing an undertaking with the court in which the action was brought ~~an undertaking in an amount equal to the amount of the plaintiff's undertaking required by Section 515.010.~~ The undertaking shall be in an amount not less than twice the value of the plaintiff's interest in the property. The undertaking shall state that, if the plaintiff recovers judgment on the action, the defendant shall pay all costs awarded to the plaintiff and all damages that the plaintiff may sustain by reason of the loss of possession of the property, ~~not exceeding the amount of the undertaking.~~ The damages recoverable by the plaintiff pursuant to this section shall include all damages proximately caused by the plaintiff's failure to gain or retain possession.

(b) The defendant's undertaking may be filed at any time before or after levy of the writ of possession. A copy of the undertaking shall be mailed to the levying officer.

(c) If an undertaking for redelivery is filed and defendant's undertaking is not objected to, the levying officer shall deliver the property to the defendant, or, if the plaintiff has previously been given possession of the property, the plaintiff shall deliver such property to the defendant. If an undertaking for redelivery is filed and defendant's undertaking is objected to, the provisions of Section 515.030 apply.

Comment. Subdivision (a) of Section 515.020 is amended to make the amount of the defendant's undertaking consistent with the security to be achieved by the undertaking. The reference to the limitation of liability to the amount of the undertaking is deleted as unnecessary. See Section 996.470 (limitation on liability of surety).

28036

Code of Civil Procedure § 515.030 (amended). Objection to undertaking

SEC. __. Section 515.030 of the Code of Civil Procedure is amended to read:

515.030. (a) The defendant may object to the plaintiff's undertaking not later than 10 days after levy of the writ of possession. The defendant shall mail notice of objection to the levying officer.

(b) The plaintiff may ~~except to the defendant's sureties~~ object to the defendant's undertaking not later than 10 days after the defendant's undertaking is filed. The plaintiff shall mail notice of objection to the levying officer.

(c) If the court determines that the plaintiff's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute, the court shall vacate the temporary restraining order or preliminary injunction, if any, and the writ of possession and, if levy has occurred, order the levying officer or the plaintiff to return the property to the defendant. If the court determines that the plaintiff's undertaking is sufficient, the court shall order the levying officer to deliver the property to the plaintiff.

(d) If the court determines that the defendant's undertaking is insufficient and a sufficient undertaking is not filed within the time

required by statute, the court shall order the levying officer to deliver the property to the plaintiff, or, if the plaintiff has previously been given possession of the property, the plaintiff shall retain possession. If the court determines that the defendant's undertaking is sufficient, the court shall order the levying officer or the plaintiff to deliver the property to the defendant.

Comment. Subdivision (b) of Section 515.030 is amended for consistency with the Bond and Undertaking Law. See Section 995.920 (objection to undertaking).

045/075

Code of Civil Procedure § 681.030 (technical amendment). Rules for practice and procedure; forms

SEC. __. Section 681.030 of the Code of Civil Procedure is amended to read:

681.030. (a) The Judicial Council may provide by rule for the practice and procedure in proceedings under this title.

(b) The Judicial Council may prescribe the form of the applications, notices, orders, writs, and other papers under this title. A form prescribed by the Judicial Council under this section is deemed to comply with this title ~~and supersedes any corresponding form provided in this title~~. The Judicial Council may prescribe forms in languages other than English.

(c) The Judicial Council shall prepare a form containing both of the following:

(1) A list of each of the federal and this state's exemptions from enforcement of a money judgment against a natural person.

(2) A citation to the relevant statute of the United States or this state which creates each of the exemptions.

Comment. Section 681.030 is amended to reflect the repeal of the statutory forms formerly provided in this title.

045/076

Code of Civil Procedure §§ 693.010-693.060 (repealed). Forms

SEC. __. Chapter 19 (commencing with Section 693.010) of Division 1 of Title 9 of Part 2 of the Code of Civil Procedure is repealed.

Comment. The statutory forms provided by former Sections 693.010-693.060 are repealed because the Judicial Council has issued superseding forms.

Code of Civil Procedure § 695.010 (amended). Property subject to enforcement of money judgment

695.010. (a) Except as otherwise provided by law, all property of the judgment debtor is subject to enforcement of a money judgment.

(b) If property of the judgment debtor was attached in the action but was transferred before entry of the money judgment in favor of the judgment creditor, the property is subject to enforcement of the money judgment so long as the attachment lien remains effective.

Comment. Subdivision (b) is added to Section 695.010 to make clear that property attached in the action is subject to enforcement even though it has been transferred. See Section 488.500 (attachment lien). Such property may be levied upon under a writ of execution after judgment without the need to bring a separate action to foreclose the lien. See Section 699.710 (property subject to execution). See also Section 697.340 (judgment lien does not reach real property transferred before judgment).

Code of Civil Procedure § 697.340 (amended). Interests subject to judgment lien on real property

SEC. __. Section 697.340 of the Code of Civil Procedure is amended to read:

697.340. Except as provided in Section 704.950:

(a) A judgment lien on real property attaches to all interests in real property in the county where the lien is created (whether present or future, vested or contingent, legal or equitable) that are subject to enforcement of the money judgment against the judgment debtor pursuant to Article 1 (commencing with Section 695.010) of Chapter 1 at the time the lien was created, but does not reach ~~a right to rents or rental payments~~, a leasehold estate with an unexpired term of less than two years ~~or~~, the interest of a beneficiary under a trust, or real property subject to an attachment lien in favor of the creditor that was transferred before judgment.

(b) If any interest in real property in the county on which a judgment lien could be created under subdivision (a) is acquired after the judgment lien was created, the judgment lien attaches to such interest at the time it is acquired.

Comment. Subdivision (a) of Section 697.340 is amended to preserve the scope of the judgment lien in light of the amendment of Section

695.010. See Section 695.010(b) and the Comment thereto. The phrase "rental payments" is substituted for "right to rents" to make clear that the debtor's power to assign the right to future rent is subject to a judgment lien. The lien does not attach to rental payments being made to the debtor. However, as rents accrue, they are subject to execution under Section 700.170 as general intangibles. See also Sections 708.510 (assignment order covering debtor's right to rents), 708.530(b) (effect and priority of assignment).

90854

Code of Civil Procedure § 697.390 (technical amendment). Effect of transfer or encumbrance of interest subject to judgment lien

SEC. __. Section 697.390 of the Code of Civil Procedure is amended to read:

697.390. If an interest in real property that is subject to a judgment lien is transferred or encumbered without satisfying or extinguishing the judgment lien:

(a) The interest transferred or encumbered remains subject to a judgment lien created pursuant to Section 697.310 in the same amount as if the interest had not been transferred or encumbered.

(b) The interest transferred or encumbered remains subject to a judgment lien created pursuant to Section 697.320 in the amount of the lien at the time of transfer or encumbrance plus interest thereafter accruing on such amount.

Comment. Section 697.390 is amended to make clear that this section does not continue judgment liens that are otherwise extinguished. See, e.g., Section 701.630 (extinction of junior liens upon execution sale); *Carpentier v. Brenham*, 40 Cal. 221, 235 (1870) (affect on junior liens of foreclosure of senior lien); *Hohm v. Riverside County Flood Control Dist.*, 228 Cal. App.2d 605, 613, 39 Cal. Rptr. 647 (1964) (purchaser at trustee's sale takes free of junior liens).

18544

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.

18543

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, notwithstanding actual knowledge on the part of 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).

Code of Civil Procedure § 699.080 (technical amendment). Levy by registered process server

SEC. __. Section 699.080 of the Code of Civil Procedure is amended to read:

699.080. (a) A registered process server may levy under a writ of execution on the following types of property:

- (1) Real property, pursuant to Section 700.015.
- (2) Growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from the sale thereof at the wellhead or minehead, pursuant to Section 700.020.
- (3) Personal property in the custody of a levying officer, pursuant to Section 700.030.
- (4) Personal property used as a dwelling, pursuant to subdivision (a) of Section 700.080.
- (5) Deposit accounts, pursuant to Section 700.140 ~~or 700-160~~
- (6) Property in a safe-deposit box, pursuant to Section 700.150 ~~or 700-160~~
- (7) Accounts receivable or general intangibles, pursuant to Section 700.170.
- (8) Final money judgments, pursuant to Section 700.190.
- (9) Interest of a judgment debtor in personal property in the estate of a decedent, pursuant to Section 700.200.

(b) Before levying under the writ of execution, the registered process server shall deposit a copy of the writ with the levying officer and pay the fee provided by Section 25721 of the Government Code.

(c) If a registered process server levies on property pursuant to subdivision (a), the registered process server shall do ~~all~~ both of the following:

(1) Comply with the applicable levy, posting, and service provisions of Article 4 (commencing with Section 700.010).

~~(2) Deliver any undertaking required by Section 700-160~~

~~(3) (2)~~ Request any third person served to give a garnishee's memorandum to the levying officer in compliance with Section 701.030.

(d) Within five days after levy under this section, all of the following shall be filed with the levying officer:

- (1) The writ of execution.
- (2) An affidavit of the registered process server stating the manner of levy performed.
- (3) Proof of service of the copy of the writ and notice of levy on

other persons as required by Article 4 (commencing with Section 700.010).

(4) Instructions in writing, as required by the provisions of Section 687.010.

(e) If the fee provided by Section 26721 of the Government Code has been paid, the levying officer shall perform all other duties under the writ as if the levying officer had levied under the writ and shall return the writ to the court.

(f) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost upon a motion pursuant to Section 685.080. If allowed, the amount of the fee to be allowed is governed by Section 1032.8.

Comment. Subdivisions (a) and (c) of Section 699.080 are amended to reflect the repeal of Section 700.160.

Code of Civil Procedure § 700.140 (technical amendment). Levy on deposit accounts

SEC. ____ . Section 700.140 of the Code of Civil Procedure is amended to read:

700.140. (a) To levy upon a deposit account, the levying officer shall personally serve a copy of the writ of execution and a notice of levy on the financial institution with which the deposit account is maintained. The execution lien reaches only amounts in the deposit account at the time of service on the financial institution (including any item in the deposit account that is in the process of being collected unless the item is returned unpaid to the financial institution).

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on any third person in whose name the deposit account stands. Service shall be made personally or by mail.

(c) ~~Subject to Sections 700-160, 700-165, and 700-167, during~~ During the time the execution lien is in effect, the financial institution shall not honor a check or other order for the payment of money drawn against, and shall not pay a withdrawal from, the deposit account that would reduce the deposit account to an amount less than the amount levied upon. For the purposes of this subdivision, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(d) During the time the execution lien is in effect, the financial institution is not liable to any person for any of the following:

- (1) Performance of the duties of a garnishee under the levy.
- (2) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where such nonpayment is pursuant to the requirements of subdivision (c).
- (3) Refusal to pay a withdrawal from the deposit account where such refusal is pursuant to the requirements of subdivision (c).

(e) When the amount levied upon pursuant to this section is paid to the levying officer, the execution lien on the deposit account levied upon terminates.

(f) For the purposes of this section, ~~and Section 700-160,~~ neither of the following is a third person in whose name the deposit account stands:

- (1) A person who is only a person named as the beneficiary of a Totten trust account.

(2) A person who is only a payee designated in a pay-on-death provision in an account pursuant to Section 852.5, 7604.5, 11203.5, 14854.5, or 15318.5 of the Financial Code or other similar provision.

Comment. Subdivisions (c) and (f) of Section 700.140 are amended to reflect the repeal of Sections 700.160, 700.165, and 700.167.

Code of Civil Procedure § 700.150 (technical amendment). Levy on safe-deposit boxes

SEC. __. Section 700.150 of the Code of Civil Procedure is amended to read:

700.150. (a) To levy upon property in a safe deposit box, the levying officer shall personally serve a copy of the writ of execution and a notice of levy on the financial institution with which the safe deposit box is maintained.

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on any third person in whose name the safe deposit box stands. Service shall be made personally or by mail.

~~(c) Subject to Section 700.160, during~~ During the time the execution lien is in effect, the financial institution shall not permit the removal of any of the contents of the safe deposit box except pursuant to the levy.

(d) The levying officer may first give the person in whose name the safe deposit box stands an opportunity to open the safe deposit box to permit the removal pursuant to the levy of the property levied upon. The financial institution may refuse to permit the forcible opening of the safe deposit box to permit the removal of the property levied upon unless the judgment creditor pays in advance the cost of forcibly opening the safe deposit box and of repairing any damage caused thereby.

(e) During the time the execution lien is in effect, the financial institution is not liable to any person for any of the following:

- (1) Performance of the duties of a garnishee under the levy.
- (2) Refusal to permit access to the safe deposit box by the person in whose name it stands.
- (3) Removal of any of the contents of the safe deposit box pursuant to the levy.

Comment. Subdivision (c) of Section 700.150 is amended to reflect the repeal of Section 700.160.

Code of Civil Procedure § 700.160 (repealed). Levy on deposit accounts and safe-deposit boxes not exclusively in name of judgment debtor

SEC. . . . Section 700.160 of the Code of Civil Procedure is repealed.

700.160. (a) The provisions of this section apply in addition to the provisions of Sections 700.140 and 700.150 if any of the following property is levied upon:

(1) A deposit account standing in the name of a third person or in the names of both the judgment debtor and a third person.

(2) Property in a safe-deposit box standing in the name of a third person or in the names of both the judgment debtor and a third person.

(b) The judgment creditor shall provide, and the levying officer shall deliver to the financial institution at the time of levy, an undertaking for not less than twice the amount of the judgment or, if a lesser amount in a deposit account is sought to be levied upon, not less than twice the lesser amount. The undertaking shall indemnify any third person rightfully entitled to the property against actual damage by reason of the levy on the property and shall assure to the third person the return of the property upon proof of the person's right thereto. The undertaking need not name the third person specifically but may refer to the third person generally in the same manner as in this subdivision. If the provisions of this subdivision are not satisfied, the levy is ineffective and the financial institution shall not comply with the requirements of this section or with the levy.

(c) Upon delivery of the undertaking to the financial institution, the financial institution shall immediately mail or deliver a notice of the delivery of the undertaking to the third person in whose name the deposit account or safe-deposit box stands. If mailed, the notice shall be sent by registered or certified mail addressed to the person's last address known to the financial institution. The financial institution shall deliver the undertaking as directed by the third person.

(d) Notwithstanding Article 5 (commencing with Section 701.010), from the time of levy and the delivery of the undertaking to the financial institution until 15 days after the notice is mailed or delivered under subdivision (c) if no objection to the undertaking is made or, if such objection is made, until the court determines that the undertaking is sufficient, the financial institution shall not do any of the following:

(1) Honor a check or other order for the payment of money drawn against, or pay a withdrawal from, the deposit account that would reduce the deposit account to less than the amount levied upon. For the purposes of this paragraph, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(2) Permit the removal of any of the contents of the safe-deposit box except pursuant to the writ.

(e) The financial institution is not liable to any person for any of the following during the period prescribed in subdivision (d):

(1) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where such nonpayment is pursuant to the requirements of subdivision (d).

(2) Refusal to pay a withdrawal from the deposit account where such refusal is pursuant to the requirements of subdivision (d).

ALL IN
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(3) Refusal to permit access to the safe-deposit box by the person in whose name it stands.

(4) Removal of any of the contents of the safe-deposit box pursuant to the levy.

(f) Upon being notified by the levying officer of the expiration of the period prescribed in subdivision (d), the financial institution shall comply with the levy and Sections 700.140 and 700.150 apply.

(g) This section does not apply in any case where the procedure provided in Section 700.163 or 700.167 is used.

Comment. Section 700.160, which required an undertaking as a prerequisite to levy on a deposit account or safe-deposit box not exclusively in the name of the defendant is repealed. See Sections 700.140(d), 700.150(e) (nonliability of financial institution for complying with levy). The nondebtor who is the holder of the deposit account or safe-deposit box may assert rights by way of a third-party claim. See Sections 720.110 et seq.

Code of Civil Procedure § 700.165 (repealed). Deposit account in name of judgment debtor and spouse

SEC. . Section 700.165 of the Code of Civil Procedure is repealed.

700.165. (a) This section provides an alternative procedure to the provisions of Section 700.160 in a case where the deposit account levied upon stands only in the names of both the judgment debtor and the spouse of the judgment debtor and not in the name of any other person. This section applies only if the judgment creditor instructs the levying officer to proceed under this section rather than under Section 700.160.

(b) If the judgment creditor instructs the levying officer to proceed under this section, the judgment creditor shall provide, and the levying officer shall deliver to the financial institution at the time of levy, a notice that the judgment creditor has elected to use the procedure provided in Section 700.165 of the Code of Civil Procedure and that the levy reaches any deposit account that stands in the names of both the judgment debtor and the spouse of the judgment debtor and not in the name of any other person and specifying the name of the spouse of the judgment debtor.

(c) At the time of the levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on the spouse of the judgment debtor. Service shall be made personally or by mail.

(d) If the judgment creditor elects to use the procedure provided in this section and the requirements of subdivision (a) are satisfied, the financial institution shall comply with the levy and Section 700.140 applies. The financial institution is not liable to any person for performing its duties as a garnishee under the levy in good faith reliance upon the information delivered to the financial institution pursuant to subdivision (b).

ALL IN
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Comment. Section 700.165 is repealed because it was an exception to the requirements of Section 700.160 which has been repealed.

Code of Civil Procedure § 700.167 (repealed). Deposit account in fictitious business name

SEC. __. Section 700.167 of the Code of Civil Procedure is repealed.

700.167. (a) This section provides an alternative procedure to the provisions of Section 700.160 in a case where the deposit account levied upon stands in a fictitious business name and the fictitious business name statement filed pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code lists as the persons doing business under the fictitious business name either the judgment debtor or the judgment debtor and the spouse of the judgment debtor but does not list any other person as doing business under the fictitious business name. This section applies only if the judgment creditor instructs the levying officer to proceed under this section rather than under Section 700.160.

(b) If the judgment creditor instructs the levying officer to proceed under this section, the judgment creditor shall provide, and the levying officer shall deliver to the financial institution at the time of levy, both of the following:

(1) A notice that the judgment creditor has elected to use the procedure provided in Section 700.167 of the Code of Civil Procedure.

(2) A copy of an unexpired fictitious business name statement, certified as provided in Section 17926 of the Business and Professions Code, listing as the person doing business under the fictitious business name either the judgment debtor or the judgment debtor and the spouse of the judgment debtor but not listing any other person as doing business under the fictitious business name.

(c) At the time of the levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy upon each of the persons listed in the fictitious business name statement. Service shall be made personally or by mail.

(d) If the judgment creditor elects to use the procedure provided in this section and the requirements of subdivision (b) are satisfied, the financial institution shall comply with the levy and Section 700.140 applies. The financial institution is not liable to any person for performing its duties as a garnishee under the levy in good faith reliance upon the information delivered to the financial institution pursuant to subdivision (b).

ALL IN
STRIKEOUT

Comment. Section 700.167 is repealed because it was an exception to the requirements of Section 700.160 which has been repealed.

Code of Civil Procedure § 704.740 (amended). Court order for sale;
exemption claim where court order for sale not required

SEC. ___. Section 704.740 of the Code of Civil Procedure is amended to read:

704.740. (a) Except as provided in subdivision (b), a dwelling may not be sold under this division to enforce a money judgment except pursuant to a court order for sale obtained under this article and the dwelling exemption shall be determined under this article.

(b) If the dwelling is personal property or is real property in which the judgment debtor has a leasehold estate with an unexpired term of less than two years at the time of levy:

(1) A court order for sale is not required and the procedures provided in this article relating to the court order for sale do not apply.

(2) An exemption claim shall be made and determined as provided in Article 2 (commencing with Section 703.510).

Comment. Subdivision (a) of Section 704.740 is amended to make clear that this article provides the exclusive procedure for determining real property dwelling exemptions (other than leaseholds of less than two years). Accordingly, the general procedures for claiming exemptions from execution are not applicable, except as otherwise provided.

29181

Code of Civil Procedure § 704.995 (added). Effect of death of homestead owner

SEC. ___. Section 704.995 is added to the Code of Civil Procedure, to read:

704.995. (a) The protection of the declared homestead from any creditor having an attachment lien, execution lien, or judgment lien on the dwelling continues after the death of the homestead owner if, at the time of the decedent's death, the dwelling was the principal dwelling of one or more of the following persons to whom all or part of the interest of the deceased homestead owner passes:

- (1) The surviving spouse of the decedent.
- (2) A member of the family of the decedent.

(b) The protection of the homestead provided by subdivision (a) continues regardless of whether the decedent was the sole owner of the homestead or owned the homestead with the surviving spouse or a member

of the decedent's family and regardless of whether the surviving spouse or the member of the decedent's family was a homestead owner at the time of the decedent's death.

(c) The amount of the homestead is determined pursuant to Section 704.730 depending on the circumstances of the case at the time the amount is required to be determined.

Comment. Section 704.995 is added to make clear that the surviving spouse or resident family do not lose the declared homestead right by the death of a homestead owner. Hence, the protection afforded the declared homestead from creditors continues even though the person who recorded the homestead declaration or who was the sole or joint owner is dead. This section rejects a contrary dictum in Estate of Grigsby, 134 Cal. App.3d 611, 615, 184 Cal. Rptr. 886 (1982) ("... the declared homestead does not survive the death of one of the spouses."). See also Prob. Code § [6528] (effect of probate homestead on declared homestead). Subdivision (c) makes clear that where the right to a declared homestead continues, the amount of the homestead exemption is determined under the normal rules. For example, if the surviving spouse is not 65 years of age or older and does not have another family member living in the dwelling, the dollar amount of the declared homestead that is protected from creditors will be reduced. See Sections 704.730 (amount of homestead exemption), 704.950 (attachment of judgment lien to surplus value).

16968

Code of Civil Procedure § 706.101 (technical amendment). Manner of service of earnings withholding order and of other notices and documents

SEC. __. Section 706.101 of the Code of Civil Procedure is amended to read:

706.101. (a) An earnings withholding order shall be served by the levying officer upon the employer by delivery of the order to any of the following:

(1) The managing agent or person in charge, at the time of service, of the branch or office where the employee works or the office from which the employee is paid. In the case of a state employee, the office from which the employee is paid does not include the Controller's office unless the employee works directly for the Controller's office.

(2) Any person to whom a copy of the summons and of the complaint may be delivered to make service on the employer under Article 4 (commencing with Section 416.10) of Chapter 4 of Title 5.

(b) Service of an earnings withholding order shall be made by personal delivery as provided in Section 415.10 or 415.20 or by delivery by registered or certified mail, postage prepaid, with return receipt

requested. When service is made by mail, service is complete at the time the return receipt is executed by or on behalf of the recipient. If the levying officer attempts service by mail under this subdivision and does not receive a return receipt within 15 days from the date of deposit in the mail of the earnings withholding order, the levying officer shall make service as provided in Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5.

(c) Except as provided in subdivision (b), service of any notice or document under this chapter may be made by first-class mail, postage prepaid. If service is made on the employer after the employer's return has been received by the levying officer, the service shall be made by first-class mail, postage prepaid, on the person designated in the employer's return to receive notices and at the address indicated in the employer's return, whether or not such address is within the county. Nothing in this subdivision precludes service by personal delivery (1) on the employer before the employer's return has been received by the levying officer or (2) on the person designated in the employer's return after its receipt.

(d) Notwithstanding subdivision (b), if the judgment creditor so requests, the levying officer shall make service of the earnings withholding order by personal delivery as provided in Section 415.10 or 415.20. If the judgment creditor requests that service be made under this subdivision, the fee provided in Section 26750 of the Government Code shall be increased by one dollar and fifty cents (\$1.50).

~~(e) An earnings withholding order also may be served by a registered process server. When an earnings withholding order is served by a registered process server pursuant to this subdivision, the levying officer shall perform all other duties required by the provisions of this chapter, except for the actual service of the order, as if the levying officer had served the order. When an earnings withholding order is served by a registered process server, the court, in allowing costs for service pursuant to Section 1032.8, shall not allow a sum in excess of one dollar and fifty cents (\$1.50).~~

Comment. Former subdivision (e) of Section 706.101 is superseded by Section 706.108 (issuance and service of earnings withholding order by registered process server).

Code of Civil Procedure § 706.108 (added). Issuance and service of earnings withholding order by registered process server

SEC. __. Section 706.108 is added to the Code of Civil Procedure, to read:

706.108. (a) If a writ of execution has been issued to the county where the judgment debtor's employer is to be served and the time specified in subdivision (b) of Section 699.530 for levy on property under the writ has not expired, a judgment creditor may deliver an application for issuance of an earnings withholding order to a registered process server who may then issue an earnings withholding order.

(b) If the registered process server has issued the earnings withholding order, the registered process server, before serving the earnings withholding order, shall deposit with the levying officer a copy of the writ of execution, the application for issuance of an earnings withholding order, and a copy of the earnings withholding order, and shall pay the fee provided by Section 26750 of the Government Code.

(c) A registered process server may serve an earnings withholding order on an employer whether the earnings withholding order was issued by a levying officer or by a registered process server, but no earnings withholding order may be served after the time specified in subdivision (b) of Section 699.530. In performing this function, the registered process server shall serve upon the designated employer all of the following:

- (1) The original and one copy of the earnings withholding order.
- (2) The form for the employer's return.
- (3) The notice to employee of earnings withholding order.
- (4) A copy of the employer's instructions referred to in Section 706.127, except as otherwise prescribed in rules adopted by the Judicial Council.

(d) Within five days after service under this section, all of the following shall be filed with the levying officer:

- (1) The writ of execution, if it is not already in the hands of the levying officer.
- (2) Proof of service on the employer of the papers listed in subdivision (c).
- (3) Instructions in writing, as required by the provisions of Section 687.010.

(e) If the fee provided by Section 26750 of the Government Code has been paid, the levying officer shall perform all other duties required by the provisions of this chapter as if the levying officer had served the earnings withholding order.

(f) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost upon a motion pursuant to Section 685.080. If allowed, the amount of the fee is governed by Section 1032.8 but may not exceed one dollar and fifty cents (\$1.50).

Comment. Section 706.108 supersedes former subdivision (e) of Section 706.101 which provided for service of an earnings withholding order by a registered process server. The authority of the registered process server to issue an earnings withholding order provided in subdivision (a) is new. This is comparable to the authority of a levying officer under Section 706.102. See also Section 706.121 (contents of application for earnings withholding order).

Subdivision (b) is comparable to subdivision (b) of Section 699.080 (levy by registered process server under writ of execution). The papers are required to be filed with the levying officer under this subdivision to give the levying officer an early opportunity to establish a file, thereby facilitating the handling of any exemption claim, the employer's return, and payments by the employer or judgment debtor. Of course, if the levying officer has issued the earnings withholding order, this step is not required since the necessary papers will already be on file before service on the employer.

Subdivision (c) is the same in substance as Section 706.103 which applies to service by a levying officer. The first sentence continues the authority provided by former subdivision (e) of Section 706.101.

Subdivision (d) is drawn from subdivision (d) of Section 699.080 (levy by registered process server under writ of execution). If the levying officer has issued the earnings withholding order, the writ of execution will already be in the hands of the levying officer, as is recognized in subdivision (d)(1). If the registered process server has issued the earnings withholding order, however, only a copy of the writ of execution is delivered to the levying officer under subdivision (b) and the writ itself is retained and filed with the levying officer only after service on the employer is complete.

Subdivision (e) continues the substance of the second sentence of former subdivision (e) of Section 706.101 and is comparable to subdivision (e) of Section 699.080 (duties of levying officer after levy by registered process server under writ of execution).

Subdivision (f) continues the limitation on the extra fee that may be allowed provided by former subdivision (e) of Section 706.101. Subdivision (f) is comparable in other respects to subdivision (f) of Section 699.080 (fee for levy under writ of execution).

Code of Civil Procedure § 708.110 (amended). Examination of judgment debtor

SEC. __. Section 708.110 of the Code of Civil Procedure is amended to read:

708.110. (a) The judgment creditor may apply to the property court for an order requiring the judgment debtor to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to furnish information to aid in enforcement of the money judgment.

(b) If the judgment creditor has not caused the judgment debtor to be examined under this section during the preceding 120 days, the court shall make the order upon ex parte application of the judgment creditor.

(c) If the judgment creditor has caused the judgment debtor to be examined under this section during the preceding 120 days, the court shall make the order if the judgment creditor by affidavit or otherwise shows good cause for the order. The application shall be made on noticed motion if the court so directs or a court rule so requires. Otherwise, it may be made ex parte.

(d) The judgment creditor shall personally serve a copy of the order on the judgment debtor not less than 10 days before the date set for the examination. Service of the order creates a lien on the personal property of the judgment debtor for a period of one year from the date of the order unless extended or sooner terminated by the court.

(e) The order shall contain the following statement in 14-point boldface type if printed or in capital letters if typed: "NOTICE TO JUDGMENT DEBTOR. If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court and the court may make an order requiring you to pay the reasonable attorney's fees incurred by the judgment creditor in this proceeding."

Comment. Subdivision (d) of Section 708.110 is amended to prescribe a one-year duration for the lien created under this section. This is consistent with the duration of a lien created under Section 708.120 (examination of third person).

Code of Civil Procedure § 708.530 (amended). Effect and priority of assignment

SEC. __. Section 708.530 of the Code of Civil Procedure is amended to read:

708.530. ~~The~~ (a) Except as provided in subdivision (b), the effect and priority of an assignment ordered pursuant to this article is governed by Section 955.1 of the Civil Code. For the purpose of priority, an assignee of a right to payment pursuant to this article shall be deemed to be a bona fide assignee for value under the terms of Section 955.1 of the Civil Code.

(b) An assignment of the right to future rent ordered under this article is recordable as an instrument affecting real property and the priority of such an assignment is governed by Section 1214 of the Civil Code.

Comment. Section 708.530 is amended to provide a special rule governing assignments of rights to future rent. Subdivision (b) recognizes such assignments as instruments affecting real property subject to the recording act.

28037

Code of Civil Procedure § 995.930 (amended). Manner of objection to undertakings

SEC. __. Section 995.930 of the Code of Civil Procedure is amended to read:

995.930. (a) An objection shall be in writing and shall be made by noticed motion. The notice of motion shall specify the precise grounds for the objection. If a ground for the objection is that the amount of the bond is insufficient, the notice of motion shall state the reason for the insufficiency and shall include an estimate of the amount that would be sufficient.

(b) The objection shall be made within 10 days after service of a copy of the bond on the beneficiary or such other time as is required by the statute providing for the bond.

(c) If no objection is made within the time required by statute, the beneficiary is deemed to have waived all objections except upon a showing of good cause or changed circumstances.

Comment. Subdivision (c) of Section 995.930 is amended to permit an objection to a bond or undertaking after the time for making an objection has expired, upon a showing of good cause. Facts constituting good cause might include inadequate time, under the circumstances, to investigate and respond. There is no time limit for late filing under this provision.

2977

Government Code § 26830 (amended). Filing fee for application for renewal of judgment

SEC. __. Section 26830 of the Government Code is amended to read:

26830. The fee for filing any notice of motion, or any other paper requiring a hearing subsequent to the first paper, or any notice of intention to move for a new trial of any civil action or special proceeding, or an application for renewal of a judgment, is fourteen dollars (\$14), except that there shall be no fee for filing any of the following:

- (a) An amended notice of motion.
- (b) An ex parte motion.
- (c) A memorandum that a civil case is at issue.
- (d) A demurrer to the original proceeding.
- (e) A motion to strike when filed concurrently with the demurrer to the original pleading.
- (f) A hearing on a petition for emancipation of a minor.
- (g) Default hearings.
- (h) A show-cause hearing on a petition for an injunction prohibiting harassment.
- (i) A show-cause hearing on an application for an order prohibiting domestic violence.
- (j) A show-cause hearing on writs of review, mandate, or prohibition.
- (k) A show-cause hearing on a petition for a change of name.
- (l) A hearing to compromise a claim of a minor, an insane or incompetent person.
- (m) A stipulation by the parties for a continuance of a hearing.
- (n) Order of examination of judgment debtor.
- (o) Notice of motion for order determining claim of exemption.

Comment. Section 26830 is amended to provide the filing fee for an application for renewal of a judgment. See Code Civ. Proc. §§ 683.110-683.220.



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.

(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.

§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.

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.
Professor Janice E. Kosel
Margaret Sheneman, Attorney

LT:jh



LOYOLA LAW SCHOOL

August 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

Dear Stan:

Thank you for your letter of July 8, 1983 enclosing an advance copy of your initial draft of a revised CCP §697.590.

I have studied your draft and its contents. As written, I think it does the job and thus have no suggestions of my own to make. The changes you have made do not change the meaning of my suggested language, and in several instances have made it more readable.

As I mentioned to you in our recent telephone conversation, one member of the UCC Committee suggested somewhat different wording for subsection (f) which deals with priority as to future advances. He proposes that the subsection make clear that the secured party will have priority "unless and until" the notice is served and that it be stated that this is the rule "notwithstanding actual knowledge on the part of the secured party". My opinion is that the present language accomplishes that purpose, but you may wish to consider this suggestion to avoid one of the "quibbles" mentioned in your letter. Perhaps some language along this line in the Comment might prove useful.

As to your draft report, I do not think that footnote 6 (which is the heart of the matter) might be expanded by giving an example, such as Example "E" in my letter of April 19, 1983. This might make more clear the objective of preservation of the integrity of the filing system.

In the second paragraph of your letter you were wondering why I had made some changes in the wording of the subsection dealing with circular priorities, now found in draft §697.590(e). I have no recollection as to why I made these changes, but in comparing the draft with present §697.590(c) these thoughts occur to me:

1. The present section reads in part: "If a perfected purchase money security interest has priority over a judgment lien on after-acquired inventory pursuant to subdivision (b) ..." I eliminated the words "perfected" and "after-acquired" in my draft. I must have done so simply because they are unnecessary. Under subsection (b), a purchase money security interest will only have priority over a conflicting judgment lien if it is perfected. Further, the only case where subsection (b) would apply is in the case of after-acquired property.

2. The words "on the inventory subject to the purchase money security interest" were substituted for the words "on after-acquired inventory." I think that this makes it clear that the judgment lien is subordinate only as to that after-acquired inventory which is also subject to the purchase money security interest and not subordinate as to all after-acquired inventory.

I noted a couple of typographical errors which could be easily overlooked, so I will mention them: (1) In footnote 6 on page 3, in the next to last line, the word "to" should, I think, be "no". (2) In the second paragraph of the Comment on page 7, in the third line the reference to "Subdivision (b)ia" should be "(b)(1)".

I am taking the liberty of sending copies of your letter and the enclosed draft to the Chairman of the UCC Committee along with a copy of this letter. I am doing so because I have to deal by mail with my secretary at the Law School and this can cause delay. This way you can get an earlier response from the Committee. I will not be attending the next Committee meeting, but I would expect to get word as to the Committee response to your draft so that I can pass it along to you.

Sincerely,



Lloyd Tevis
Professor of Law

LT/eaf

Enclosure

cc: Ronald M. Bayer, Esq.

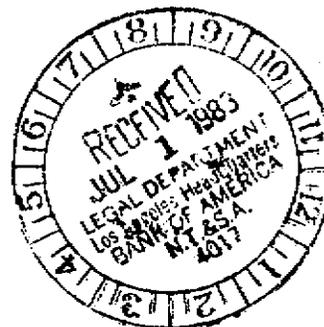
My Summer Address:

90 Costa Azul Drive
Los Osos, California 93402

FROM Legal Department #3017
World Headquarters Building

BANK OF AMERICA

TO Rick Schwartz
Senior Counsel
Legal Department - South #4017



DATE June 30, 1983

SUBJECT Notice of Personal Property Judgment Lien

This is in reply to your letter dated June 28.

A first-to-file priority rule seems desirable insofar as it is feasible among the competing interests. I see no reason why a simple first-to-file rule would not be feasible as between security interests perfected by filing and liens acquired by filing a notice of judgment lien. There is every reason to subject a judgment lien acquired by filing a notice to the same priority rules as security interests perfected by filing. The new procedure essentially provides a method for a judgment creditor to acquire rights identical to the rights of a secured party who has perfected by filing in both existing and after-acquired property.

But even among competing security interests, the first-to-file rule is only one of several rules. Others include security interests perfected by possession and purchase money security interests. The lien creditor who acquires a lien by filing a notice of judgment lien is only one of several categories of lien creditors. The priority of at least some of the other lien creditors

Rick Schwartz
June 30, 1983
Page Two

cannot be controlled by the Uniform Code, e.g., a trustee in bankruptcy. The considerations which resulted in the existing priority provisions for lien creditors will probably prevent any change of priority rules for lien creditors other than with respect to the liens acquired by filing a notice of judgment lien.

While I am fairly confident that a perfected security interest will have priority over lien creditors as to after-acquired property, there may still be some exposure under the "only to the extent that" provision in Section 9301(c)(4). For example, in rolling-over inventory, new inventory is after-acquired property, but does the financing constitute "future advances"? To the extent there is such an exposure, it is not new. As to liens acquired by filing a notice of judgment lien, the notice requirements of Section 9301(c)(5) should enable us to avoid any problems by reason of those liens.



Eldon C. Parr
Vice President and
Senior Counsel

ECP:mem

cc: Carol C. Weisner
Thomas E. Montgomery
Richard C. Herr

Exhibit 5

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SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW (BOALT HALL)
 BERKELEY, CALIFORNIA 94720
 TELEPHONE [415] 642- 0330

14 September 1983

Mr. John H. DeMouilly, Executive Secretary
 Mr. Stan G. Ulrich, Staff Counsel
 California Law Revision Commission
 4000 Middlefield Road, Suite D-2
 Palo Alto CA 94306

Dear John and Stan,

I.

I have received and read the Staff Draft proposing amendments to §697.590 C.C.P. and §9-301 Com. Code. I would like to urge you not to pursue the proposal because in my view it is

- a) based on an erroneous interpretation of §9-301(1)(b) Commercial Code
- b) undesirable as a matter of policy
- c) defective on technical grounds, and most of all
- d) unnecessary

Since the proposal was generated as a response to a criticism of §697.590 C.C.P. by Professor Tevis of April 19, 1983, I shall focus on the views of Professor Tevis before addressing other points:

A.

§9-301: What it does and what Professor Tevis says
 it does not

As I see it, §9-301 -- if read in conjunction with §§9-201 (first sentence) and 9-203 of the Commercial Code -- solves adequately all examples given by Professor Tevis, including D and E. These examples were as follows:

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

Since C has an interest in the collateral from 2/1/84 to 2/5/84, C's judgment lien attaches to the collateral prior to the attachment and prior to perfection of the S/I. Hence C prevails. C became a lien creditor before the perfection of S/P's security interest as §9-301(1)(b) requires. What could be plainer? The assertion that §9-301(1)(b) applies only to a person who becomes a lien creditor after an S/I has attached and before it is perfected is not supported by either the wording of 9-301(1)(b) or its legislative history. It applies to all persons who became lien creditors (as defined in §9-301(4)) before the S/I is perfected.

Equally untenable is Professor Tevis' solution of Example E.

- 2/1/84 -- S.F. files a F/S in advance of the creation of a S/I,
- 2/3/84 -- C files notice of a J/L,
- 2/5/85 -- D executes a S/A, granting a S/I in specified collateral.

Advance filing does not affect Debtor's power of disposition. It only renders the S/I perfected, if and when it attaches. Section 9-301(1)(b) again gives the judgment lien priority, because C became a lien creditor before the security is perfected, making the security interest subordinate to the judgment lien. There is no security interest in the collateral when C becomes a lien creditor. The history of the changes in §§9-203 and 9-301 in 1972 support this reading of the Code.

Other examples, the solution of which could be doubtful under §9-301 Commercial Code standing by itself, are adequately taken care of by §697.590(b) Cal. C.C.P. as enacted.

- Example G.
- 2/1/84 C files notice of a J/L, covering C's inventory,
 - 2/3/84 D grants a S/I in D's inventory with an after-acquired property clause,
 - 2/5/84 S/P files a F/S,
 - 9/1/84 C levies on then existing inventory.

Looking at §9-301 alone, the hyper-technical argument could be made that the J/L did not have priority with respect to the after-acquired inventory because to that extent the judgment lien did not attach before the S/I was perfected. Although I do not think that the U.C.C. compels that result, §697.590(b) takes care of the situation: the judgment lienor has priority since the filing of the F/S was subsequent to the filing of the J/L.

Example H	2/1/84	C files a J/L,
	2/3/84	D grants a S/I on collateral to be acquired,
	2/5/84	S/P files the F/S,
	3/30/84	D acquires the collateral,
	9/1/84	C levies.

Again §9-301 might give S/P priority since the J/L did not attach on collateral which replaced prior collateral in which J/L has priority and the S/I was perfected when the S/I interest and the J/L attached. Thus while example H differs from G in the absence of prior collateral which was replaced by the after-acquired collateral, still §695.590(b) Cal. C.C.P gives priority to the judgment creditor, unless the S/I is a purchase money S/I. I see no reason to quarrel with that policy established by the 1982 act.

B.

A First-to-file rule for judgment
lien priority is undesirable

Introduction of a first-to-file rule for the determination of the priorities between judicial and consensual liens on personal property would upset the policies of the Code and be an impediment to secured lending. The first-to-file rule has a place in the determination of priorities of conflicting security interests inter se but not in the determination of other priorities. Particularly unsound results occur in situations where the financing statement antedates the compliance with U.C.C. §9-203 and the filing of a J/L intervenes between the filing of the F/S and the attachment of the S/I. Why should the creditor forego a priority which he would gain by causing a levy because he is satisfied with a judgment lien? The very purpose of the judgment lien is to provide an alternative to immediate levy!

In addition the proposal appears to be inconsistent with other priority rules. Thus the priorities of future advances in the case of conflicting security interests inter se are governed by U.C.C. §9-312(7), while the priorities of future advances in the case of conflicts with judicial liens are governed by U.C.C. §9-301(4) and (5). The difference was made on policy considerations set forth in note 5 to the 1972 amendments of U.C.C. §9-312. They should be retained for judgment liens. The same holds true with respect to the purchase money priority. There is no reason to extend the rules of U.C.C. §9-312(3) or (4) to the conflict between judgment liens and p/m S/Is. The matter is correctly covered by the present statutes (U.C.C. §9-301(2) and Cal. C.C.P. §697.590(c)).

The injection of a first-to-file or first-to-perfect rule into the determination of priorities between judgment liens and security interests would raise problems with respect to the soundness of the retention of the difference in priority rules governing these matters.

C.

Technical imperfections

Section 697.590(4)(b)(1) would introduce the idea of "filing" and "perfection" to judgment liens. That is totally uncalled for. Judgment liens do not attach due to security agreements. Judgment liens have no "time of perfection." They are never "unperfected." They arise when the debtor has rights in the collateral and a notice is filed, whichever is later. The proposed application of the notions of "perfection" and "non-perfection" to judgment liens on personal property is an undesirable aberration.

D.

Lack of Need

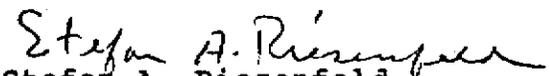
I hope I have shown that the proposed changes are uncalled for.

II.

I believe that the problem No. 3 raised in Professor Tevis' letter is also one not calling for changes. The U.S. Supreme Court has dealt with the impact of the Full Faith & Credit Clause on revived judgments in *Union Bk. v. Lamb*, 337 U.S. 38, 69 S.Ct. 911, 93 L.Ed. 1190. The application of the "old" v. "new" test causes difficulties; see *Riesenfeld 7 Survey of Calif. Law* 142 (1957). In my opinion §683.220 renders the renewal pursuant to §683.120(b) tantamount to a new judgment for limitation purposes.

I hope that I have prompted a reconsideration by you and your staff of the issues raised in this letter. If I can be of any further assistance, let me know.

Cordially yours,


Stefan A. Riesenfeld



LOYOLA LAW SCHOOL

October 3, 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

Dear Stan:

Thank you for your letter of September 20, 1983 enclosing Professor Riesenfeld's letter in opposition to proposed new CCP §697.590. I have read his views with great interest and have studied them carefully. In the end, I remain unconvinced by his arguments.

Professor Riesenfeld states a variety of objections to proposed §697.590. In what follows I attempt to discuss them more or less in the order presented in his letter. However, it seems clear to me that the thrust of his letter boils down to his objection to adopting a first-to-file rule. This presents for the Commission's consideration a policy question, which is: Is a judgment lien on personal property to be treated in the same manner as an attachment or execution lien, or is it to be viewed as more in the nature of a competing security interest? Professor Riesenfeld obviously argues for the former view, and I for the latter.

On the first page of his letter, Professor Riesenfeld refers to Example "D" set forth in my letter to you dated April 19, 1983. Example "D" is as follows:

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.

It was and is my view that Comm. Code §9301(1)(b) does not state a rule governing priority in this situation. Professor Riesenfeld states that this view "is not supported by either the wording of 9-301(1)(b) or its legislative history." Unfortunately he does not detail the legislative history on which he relies.

At the time the California Legislature was considering the adoption of the Uniform Commercial Code, §9-301 of the Official Text provided in part that an unperfected security interest is subordinate to the rights of "(b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected; . . ." It is to be noted that the reference was to "an unperfected security interest." It also referred to "knowledge of the security interest." These are clearly references to an already existing security interest, not to some security interest that may be created at some future time. The Official Comment does not address the question of priority between a judicial lien created before the security interest attached.

As enacted in California in 1963, §9301 differed from the Official Text in several ways. It provided as follows:

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

"(a) . . .

"(b) A person who becomes a lien creditor after the security interest attaches and before it is perfected unless the security interest is perfected within 10 days after it attaches and a person who becomes a lien creditor before the security interest attaches; . . ." [Underlining added]

The wording suggests that the meaning of the Official Text was uncertain to those who drafted the California statute. The language used cleared up that uncertainty.

In any event, the wording of both the Official Text and the California statute were subsequently changed to provide as follows:

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

"(a) . . .

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

Here again it seems to me that the reference is to an existing security interest and not one created after the judicial lien was created. The background studies made for the benefit of the California Legislature all indicate that the principal concern over the wording of §9301(1)(b) was with the answer to the question: What unsecured creditors should have priority over a security

interest if their rights arise during the gap between attachment and perfection of the security interest. See the discussion in the Marsh and Warren Report in Sixth Progress Report to the Legislature by Senate Fact Finding Committee on Judiciary (1959-1961), Part 1, The Uniform Commercial Code, p. 561 et seq.

The draftsmen of the Enforcement of Judgments Law seem not to have shared Professor Riesenfeld's opinion that §9301(1)(b) is dispositive of the issue. They seem to have concluded, as I do, that the statute is the appropriate place for a rule relating to priority in a conflict between a judicial lien and subsequently acquired interests in the same property. Thus, in the case of an execution lien upon personal property, CCP §§697.730 and 697.740 make express provision that, if property subject to the lien is thereafter encumbered, the property remains subject to the lien after the encumbrance. These sections, when read in conjunction with §701.640 make clear that a subsequently created security interest is subordinate to the rights of a person who became a lien creditor before the security interest has attached. See also CCP §488.500. All that I proposed in my letter of April 19, 1983 in connection with Example "D" was that §697.590 state a similar rule of priority with respect to judgment liens on personal property. I do not find Professor Riesenfeld in disagreement as to the general proposition that the lien creditor should have priority in this situation. We only disagree as to the necessity for articulating it in the Enforcement of Judgments Law. I hope that I have demonstrated that need.

The more serious disagreement between Professor Riesenfeld and myself relates to the proposal to amend §697.590 to deal with the issue presented by Example "E", as follows:

- 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 S/A granting S/I in equipment to S/P

The question raised by these facts is whether the judgment lien should have priority over the security interest that subsequently attaches. I proposed that the judgment lien should not have priority. Professor Riesenfeld vigorously opposes that suggestion. In his response he points out that which is incontrovertible, namely, that at the time the judgment becomes a lien no security interest has attached to the property. He then again states his understanding that, under §9301(1)(b), the security interest is subordinate to the judgment lien. As indicated above, I seriously doubt the applicability of §9301(1)(b) to these facts. Nevertheless it is probable that the application of §§697.710 and 701.640 to these facts results in the subordination of the later security interest to the earlier

judgment lien. The judgment lien continues despite the encumbrance. Upon an execution sale the purchaser would acquire the interest of the judgment debtor as of the date the judgment became a lien upon the debtor's property. The subordinate security interest would be extinguished upon the sale. §701.630.

§697.730 provides that if personal property subject to an execution lien is in the custody of a levying officer and is thereafter transferred or encumbered, the property remains subject to the lien after the transfer or encumbrance. §697.740 states the same rule with respect to property not in the possession of a levying officer. However §697.740 provides some 10 exceptions to this rule. In these 10 cases the transferee or encumbrancer will take free of the prior execution lien. Among such protected persons may be persons with a consensual security interest. [See subsections (a), (c), (d), (e), (f), (g), and (j).] In all these cases the execution lien is extinguished, not merely subordinated. In most of these cases the protected secured party is one who has no notice or knowledge of the prior levy. These situations differ markedly from those cases where, upon levy, the property is taken into custody. Where the levy is by seizure, the debtor no longer has possession and a subsequent encumbrancer is put on inquiry.

In the case of a judgment lien on personal property there is, of course, no seizure of the property involved. Thus an inspection of the collateral will give no notice of a judgment lien. Except as provided in §697.610, transferees and encumbrancers are held to be on notice of any prior filings of notices of judgment liens and take subject to them. Two of the exceptions may apply to a subsequent secured party. See §697.610(b)(c). Those who are protected take free and clear of the earlier judgment lien, which is extinguished and not merely subordinated.

It was my suggestion that a further rule be provided to give priority to the secured party in Example "E". I do not suggest that the earlier judgment lien be extinguished. Rather I suggest that it be subordinated to the secured party who filed a proper financing statement before the filing of a notice of judgment lien. This is the real bone of contention. Professor Riesenfeld addresses this issue in part "B" of his letter, beginning on the third page. The first paragraph contains largely conclusory statements. We are not, for example, informed as to the "particularly unsound results" that occur in situations where the financing statement antedates the attachment of the security interest and a judgment lien intervenes between filing and attachment. Nor does he explicate the manner in which a first-to-file rule "would upset the policies of the Code and be an impediment to secured lending."

As I see it, there may be positive benefits to secured lending under a first-to-file rule. In Example "E" the prospective secured party has filed to establish his priority viz-a-viz other secured lenders.

In practice many, perhaps most, lenders will obtain a certificate from the Secretary of State showing if any financing statements, tax lien certificates, attachments, and judgment liens are on file in that office in the name of the borrower as of the time when the lender has filed his financing statement. If no other financing statements are on file, the lender may thereafter loan with assurance that under the §9312(5) no secured party will have priority as the first-to-file. As things stand now, the lender has no similar assurance with regards to an attachment lien obtained by filing with the Secretary of State or a judgment lien on personal property if the filing occurs in the gap between the filing of the financing statement and the attachment of the security interest. To be sure, a sophisticated lender may structure the loan transaction to avoid such a gap. For example a loan agreement may be made and a security agreement executed with the lender's commitment conditional upon a "clean certificate" being received from the Secretary of State's office. This may also have the effect of unduly delaying disbursement of the loan to the borrower. For less sophisticated lenders the present law may provide a trap for the unwary. This trap would disappear were the first-to-file rule applied in this situation.

Professor Riesenfeld asks, "Why should a creditor forego a priority which he would gain by causing a levy because he is satisfied with a judgment lien? The very purpose of the judgment lien is to provide an alternative to immediate levy!" No one is asking the creditor to forego priority. If the creditor can identify property subject to execution, he or she may levy and will have priority over any subsequent interest unless one of the exceptions in §697.740 apply. I do not accept the picture of a creditor using the remedy of a judgment lien as an alternative to levy. There may be isolated cases where such a conscious choice is made. The more likely situation is that, as standard office practice, a notice of judgment lien on personal property will be filed in most cases where a money judgment is recovered. Perhaps this will not be true as to consumer debtors. As the availability of judgment liens becomes more widely known, filings will become as routine as recording an abstract of judgment. This will be done, not as an alternative to levy, but in the hope that the judgment debtor has, or will acquire, property subject to a judgment lien. Later, after investigation or after supplementary proceedings, such property may be discovered. It will be at that time that thoughts of a levy will occur.

There is, in my mind, a significant difference between the notice imparted by a levy involving the seizure of personal property and the notice given by a notice of judgment lien filed after a secured party has already filed a financing statement. It is my opinion that in Example "E," a lender is in somewhat the same position of those subsequent transferees and encumbrancers who are protected by §§697.610 and 697.740 discussed above. As a matter of policy the first-to-file rule should be enacted to protect them in this situation. As discussed in my letter of April 19, 1983, such a rule further protects the integrity of the filing system.

Although Professor Riesenfeld does not raise the point in his letter, there is one problem concerning proposed §697.590 that has been suggested to me that is cause for concern. It would be unfair to a judgment lienor to permit an undue delay between the time of filing a financing statement and the attachment of the security interest to secure the initial loan. It would be appropriate to provide that in a case of unreasonably delayed attachment (and hence delayed perfection) would result in priority for the judgment lien. Perhaps a 30 day grace period would be appropriate.

In Part "B" of Professor Riesenfeld's letter (third page, last full paragraph) it is said that the draft revision of §697.590 appears to be inconsistent with the rules of the U.C.C. relating to priorities as to future advances. He notes that at present priorities as to future advances in the case of conflicts with judicial liens are governed by §§9301(4) and (5) and urges that they not be changed. The only change made was one that was necessary to reflect the first-to-file rule in proposed §697.590(b). If the first-to-file rule is not adopted then there should be no change. If it is adopted then the change is necessary for the sake of internal consistency.

In the same paragraph in Part "B" of his letter, Professor Riesenfeld suggests that the draft proposal, in some unspecified manner, changes the present rules with respect to the purchase money priority. I do not see that it does. As I read proposed §697.590(d) and (e) they retain the substance of the rules regarding purchase money priority presently found in §697.590(b) and (c). Not knowing the reason for Professor Riesenfeld's objection, I cannot respond to it.

On the last page of Professor Riesenfeld's letter, under the heading, "Technical Imperfections" he suggests that proposed §697.590 would improperly introduce the idea of "filing" and "perfection" to judgment liens. As to "perfection," I simply do not understand his criticism. In subsection (a)(2) "perfection" is defined in relation to a security interest, not a judgment lien. Thus, as used in subsections (b) and (c), the term can only have reference to a security interest. In subsection (d) the term clearly refers to a security interest.

Proposed §697.590 does not, in my view, introduce the term "filing" into the article on judgment liens on personal property. It is already there. As defined in subsection (a)(1), it means nothing more than it presently means; namely the creation of a judgment lien by filing a notice of judgment lien. This objection amounts to nothing more than another way to object to the use of a first-to-file rule to determine priorities.

In Part II (last page) of Professor Riesenfeld's letter he addresses himself to a question which I raised concerning renewed judgments and the Full Faith and Credit Clause. I had not suggested any changes, nor is that matter presently under consideration. I

Mr. Stan G. Ulrich - October 3, 1983

7.

sincerely hope that he is correct in his opinion that a renewed judgment is tantamount to a new judgment for limitational purposes. The genesis of my question is the Comment to §683.120 which speaks of the renewal as extending the enforceability of the judgment, and which states that renewal does not result in the entry of a new judgment. This suggests the possibility that conceptually renewal is more akin to former CCP §685 than to a new judgment entered in an action on the earlier judgment.

This has been a very long letter, for which I apologize. However, I felt it necessary to respond in some detail to the many points raised by Professor Riesenfeld. As I see it, although he raises many objections, there is only one real issue. It is that which I stated in the second paragraph of this letter: Is a judgment lien on personal property to be treated in the same manner as an attachment or execution lien, or is it to be viewed as more in the nature of a competing security interest? If it is to be the former, then some "clean up" amendments should make that policy decision more clear. If it is to be the latter, then proposed §697.590 (as modified to deal with the problem of delay between filing and attachment) will make the policy explicit.

Sincerely,



Lloyd Tevis
Professor of Law

LT:gt

UNIVERSITY OF CALIFORNIA, BERKELEY

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SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW (BOALT HALL)
 BERKELEY, CALIFORNIA 94720
 TELEPHONE [415] 642-

0330

September 28, 1983

Mr. John H. Demouilly, Executive Secretary
 Mr. Stan G. Ulrich, Staff Counsel
 California Law Revision Commission
 4000 Middlefield Road, Suite D-2
 Palo Alto, CA 94306

Dear John and Stan,

Following up my letter of September 14, 1983, I would like to raise two further issues with you involving matters 1) where the comments to the Enforcement of Judgments Law, if not the Law itself, are apparently defective, and 2) where there seems to be a gap either in the Enforcement of Judgments Law or in the Attachment Law.

I

Creditors' Remedies with respect to Rents
 and Accounts Receivable

1.

Rents

Prior to the enactment of the new law, future rents could not be reached by garnishment, Hustead v. Supreme Court, 2 CA 3d 780, 83 Cal. Rpt. 26 (1969), cited in comment to §708.510. A creditor, however, could reach future rents by levying on the debtor's interest in land (freehold or leasehold in the case of a sublease), followed by an execution sale at which the creditor could purchase the debtor's interest in land. The creditor could also reach future rents by the appointment of a receiver in supplementary proceedings. Garnishment was only possible with respect to past due rents.

Since the right to future rent is an interest in real property in the nature of an "incorporeal hereditament," the right to future rent can be transferred separately by deed. The deed is subject to recordation in order to be effective against a b.f.p. for value who records first. In other words, if there is an unrecorded assignment of rent, followed by a levy on the lessor's interest in the realty, a purchaser at the execution sale would prevail over the assignee upon recording the sheriff's certificate. Moreover, a judgment lien would attach on unsevered rights to future rent. See Valley Nat'l Bk & Avco, 980 P.2d 671, 677 (1992)

The new law seems to make some important changes:

- 1) A judgment lien no longer reaches a right to rents, §697.340. But the section leaves it unclear, whether this applies only to an assigned right to rents or also to a right to rent of the owner of the reversion.
- 2) Rents can be reached by assignment order, §708.510. But, in my opinion, such order is an instrument affecting title which must be recorded to be effective against a b.f.p. of the reversionary interest who records first. To include rent assignment orders within §708.530 is totally inapposite and confusing. Likewise, erroneous is the comment to §697.340 which states: "(For the procedure for reaching rents see Sections 700.170 [garnishment of rents]...). §700.170 deals with accounts receivable and general intangibles. Future rents are neither! The U.C.C. excludes rents from Article 9. [§9-104j] At best, accrued rent is a general intangible.

As a result: 1) The comment to §700.170 should be corrected, 2) The comments should state that a rent assignment order is an instrument affecting title to land and 3) Such order should be expressly excluded from §708.530.

2.

Accounts Receivable

Accounts receivable are defined in §680.130 by reference to U.C.C. §9-106. That Section defines the term as "right to payment for goods sold or leased or for services rendered, whether or not it has been earned by performance." In other words it includes contingent rights. They are subject to levy under a writ of execution by service of a copy on the writ on the account debtor, i.e., by garnishment. Hence contingent rights to payment of the kind described above are now - in change of prior law - garnishable. The garnishee must disclose to the levying officer the amount and terms of the obligation §701.030(4) and must pay to the levying officer "amounts that become due and payable to the judgment debtor on the obligation levied upon during the period of the execution lien." According to the comment, the judgment creditor may enforce the liability pursuant to §701.020. If the garnishee fails to make payments presently due because of a dispute with the debtor, what issues can be litigated in §701.020 proceedings and when is a creditor's bill pursuant to §708.210 the appropriate remedy? Thus in a case where a contingent claim is garnished, the interrelation between the two remedies is not clear. But for the comments, I would have thought that §701.020 is purely

substantive and not procedural at all. This impression is strengthened by the new §488.600 replacing §488.550 referred to in the comment to §701.020.

II

Status of Attachment Lien when Attached Property
is Conveyed

Formerly attached property could be levied upon and sold at an execution sale, even when the attached property had been transferred by the debtor. C.C.P. §688(a) provided so explicitly. The last part of the sentence defining property subject to execution was deleted in §695.010 and §699.710. §488.500(b) does not deal with the enforcement of attachment liens. The result is that attachment liens on property transferred must be enforced by a foreclosure action and enforcement of the foreclosure judgment pursuant to C.C.P. Title 9 ch. 4. Was this result an intentional change? It seems to complicate matters unnecessarily, especially since the amendment of §732 of the Probate Code (Stats. 1981 c. 714) pursued the opposite policy. While the judgment debtor is alive a recording of the abstract does not create a judgment lien on property conveyed before the recording even if it is subject to an attachment lien (§695.010 and §697.310), but the attachment lien should be merged into an execution lien as before!

I suggest that §695.010 be amended to include enforcement against property levied upon under an attachment in an action in which the judgment was rendered and an amendment of §697.310 by inserting "of the debtor" after the words "real property" in (a).

Sincerely yours,

Steve

Stefan A. Riesenfeld

SAR/lmc

County of Santa Clara**California****Robert E. Winter, Sheriff**

September 23, 1983

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

RE: THIRD PARTY ACCOUNTS - UNDERTAKINGS
700.160 CCP

Dear Stan:

Enclosed you will find sample copies of the two notice letters being proposed under CCP 700.160.

As you can see, the Notice to Judgment Creditor is comprehensive and confusing, and there is indecision among the different levying officers whether the Notice to Judgment Creditor is necessary. Granted, the code does not require such notice, but without alerting the creditor of the necessity to follow up, leaves a process incomplete. A second issue is whether additional fees should be charged when giving such notice.

However, if the Commission is successful in changing the law, all of our concerns are moot.

I wholeheartedly support the Law Revision Commission's position to completely eliminate the need for an undertaking on third party account levies.

Thank you for your help.

Very truly yours,

ROBERT E. WINTER, Sheriff



GALE D. STROUD, LT.
Civil Section Commander

mk
encls.

Date:

NOTICE TO JUDGMENT CREDITOR
THIRD PARTY ACCOUNTS
700.160 CCP

CIVIL # _____

RE: _____

On _____ a garnishment was served on _____ together with an undertaking to indemnify any third person in whose name the deposit account and/or safe-deposit box may stand against damages resulting from the levy.

CCP 700.160 (as amended by Stats. 1983 c.155) does not require the financial institution to comply with the levy until it has mailed or delivered a notice of the delivery of the undertaking to the third person and been notified by the Sheriff that the third person either did not file a timely objection to the undertaking or, if an objection was made, the court determined the undertaking to be sufficient.

The current statute does not provide for any notification to the Sheriff of the date the financial institution mailed or delivered the notice to the third person, whether the third person has filed an objection to the undertaking, or if the court has determined the undertaking to be sufficient. Without being provided this information, the Sheriff cannot make the notification to the financial institution which would then require the financial institution to comply with the levy.

As a consequence, the Sheriff will serve the NOTICE TO THE FINANCIAL INSTITUTION requiring it to comply with the levy pursuant to CCP 700.160(f) only upon receipt of signed instructions from you requesting service of the NOTICE and stating either no objection to the undertaking was made by the third person within 15 days after the notice of delivery of the undertaking was mailed or delivered to such person by the financial institution (this will normally require you to contact the financial institution in order to ascertain such date) or, if an objection was made, the court determined the undertaking to be sufficient. There will be an additional fee of \$14.00 for serving the notice.

This notice was mailed on the date listed above from San Jose, California. Address and refer all correspondence to the Civil File Number;
ATTN: CIVIL SECTION

ROBERT E. WINTER, SHERIFF

_____, Deputy

Date:

NOTICE TO FINANCIAL INSTITUTION
THIRD PARTY ACCOUNTS
700.160 CCP

CIVIL # _____

On _____, a levy was performed against a deposit account and/or property in a safe-deposit box standing in the name of a third person or in the names of both the judgment debtor and a third person. At the time of the levy against the personal property in your possession, an undertaking was also delivered to you. The undertaking indemnified the third person against any damages resulting from the property being subjected to the levy.

Information in our possession indicates that:

- Fifteen (15) days has elapsed since you mailed or delivered a notice of the delivery of the undertaking to the third person, and no objection to the undertaking has been filed with the court.
- The third person did file an objection to the undertaking; however, the court has determined the undertaking to be sufficient.

You are now requested to comply with the levy pursuant to CCP 700.160(f).

This notice was mailed on the date listed above from San Jose, California.

Address and refer all correspondance to the Civil file number;
ATTN: CIVIL SECTION

ROBERT E. WINTER, SHERIFF

_____, Deputy